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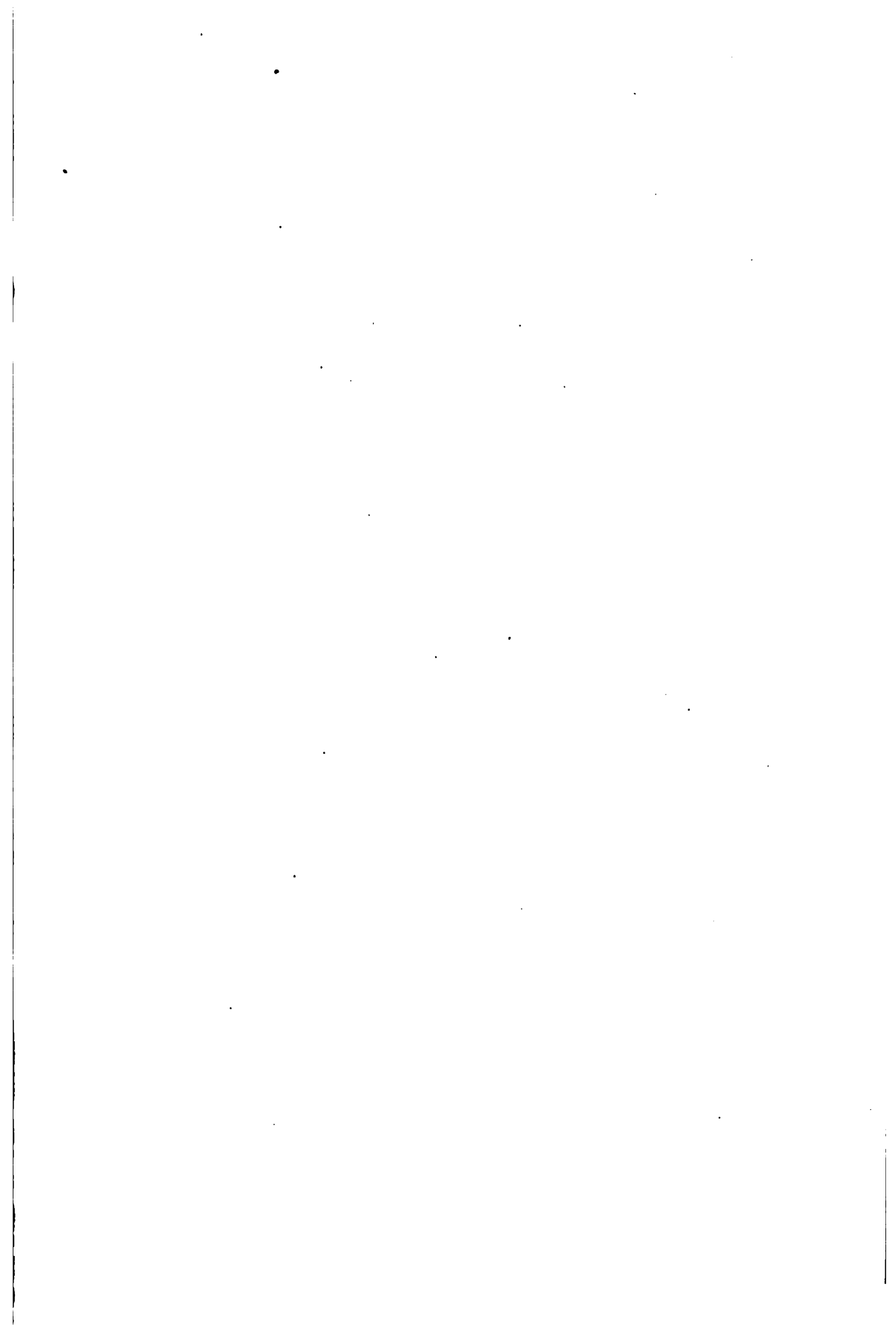
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The Law of Contracts

By

WILLIAM HERBERT PAGE

Professor of Law in the Law School of the University
of Wisconsin; Author of *Page on Wills*;
Page and Jones on Taxation
by Assessments

SECOND EDITION

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I

NATURE AND CLASSES

§ 2574. Definition and nature of conditions. A condition is an uncertain event upon the happening or not happening of which, as the case may be, the parties have agreed that the legal effect of

part or all of the contract shall depend.¹ As is the case with so many terms which are taken by the law from daily life,² the term "condition" has a number of related meanings which shade off, one into the other; and neither in popular language nor in the language of the courts and the text writers is an accurate distinction drawn between the different meanings of this term. If the confusion were one of words only, it would have no worse results than a rather detailed explanation in each case of the meaning which attaches to the term as it is then used. Unfortunately, the confusion has frequently gone far beyond a mere confusion of words into a corresponding confusion of ideas. Accordingly, some of the different meanings which attach to this term will be noted briefly.

Since express conditions are created in accordance with the intention of the parties, either by specific language making provision therefor, or by necessary inference from the contract when construed as a whole; and since the consequences of the breach of such condition are ordinarily agreed upon by the parties, the questions which arise in connection with conditions of this sort, are usually limited to questions of construction, to questions of the validity of the conditions, and to questions of waiver. The ordinary rules of construction apply to express conditions,³ although the general principle that provisions which operate as a forfeiture

¹ See, Conditions in Contract, by Clarence D. Ashley, 14 Yale Law Journal, 424; and, Conditions in the Law of Contract, by Arthur L. Corbin, 28 Yale Law Journal, 730

Upon the general subject of the nature of the condition, see:

England. Richards v. Hayward, 2 Man. & G. 574; Roberts v. Brett, 11 H. L. Cas. 337.

United States. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811.

California. Diepenbrock v. Luiz, 150 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743.

Maine. Skowhegan Water Co. v. Skowhegan Village Corporation, 102 Me. 323, 66 Atl. 714.

New Jersey. Mackenzie v. Trustees, 67 N. J. Eq. 652, 3 L. R. A. (N.S.) 227, 61 Atl. 1027.

North Carolina. Braddy v. Elliott, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

North Dakota. Walker v. Stimmel, 15 N. D. 484, 107 N. W. 1081.

West Virginia. Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917C, 171, 89 S. E. 12.

See also, Conditions in Contracts, by George P. Costigan, Jr., 7 Columbia Law Review, 151.

Whether in order to amount to a true condition the event must be a future event or whether it may be a past or present event concerning which the parties are uncertain, is discussed elsewhere. See §§ 2594 et seq.

See also § 222.

² See § 55.

³ See ch. LXIII.

are to be construed against those in whose favor such forfeitures are effected,⁴ frequently results in a much narrower construction than the courts would use in case of covenants or other provisions which would not operate as a forfeiture. The dislike of the courts for conditions which operate harshly and oppressively, has extended, however, beyond mere rules of construction, and in many cases the courts refuse to enforce conditions upon which the parties have undoubtedly agreed on the theory that such conditions are either illegal or void, as contrary to sound public policy, or as tending to produce results which the law forbids or condemns.⁵ Since these subjects have been discussed in detail elsewhere, the only question that remains in connection with conditions is the application of these general principles.

§ 2575. History of law of conditions. Long before simple contracts were recognized by the king's courts,¹ and probably before the contract under seal had become established as a formal contract,² the king's courts had been confronted with a number of problems arising out of grants of land or interests in land upon condition. Since the king's court was the court in which the greater number of questions concerning freehold estates would be decided, and since under the so-called feudal system, questions of this sort were among the most numerous and vital of those which were presented for adjudication, the courts were forced to develop these principles at an early stage of English law. As is always the case when legal ideas are developed at an early stage of legal history, the rules on these subjects were technical and regarded form rather than substance. Archaic as they were, they supplied a great need in the community; and the deficiencies of contract law in the king's courts were to a large extent supplemented by the law of real property.³ When the sealed contract and later on the simple contract came to be employed as instruments for conducting business, there was therefore a great mass of authority on the subject of conditions and a number of well-settled principles. By analogy to the law of real property, a great many of these principles were carried over into the early law of contracts,⁴ and the definitions used and the authorities cited upon the subject of conditions in

⁴ See § 2054.

⁵ See chs. XX et seq.

¹ See §§ 23 et seq.

² See § 20.

³ See § 11.

⁴ See discussion in *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449.

contract law are very likely to be drawn from the law of real property even more freely than from the law of contract,⁵ since the law of conditions is still worked out in much greater detail in real property than it is in the law of contracts. At the same time, the constant tendency of modern courts is to disregard the outward form and to look primarily to the intent of the parties;⁶ and in this tendency the courts feel freer to treat conditions in contracts in a rational manner than they do when they are dealing with conditions in deeds, leases, wills, and the like.

§ 2576. Condition distinguished from covenant. A condition, as we have seen,¹ is an uncertain fact, which, as a result of the agreement of the parties, is to affect the legal effect of the contract. The condition, accordingly, in its more limited and accurate sense, does not contain any promise, either express or implied, on the part of either party, to bring about the happening of such uncertain fact.² Accordingly, if the fact is a true condition, the happening or not happening of the event, as the case may be, may terminate the legal rights of the parties, and by the terms of the contract it may result in the substitution of other specified legal liabilities for

⁵ See *Redman v. Aetna Fire Ins. Co.*, 49 Wis. 431, 4 N. W. 591.

⁶ See §§ 2021 et seq.

¹ See § 2574.

² *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335 ["condition" used as meaning "covenant," affirming, *Quinlan v. Green County*, 157 Fed. 33]; *Diepenbrock v. Luiz*, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743; *Cavanagh v. Iowa Beer Co.*, 136 Ia. 236, 113 N. W. 856.

"The attitude of the parties, indicated by their respective claims, leads us, in the first place, to consider the meaning of the terms 'condition' and 'covenant' and to ascertain their significance as bearing upon the present controversy.

"Numerous authorities might be cited in which a 'condition' is defined to be something inserted in a deed for the benefit of the grantor giving him the power, on default of perform-

ance, to destroy the estate if he will and revest it in himself or his heirs. A 'covenant' has been defined to be an agreement or consent of two or more by deed in writing, sealed and delivered, whereby either one of the parties doth promise to the other that something is done or shall be done in the future. While there is more or less variation in the language employed by different courts in defining and giving effect to these terms the decisions are, in substance, practically the same. Some of the authorities point out various terms and expressions having a well-settled meaning and which are clearly and indisputably indicative of the intent of the parties to the instrument to create a condition or enter into a covenant as the case may be.

"A more extended discussion of these authorities would not be profitable in view of the fact that we find

those which were to exist if the specified condition had not happened; but the happening of the condition alone is not a breach of a covenant and no right of action arises by reason thereof.³ If, however, the condition is broken, the party in whose favor such condition is exacted may treat the rights of the adversary party as terminated or suspended in accordance with the terms of the contract, and he is not remitted to a right of action for damages.⁴

A covenant, on the other hand, is an agreement of one of the parties to the contract to act or to forbear to act in a certain specified way.⁵ If the party who has thus agreed to act or to forbear to act breaks his covenant, and the covenant is a part of an enforceable contract, a legal liability of some sort arises upon such breach,⁶ unless the happening of other and further events since the contract was made, have operated as a discharge thereof.⁷ The covenant, in its simplest form, is therefore merely a promise by one party to act or to refrain from acting in a certain way, and the

it to be the consensus of opinion that no particular form of expression is essential to the creation of a condition, but that if it is manifest from the terms of the instrument that a condition was intended, the estate will become defeated upon a breach thereof. In *Fowlkes v. Wagoner*, 46 S. W. (Tenn.) 586, the court said, a condition 'may be created by any words which show a clear, unmistakable intention on the part of the grantor or deviser to create an estate on condition, regard being had to the whole of the deed or will in which they occur.' It has even been held that the same words may create either a covenant or a condition depending upon the intention of the parties as such intention may be determined from the context. *Chapin v. Harris*, 8 Allen, 504; *Tiffany on Landlord and Tenant*, Vol. 2, p. 1363, § 194. The principle therefore upon which this question must be determined is well-settled. The authorities are briefly and correctly summarized in the note to be found in 1 L. R. A. 381, as follows: 'According to modern authorities

a clause only operates as a condition when it is apparent, from the whole scope of the instrument, that it was intended to operate so, or in other words, there is no technical rule, but courts are in each case to ascertain the intent and give the instrument effect accordingly.' " *Perkins v. Kirby*, 35 R. I. 84, 88, 85 Atl. 648.

³ *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002; *Schwab v. Baremore*, 95 Minn. 295, 104 N. W. 10.

⁴ *Diepenbrock v. Luiz*, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743; *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917C, 171, 89 S. E. 12.

⁵ *Mercantile Trust Co. v. Hensley*, 205 U. S. 298, 51 L. ed. 811; *Quinlan v. Green County*, 157 Fed. 33; *Mackenzie v. Trustees*, 67 N. J. Eq. 652, 3 L. R. A. (N.S.) 227, 61 Atl. 1027; *Braddy v. Elliott*, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

⁶ *Cavanagh v. Iowa Beer Co.*, 136 Ia. 236, 113 N. W. 856. See ch. LXXXIV.

⁷ See ch. LXXVIII, ch. LXXXIX and ch. LXXXV.

consequences of his breaking such promise are fixed by the law and not by the express agreement of the parties.

§ 2577. Implied conditions, so-called. Another reason for the confusion between conditions and covenants is the fact that they shade off from the clearest and most extreme type of the condition, which contains no element of a promise, through intermediate stages, into the clearest and most extreme type of a covenant, the breach of which may give rise to an action for damages, but which has no effect whatever upon the validity or performance of the contract.¹ The express condition, as the term is frequently used, is one which is stated in so many words in the contract itself.² There are, however, cases in which the contract taken as a whole shows that its validity or its effect is conditioned upon the happening or not happening of some specific event, although such intention has to be taken from the contract taken as a whole, and it is not expressed in any single clause or sentence.³ While such covenants are frequently referred to as implied contracts, they are not implied contracts in the proper sense of the term, but they are rather covenants which are part of express contracts and which are deduced from such express contracts by the ordinary rules of construction and interpretation. A covenant which is possibly an illustration of this class is one which from its very terms can be performed only if some other event happens.⁴ Conditions of this sort are sometimes referred to as implied conditions. They bear the same relation to conditions which are set forth in so many words in the contract itself, that covenants which are not set forth in so many words, but which are seen to be clearly intended by the parties when the contract is read as a whole in the light of surrounding circumstances, bear to the contract from which the intention to include such covenant is inferred.⁵

In cases of this sort, the courts are in a dilemma. They must either construe such act as a condition upon which the covenant is based, or they must assume that the party to such a covenant

¹ See ch. LXXXV.

² See § 2574.

³ *Raynay v. Alexander*, Yelv. 76b; *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 Pac. 989; *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah, 544, L. R. A. 1916D, 728, 155 Pac. 337.

⁴ *Raynay v. Alexander*, Yelv. 76b;

Coombe v. Greene, 11 M. & W. 480; *Western Lime & Cement Co. v. Copper River Land Co.*, 138 Wis. 404, 120 N. W. 277.

⁵ See §§ 1434 et seq. and 2042; *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah, 544, L. R. A. 1916D, 728, 155 Pac. 337.

intended to bind himself to perform something which upon the face of the contract can not be performed in case such act does not happen. In cases of this sort, the courts prefer to treat such a covenant as conditional,⁶ unless it appears clearly that the promisor intends to assume an unconditional liability. Wherever it is possible, a reasonable construction will be placed upon such a covenant.⁷

In addition to these meanings, the term condition or implied condition is frequently used of facts which operate as a discharge of liability;⁸ and as applied to covenants, the term condition or implied condition is used of covenants, the breach of which operates as a discharge of the contract in part or in whole.⁹ In many cases of this sort it is a sheer fiction to call the promise a condition. The parties made their promises with a view to performance, and the question of the effect and consequence of breach in all probability never entered the minds of either party. In cases of this sort, where the parties have overlooked the possibility of breach, and breach has occurred, the law attempts to adjust the rights of the parties in accordance with its own ideas, which, it will be seen, have varied from time to time.¹⁰ Even if breach of a covenant operates as a total discharge of the contract, it should not be called a condition if the parties did not anticipate the possibility of such breach, and did not make provision therefor. In this, as in other cases, confusion has no doubt arisen because of the fact that wherever the parties make specific provision for the consequences of a breach, full effect must be given to such provision; and frequently the parties have provided in express terms that breach of one or more of the covenants of the contract shall operate as a termination of all liability thereunder.¹¹

If the provision in question is material and vital, it may make little difference in the particular case whether it is a condition or covenant, since even if it is merely a covenant, the breach thereof may operate as a discharge of the remaining covenants on the part of the adversary party.¹² If, however, the provision deals with some immaterial matter, it is of the greatest importance to deter-

⁶ See cases cited in note 4, this section.

⁷ See § 2053.

⁸ See § 2446.

⁹ See ch. LXXXIV.

¹⁰ See ch. LXXXIV.

¹¹ See § 2578.

¹² Whether it will have this effect or not will depend in part on the relation of the covenant which is broken, to the remaining covenants of the contract. See ch. LXXXIV.

mine whether such provision is a true condition or a covenant; since if it is a covenant, the breach thereof will not operate as a discharge of the contract,¹³ while if it is a true condition the breach thereof may operate as a discharge of the contract, even though the event is immaterial.¹⁴

§ 2578. Provision both covenant and condition—Condition as to effect of breach. Among the causes for confusion between conditions in covenants, is the fact that the same provision of a contract may be both at once. It is possible and not uncommon for the parties to agree that one of them shall act or forbear to act in a certain specified way, and also to agree in express terms that the consequences of the failure of such party to perform shall discharge the adversary party from liability, either as to certain specified covenants of the contract or as to the entire contract.¹ Such a condition differs from ordinary breach of executory covenants in that the relationship of the covenants and the materiality of the breach are important if they are merely covenants, but immaterial if they are also conditions.² Such a condition also differs from the

¹³ See ch. LXXXIV.

¹⁴ *National Council v. Thompson*, 153 Ky. 636, 45 L. R. A. (N.S.) 1148, 156 S. W. 132; *Knowlton v. Patron's Androscoggin Fire Ins. Co.*, 100 Me. 481, 2 L. R. A. (N.S.) 517, 62 Atl. 289; *R. H. White Co. v. Remick*, 198 Mass. 41, 84 N. E. 113; *Adams v. Guyandotte Valley Ry.*, 64 W. Va. 181, 61 S. E. 341. See also, *Union Saw Mill Co. v. Lake Lumber Co.*, 120 La. 106, 44 So. 1000.

¹ *United States. California Bridge & Construction Co. v. United States*, 50 Ct. Cl. 40.

Colorado. *Hottel v. Poudre Valley Reservoir Co.*, 41 Colo. 370, 92 Pac. 918.

Illinois. *Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771.

Massachusetts. *White v. Abbott*, 188 Mass. 99, 74 N. E. 305; *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520; *R. H. White Co. v. Remick*, 198 Mass. 41, 84 N. E. 113.

North Dakota. *Sunshine Cloak &*

Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Oregon. *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796, 83 Pac. 536.

Pennsylvania. *Payne v. Roberts*, 214 Pa. St. 568, 64 Atl. 86; *Hunn v. Pennsylvania Inst. for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

A provision for liquidated damages in case of delay will prevent delay from operating as a discharge. *Hunn v. Pennsylvania Inst. for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

West Virginia. *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825 (so by construction adopted by court); *Berry v. Humphreys*, 76 W. Va. 668, 86 S. E. 568.

Wisconsin. *Hodge v. Wallace*, 120 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212.

See § 222.

² See § 2578 and ch. LXXXIV.

ordinary covenant in that in case of the condition, the consequences of breach are frequently agreed upon by the parties, and may be less than the discharge of the contract;³ while in case of breach, the consequences are fixed by law, and in case of breach of a vital covenant, either precedent or concurrent, the consequence is ordinarily the discharge of the contract.⁴

It may be provided in the contract that one of the parties promises a certain performance, and that in case of his failure to perform in accordance with such covenant, the adversary party may terminate the contract.⁵

Under a condition reserving to the property owner the right to complete the contract on the inability of the original contractor to perform, and to deduct the cost of completing the work from the contract price, the amount to be deducted is the actual cost of completing the work, which is not necessarily the amount which is paid to the person who completes it or the amount which the property owner enters upon his books as the cost of such work.⁶ Under a provision in a building contract allowing the owner under certain conditions to complete the contract at the expense of the contractor, his doing so does not discharge the contract further than is necessarily affected by such provision.⁷ On the one hand, the contractor is entitled to the balance of the contract price above the cost of completion, as the owner can not refuse payment on the ground that the contractor has not performed the contract on his part to be performed;⁸ and, on the other hand, he is liable for whatever damage his default has caused the owner.⁹ However, a provision for an architect's certificate of completion as a condition precedent

³ See cases cited in this section.

⁴ See ch. LXXXIV.

⁵ **England.** *Davies v. Swansea*, 8 Exch. 808.

Illinois. *Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771.

Kentucky. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. 18, 937.

Massachusetts. *R. H. White Co. v. Remick*, 198 Mass. 41, 84 N. E. 113.

Pennsylvania. *Payne v. Roberts*, 214 Pa. St. 568, 64 Atl. 96.

⁶ *Hottel v. Poudre Valley Reservoir Co.*, 41 Colo. 370, 92 Pac. 918.

⁷ *Christopher, etc., Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166; *Brown v. Baton*

Rouge, 109 La. 967, 34 So. 41; *Hay v. Bush*, 110 La. 575, 34 So. 692; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; *Hunn v. Pennsylvania Inst. for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁸ *Charles v. Lumber & Mfg. Co.*, 22 Colo. 283, 43 Pac. 548; *Hunn v. Pennsylvania Inst. for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812; *Arndt v. Keller*, 96 Wis. 274, 71 N. W. 651.

⁹ *New York v. Construction Co.*, 146 N. Y. 210, 40 N. E. 771.

to the contractor's recovery is waived thereby.¹⁰ Under a provision that if the contractor abandons his contract the owner is to complete it, its abandonment by the contractor does not discharge the owner.¹¹

It may be provided, either in express words or in legal effect, that unless one party performs by a specified time, the adversary party shall be discharged.¹² A common illustration of this type of combined covenant and condition is found in cases in which time is of the essence of the contract.¹³ Since in cases of this sort, the same provision is both condition and covenant at once, the courts are likely to use language concerning such provision as a covenant which should have been used with reference to such provision as a condition.

Provision is frequently made that failure to pay or to perform by a specified time, shall operate as a discharge of some or all of the rights under the contract, and where such provision is clear and unequivocal, full effect is given thereto,¹⁴ at least as long as such provision is not intended to operate as a penalty.¹⁵ A provision for giving credit for insurance premiums may be upon condition that such premium shall be paid at a certain time or that the policy shall be void.¹⁶ A provision in the original policy for a certain number of days of grace in making the payment provided for by the policy, does not apply to a subsequent modification of the original contract providing for an additional extension of time.¹⁷

¹⁰ *Campbell v. Coon*, 149 N. Y. 556, 38 L. R. A. 410, 44 N. E. 300.

¹¹ *Marcus Sayre Co. v. Burnz* (N. J. Eq.), 26 Atl. 911.

¹² *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

¹³ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359. See §§ 2103 et seq.

¹⁴ *United States. Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. ed. 662.

Alabama. Pan American Life Ins. Co. v. Carter, — Ala. —, 80 So. 75.

Georgia. Williams v. Empire Life Ins. Co., 146 Ga. 246, 91 S. E. 44.

Kentucky. Standard Accident Ins. Co. v. Smith, 184 Ky. 155, 209 S. W. 848.

North Carolina. Underwood v. Jeffer-

son Standard Life Ins. Co., 177 N. Car. 327, 98 S. E. 832.

Ohio. Union Mutual Life Ins. Co. v. McMillen, 24 O. S. 67.

Oregon. Wrenn v. University Land Co., 65 Or. 432, 46 L. R. A. (N.S.) 897, 133 Pac. 627.

Tennessee. Edington v. Michigan Mutual Life Ins. Co., 134 Tenn. 188, 183 S. W. 728.

¹⁵ See §§ 2113 et seq.

¹⁶ *Pan American Life Ins. Co. v. Carter*, — Ala. —, 80 So. 75; *Standard Accident Ins. Co. v. Smith*, 184 Ky. 155, 209 S. W. 848; *Underwood v. Jefferson Standard Life Ins. Co.*, 177 N. Car. 327, 98 S. E. 832.

¹⁷ *Pan American Life Ins. Co. v. Carter*, — Ala. —, 80 So. 75; *Kansas City Life Ins. Co. v. Leedy*, — Okla. —, L. R. A. 1917C, 917, 162 Pac. 760.

Such provisions are not, however, extended by construction.¹⁸ A provision by which the engineer of one of the parties is given the power to "annul" the contract if in his judgment the contractor does not "prosecute the work faithfully and diligently," reserves the right to terminate the contract in case the engineer reaches this conclusion in good faith, but his judgment is not final as to the fact of the breach,¹⁹ and accordingly the United States can not recover the extra cost of completing the work.²⁰

A condition in an instrument for the payment of money may provide that in case of certain specified defaults, as defaults in payment of interest, taxes upon the collateral security for the debt, and the like, the negotiable instrument shall become due forthwith.²¹ Such effect is given to a provision that a default in the payment of instalments "shall cause the whole note to be immediately due and collectable."²² Such provisions are, however, usually so drawn as to give to the holder of the negotiable instrument the option to declare the entire amount due or to treat the note as not due until the time of its original maturity.²³

A provision fixing the time of payment is not treated as a condition unless it clearly appears that the parties intend to make it such.²⁴ A provision for forfeiture if "premium, loan, or interest" is not paid when due, is held not to apply to a note taken for a premium.²⁵

The question of forfeiture for non-payment of premiums is frequently complicated by the fact that at the time of default the policy has a paid-up value or surrender value, and by the fact that the policy occasionally contains provisions for automatic extension,

¹⁸ *Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738; *Friend v. Southern Life Ins. Co.*, — Okla. —, L. R. A. 1917B, 208, 160 Pac. 457; *Lathrop v. Modern Woodmen*, 63 Or. 193, L. R. A. 1918E, 333, 126 Pac. 1002; *Lyke v. First National Life & Accident Ins. Co.*, — S. D. —, 171 N. W. 603; *Langbehn v. American Ins. Co.*, — S. D. —, 171 N. W. 820.

¹⁹ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481.

²⁰ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481.

²¹ *Hodge v. Wallace*, 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212.

²² *Hodge v. Wallace*, 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212.

²³ *Consolidated Lumber Co. v. Maryland Fidelity & Deposit Co.*, 161 Cal. 397, 119 Pac. 506; *Bardsley v. Washington Mill Co.*, 54 Wash. 553, 132 Am. St. Rep. 1133, 103 Pac. 822; *Zwiekey v. Haney*, 63 Wis. 464, 23 N. W. 577.

²⁴ *Friend v. Southern Life Ins. Co.*, — Okla. —, L. R. A. 1917B, 208, 160 Pac. 457; *Langbehn v. American Ins. Co.*, — S. D. —, 171 N. W. 820; *Lyke v. First National Life & Accident Ins. Co.*, — S. D. —, 171 N. W. 603.

²⁵ *Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738.

and for the application of such paid-up value or surrender value to the payment of premiums for such extension.²⁶

A provision that one of the parties may terminate the contract in case the other party makes default, does not prevent the transaction from amounting to a contract,²⁷ and does not make it an option.²⁸

A notice by the party not in default, to the effect that the breach in question renders the contract void and renders the adversary party liable in damages, does not amount to an election to waive damages and to avoid the contract.²⁹

§ 2579. Construction as between condition and covenant. Whether a provision is a condition or a covenant depends upon the intention of the parties as deduced from the language of the contract when read in the light of the surrounding circumstances.¹ Conditions, especially if their enforcement will operate as a forfeiture,² are not favored in construction; and accordingly the tendency of the courts is to treat an ambiguous provision as a covenant, the breach of which can be compensated by damages rather

²⁶ For a discussion of the rights of the parties under such provisions, see: **Georgia.** Volunteer State Life Ins. Co. v. Spratling, 148 Ga. 687, 98 S. E. 464.

Iowa. Highland v. Iowa Life Ins. Co., — Ia. —, 171 N. W. 587.

Missouri. Cooper v. New York Life Ins. Co., — Mo. —, 211 S. W. 548.

North Carolina. Underwood v. Jefferson Standard Life Ins. Co., 177 N. Car. 327, 98 S. E. 832.

Washington. Millar v. Western Union Life Ins. Co., — Wash. —, 180 Pac. 488.

Vermont. New York Life Ins. Co. v. Kimball, — Vt. —, 106 Atl. 676.

²⁷ United States v. O'Brien, 220 U. S. 321, 55 L. ed. 481; Berry v. Humphreys, 76 W. Va. 668, 86 S. E. 568.

²⁸ Berry v. Humphreys, 76 W. Va. 668, 86 S. E. 568.

²⁹ Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520; R. H. White Co. v. Remick, 198 Mass. 41, 84 N. E. 113.

¹ United States. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811 [affirming, Mercantile Trust Co. v. Hensey, 27 D. C. App. 210]; Green County v. Quinlan, 211 U. S. 582, 53 L. ed. 335; Quinlan v. Green County, 157 Fed. 33, 84 C. C. A. 537.

California. Diepenbrock v. Luiz, 159 Cal. 716, L. R. A. 1015C, 234, 115 Pac. 743.

Illinois. Harley v. Sanitary District, 226 Ill. 213, 80 N. E. 771.

New Jersey. Mackenzie v. Trustees, 67 N. J. Eq. 652, 3 L. R. A. (N.S.) 227, 61 Atl. 1027.

North Carolina. Braddy v. Elliott, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

Oklahoma. Paraffine Oil Co. v. Cruce, — Okla. —, 162 Pac. 716.

Rhode Island. Perkins v. Kirby, 35 R. I. 84, 85 Atl. 648.

West Virginia. Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

² See § 2054.

than as a condition the breach of which will operate as a forfeiture of the rights of the parties.³ The fact that the provision is called a condition is not conclusive,⁴ nor is the use of words which are more appropriate to a condition than to a covenant.⁵ A provision to the effect that an architect's certificate is to be furnished on performance of a building or construction contract, is not a condition unless it appears from the express words of the contract or by necessary implication from the words which are used that it was intended as a condition.⁶

The rule that a covenant is to be preferred to a condition in construction is not an arbitrary rule, but it is merely a rule which

³ **United States.** *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811 [affirming, *Mercantile Trust Co. v. Hensey*, 27 D. C. App. 210]; *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335; *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537.

California. *Diepenbrock v. Luiz*, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743.

New Jersey. *Mackenzie v. Trustees*, 67 N. J. Eq. 652, 3 L. R. A. (N.S.) 227, 61 Atl. 1027.

North Carolina. *Braddy v. Elliott*, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

⁴ *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335; *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537.

"It is not conclusive that the obligation thus imposed upon the railroad company is called a condition. It frequently has been the case that the word condition has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a covenant or

agreement, to be performed independently of the counter-obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the result be to disregard the technical meaning of the word condition. *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 18 L. ed. 502; *Sohier v. Trinity Church*, 100 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Cassidy v. Mason*, 171 Mass. 507; *Clapp v. Wilder*, 176 Mass. 332; *Post v. Weil*, 115 N. Y. 361; *Clark v. Martin*, 49 Pa. St. 289; *Watrous v. Allen*, 57 Mich. 362; *Scoville v. McMahon*, 62 Conn. 378; *Hartung v. Witte*, 59 Wis. 285"; *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335.

⁵ *Mackenzie v. Trustees*, 67 N. J. Eq. 652, 3 L. R. A. (N.S.) 227, 61 Atl. 1027.

⁶ **United States.** *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811 [affirming, *Mercantile Trust Co. v. Hensey*, 27 D. C. App. 210]; *Central Trust Co. v. Louisville, St. L. & T. Ry. Co.*, 70 Fed. 282.

District of Columbia. *Fontano v. Robbins*, 22 D. C. App. 253.

Illinois. *Adlard v. Muldoon*, 45 Ill. 193.

New Jersey. *Bond v. Newark*, 19 N. J. Eq. 376.

Pennsylvania. *Memphis, etc., R. R. Co. v. Wilcox*, 48 Pa. St. 161.

is intended to give effect to the actual intention of the parties. The entire instrument and the surrounding circumstances may show that the provision was intended to be a condition rather than a covenant.⁷ If a covenant would be burdensome while a condition would give effect to the intention of the parties, the provision will be treated as a condition.⁸ A provision by which the lessee of oil land agrees to drill a well in a specified time or to pay a specified rental in case he does not do so, will not be treated as equivalent

⁷ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917C, 171, 89 S. E. 12; *Western Lime & Cement Co. v. Copper River Land Co.*, 138 Wis. 404, 120 N. W. 277.

⁸ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917C, 171, 89 S. E. 12.

"An implied covenant to prevent drainage, giving a right of action for damages for a breach thereof, is not necessary nor essential to preservation or conservation of the minerals during the specific optional term created by the lease. If a condition less onerous than a covenant will effectuate the manifest intention of the parties, as to a matter not specifically provided for in the lease, and adequately protect the subject-matter of the contract, the court may justly and consistently regard it as the provision intended. Both covenants and conditions are frequently used in all sorts of contracts. They are equally known to courts, lawyers, and laymen, and either may have been intended by the parties, as an unexpressed safeguard against a contingency, and the courts may recognize one of them as an implied provision, with as much propriety as characterizes such recognition of the other. And, if either will accomplish the purpose obviously intended, and one is less burdensome to either of the parties than the other, the adoption of the less onerous one is made obligatory by the rule applicable to the addition of terms to contracts

on the theory of implication. *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019; *United States v. Fisher*, 6 U. S. (2 Cranch) 358, 2 L. ed. 304; *Jackson ex dem. Boyd v. Lewis*, 17 Johns. 475; *Waterford & W. Turnp. v. People*, 9 Barb. 161; *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716, 24 L. ed. 743; *Hamlyn & Co. v. Wood & Co.* [1891], 2 Q. B. 488, 60 L. J. Q. B. N. S. 734, 65 L. T. N. S. 286, 40 Week. Rep. 24; *The Moorcock*, L. R. 14 Prob. Div. 64, 58 L. J. Prob. N. S. 73, 60 L. T. N. S. 654, 37 Week. Rep. 439, 6 Asp. Mar. L. Cas. 373; *Sterling v. Maitland*, 5 Best & S. 840, 122 Eng. Reprint, 1043, 34 L. J. Q. B. N. S. 1, 11 L. T. N. S. 337, 13 Week. Rep. 76; *Butler v. Manchester, S. & L. R. Co.*, L. R. 21 Q. B. Div. 207, 57 L. J. Q. B. N. S. 564, 60 L. T. N. S. 69, 36 Week. Rep. 726, 52 J. P. 611. Accordingly, if it is doubtful whether a clause in a deed is a condition subsequent, breach of which would divest an estate, or a covenant, breach of which would merely create a liability for damages, the courts universally hold it to be a covenant, because less burdensome and drastic in its operation and effect than such a condition. *Millan v. Kephart*, 18 Gratt. 9; 4 Kent Com. 14th ed. 152. This is only a rule of construction emanating from a general principle, and made to carry it into effect. An exactly opposite rule, applicable in a different situation, may apply the same principle. The rule is subordinate; the principle it enforces,

to a covenant to use delay in developing such land so as to benefit the lessor.⁹ If, on the other hand, a given provision will leave the rights of one of the parties unprotected, unless it is construed as a condition, such effect will be given to it,¹⁰ on

paramount. The latter is the parent of the former. Construction and interpretation always proceed upon lines of equity, fairness, and reason, when the terms of the instrument are broad enough to admit the influence of such considerations. No contract will be so construed as to inflict unreasonable hardship, unless the terms clearly impose it. 'Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case.' 4 Kent Com., 14th ed. 152." *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 441, L. R. A. 1917A, 171, 89 S. E. 12.

⁹*Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

¹⁰"We have yet to consider the force and effect of the clause in the contract whereby the defendant's predecessor agreed to remove such timber at the rate of 6,000 acres per year, or, in other words, the whole of it within seven years. We deem that provision of the contract to control defendant's rights, both because of the special reference thereto contained in the deed made in execution of the original land contract, and because of the principle,

well established in Wisconsin, that the real transfer of title under a land contract and a subsequent deed in pursuance thereof takes place at the time of the contract, at least in case of part payment of the consideration, and that the deed when made relates back to the date of the contract. *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121. The trial-court treated this clause as a mere promise, with no result from its breach except money damages. Appellant contends that the parties intended thereby to limit the right to the timber and that by its breach a forfeiture results. It is urged, on authority, that courts will be slow to import into a mere agreement to do some act, a further agreement that the failure to perform it shall constitute a condition subsequent sufficient to divest an existing title. Nevertheless if from the contract, properly construed, we must conclude that the parties intended and attempted to express an agreement to that effect, it is our duty to so construe and enforce it. Justification for construction of even very plain words in a contract may arise if otherwise the result would be wholly unreasonable or absurd. *Corbett v. Joannes*, 125 Wis. 370, 387, 104 N. W. 69. It seems to us that in a sale of a large tract of land to a purchaser for the purpose of presently selling the same in parcels to actual settlers, an agreement that the seller might persist in practical possession and occupancy of the whole of said land, so that as to none of it could anything but a bare legal title without right of occupancy and use be transferred to such settlers, would be unreasonable to the extent of

the theory that a contract will, if possible, be construed as reasonable."

It has been suggested that the test for determining whether a provision is a condition or a covenant is the remedy which arises in case of breach; and that if the breach operates as a discharge, it is a condition, while if it merely gives rise to an action at law for damages, it is a covenant.¹² As a distinction between the condition and the covenant, this test is unsatisfactory, since it looks to the consequences rather than to the nature of the provision in question. It is also unsatisfactory since in some cases the same provi-

absurdity. It would be in practical negation of the acquisition of the rights for which it is apparent the purchaser pays his money. We can not read this clause, so industriously inserted, in any other light than indicating the intention of the parties to express an agreement for some limitation upon the right of the seller to occupy said land with its timber to the exclusion of the purchaser and its anticipated and intended grantees. How it should be effective as a limitation, whether by mere threat of damages, or by way of some termination of the seller's right, is not declared. A right to recover damages for breach of this agreement would not accomplish the obvious purpose of placing the lands in a condition for use by the purchaser, and the amount of the money damages really suffered would be almost conjectural. The situation is not without precedent or at least analogy in several cases which have come before this court with reference to contracts or conveyances separating the title to the standing timber from the title to the soil, and in nearly all of them an expression of a time limit within which the right of severance of the timber from the land is to be exercised has been held sufficient to express a meeting of the minds of the parties upon the intention that the right to the timber and to enter

for removing the same should be terminated at the end of such period. In other words, that the declaration of such duty to remove, whether in the form merely of a covenant or a limitation, implied a condition subsequent on the happening of which the right should terminate. *Smith v. Scott*, 31 Wis. 437, 440; *Golden v. Glock*, 57 Wis. 118, 15 N. W. 12; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133; *Williams v. Jones*, 131 Wis. 361, 111 N. W. 503; *Peshtigo L. Co. v. Ellis*, 122 Wis. 433, 100 N. W. 834. Another class of cases presents numerous instances where words of mere covenant have been held sufficient to express a real intention of a condition subsequent and resulting forfeiture by reason of the impossibility otherwise to avert inequitable results. Illustrations are: *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671; *Burgson v. Jacobson*, 124 Wis. 295, 102 N. W. 563. We are convinced that the reasons of such analogous decisions should control the instant situation and lead us to construe this limitation of time as declaring a condition subsequent." *Western Lime & Cement Co. v. Copper River Land Co.*, 138 Wis. 404, 410, 120 N. W. 277.

¹¹ See § 2053.

¹² *Cavanagh v. Iowa Beer Co.*, 136 Ia. 236, 113 N. W. 856.

sion may be a condition as well as a covenant;¹³ and since in many cases the breach of a covenant, which is an essential term of the contract, may operate as a discharge of the remaining covenants.¹⁴

§ 2580. Condition compared with warranty. The term "warranty" is used in a variety of meanings. A comparison of the condition with the warranty, and a distinction between them, is therefore a comparison and a distinction of two terms, each of which is used in a variety of different meanings. As far as the term "warranty" is used of a purely collateral agreement, the breach of which may give rise to a cause of action, but which has no effect upon the contract itself,¹ there is as little danger of confusion between warranty in this sense and the condition, as there is between condition and any covenant.

In some cases, however, the term "warranty" is used of a promise as to the future, the breach of which, by the express terms of the contract or by necessary implication therefrom, is to operate as a discharge of the liability of the adversary party.² The term "warranty" is frequently employed in this meaning in contracts of insurance.³ In cases of this sort the breach of the executory prom-

¹³ See § 2578.

¹⁴ See ch. LXXXIV.

¹ *Street v. Blay*, 2 B. & Ad. 456; *Thornton v. Wynn*, 25 U. S. (12 Wheat.) 183, 6 L. ed. 595; *H. W. Williams Transportation Line v. Darius Cole Transportation Co.*, 129 Mich. 209, 56 L. R. A. 939, 88 N. W. 473. See § 222.

² *Aetna Life Ins. Co. v. Davey*, 123 U. S. 739, 31 L. ed. 315; *Edwards v. Farmers' Mut. Ins. Asso.*, 128 Ga. 353, 12 L. R. A. (N.S.) 484, 57 S. E. 707; *Fidelity & Deposit Co. v. Kane*, 182 Ky. 648, 206 S. W. 888.

³ "In the law of insurance, as established and declared by judicial decision, a warranty is a statement of the contract with reference to the conditions on which it is predicated, the truth of which is made a condition to its validity; while a representation is a statement made as an inducement to a proposed contract of insurance and collateral to it. Warranties are

of two kinds, affirmative and promissory. Affirmative warranties may be express or implied, and consist of representations in the policy of the existence of some fact or state of things at or previous to the time of making the policy. Promissory warranties may also be express or implied, but they usually have respect to the happening of some future event, or the performance of some act in the future. The distinction between affirmative and promissory or executory warranties is that the former represent the existence of certain facts or condition of things at the time when the policy is effected, and the latter represent that certain things shall exist during the continuance of the policy.

"An affirmative warranty is in the nature of a condition precedent, while a promissory warranty is in the nature of a condition subsequent, to the contract; and, whether affirmative or

ise operates as a discharge of the contract, and for this reason such a promissory warranty is in legal effect a condition, if such effect is provided for by the parties. The term "warranty" is also used of representations as to past events on the truth of which the contract is conditioned.⁴ A warranty of this sort is as true a condition as any past event,⁵ if such effect is agreed upon by the parties.

§ 2581. Condition distinguished from consideration. The confusion between condition and consideration arises in part from the popular use of a clause beginning with "if" to indicate indiscriminately a condition, an act which is to serve as acceptance of an offer, as consideration therefor, and as performance therefor, in all cases in which the offer calls for acceptance by the performance of a specified act, and such act is the entire consideration for the promise;¹ and of using "if" to introduce the clause which really

promissory, the effect of a breach thereof by the insured is to relieve the liability of the insurer, and this regardless, until the enactment of section 4572 of the code, of whether the matters warranted be material or not to the risk, and regardless of whether the insured acted in good faith or not in making the warranty. On the other hand, in order to avoid a contract of insurance for false representations or misrepresentations not amounting to warranties, which, as seen, are a mere inducement to the making of the contract, it must appear, or be made to appear, not only that the matters and things so represented are false, but also that they were material to the risk. A false representation or misrepresentation renders the policy void on the ground of fraud on the part of the applicant in procuring it, while a non-compliance with a warranty by him operates as a breach of the conditions of the contract. Quite frequently it is a difficult question, even for the courts, to determine whether a clause in a contract of insurance amounts to a warranty or only a

representation." *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 449, 65 So. 449.

⁴*Arkansas. National Annuity Assn. v. McCall*, 103 Ark. 201, 48 L. R. A. (N.S.) 418, 146 S. W. 125.

Illinois. Crosse v. Supreme Lodge, 254 Ill. 80, 45 L. R. A. (N.S.) 162, 98 N. E. 261.

Michigan. Haapa v. Metropolitan L. Ins. Co., 160 Mich. 467, 16 L. R. A. (N.S.) 1165, 114 N. W. 380.

New Jersey. New Jersey Rubber Co. v. Commercial Union Assurance Co., 64 N. J. L. 580, 46 Atl. 777.

Oklahoma. Deming Investment Co. v. Shawnee F. Ins. Co., 16 Okla. 1, 4 L. R. A. (N.S.) 607, 83 Pac. 918; *Eminent Household of Columbian Woodmen v. Prater*, 24 Okla. 214, 23 L. R. A. (N.S.) 917, 103 Pac. 558.

Oregon. Beard v. Royal Neighbors of America, 53 Or. 102, 19 L. R. A. (N.S.) 798, 99 Pac. 83.

Texas. Supreme Lodge v. Payne, 101 Tex. 449, 15 L. R. A. (N.S.) 1277, 108 S. W. 1160.

⁵ See §§ 222 and 2594.

¹ See §§ 153 et seq. and 190 et seq.

amounts to a covenant on the one side, which by the terms of the offer is to operate as a consideration for the covenant on the other side.² As has already been said,³ it is clearly improper to call a covenant a condition, even if such covenant is the sole consideration for the promise and if a breach thereof will amount to a total failure of consideration and to operate as a discharge of the entire contract.⁴ Whether it is proper to use the term condition of an act which is to serve as acceptance, consideration and performance of an offer which by its terms is to be accepted by doing an act, is not quite so clear. It is true that the parties do not intend any liability to attach until such act is performed.⁵ On the other hand, up to the time of the performance of such act, no contract exists. There is merely an outstanding offer which may lapse,⁶ or which may be revoked,⁷ at any time, at least before the person to whom the offer is made begins performance of the act which is called for by the offer.⁸ If this is to be called a conditional contract, it ordinarily amounts to calling an unaccepted offer a contract, which of course is a contradiction in terms.⁹

If the contract recites a consideration,¹⁰ even if it is only a nominal consideration,¹¹ a further statement of the events on the happening of which performance is due, is regarded as a condition or as a definition of the time of performance, and not as an addition to the consideration or as a detailed statement of the "valuable considerations" which are referred to in the nominal consideration.¹²

§ 2582. Condition distinguished from exception. A condition is occasionally to be distinguished from an exception. An exception is frequently used where, instead of stating the subject-matter specifically, the parties stated it in broad and general terms, and then proceeded to limit it by a number of exceptions which thus limit the broad and general terms to the subject-matter upon which the parties have really agreed.¹ As a rule, therefore, an exception is

² See § 189.

³ See §§ 2576 et seq.

⁴ See ch. LXXXIV.

⁵ See §§ 190 et seq.

⁶ See §§ 139 et seq.

⁷ See § 118.

⁸ See §§ 130 et seq.

⁹ See §§ 74 et seq.

¹⁰ *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002.

¹¹ *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002.

¹² *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002.

¹ *United States. Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. ed. 216; *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419.

California. Lange v. Waters, 150 Cal. 142, 103 Pac. 889.

used as a mere matter of convenience in order to enable the parties to describe the subject-matter in fuller words than it would be necessary to employ if they attempted to describe the limited subject-matter without the use of the exception. The exception is sometimes confused with the condition because of the fact that the exception is occasionally introduced by the word "if" and the like, so that it reads like a condition in outward form; although in such cases the function of the conditional clause is not to insert a true condition, but to prevent the contract from ever applying to the subject-matter to which it would apply if it were not for such clause, conditional in outward form, but really serving merely to define the subject-matter. While provisions of this sort occasionally amount to conditions,² and while they are not infrequently so worded as to read like conditions, they are, in many cases, not true conditions, but rather exceptions to the broad terms by which the original liability is imposed in the contract. The same result could be reached by giving a detailed statement of the facts under which liability was to be incurred; but as a means of expressing the same intention in fewer words, provision is often made for general liability with exceptions of this sort. In any case, full effect is given thereto,³ if the provision is not otherwise in violation of the policy of the law.

§ 2583. Specific illustrations of exceptions. In policies of life insurance, provisions are frequently found to the effect that such

Indiana. *Red Men's Fraternal Accident Association v. Rippey*, 181 Ind. 454, 50 L. R. A. (N.S.) 1006, 103 N. E. 345.

Iowa. *McDermott v. Hawkeye Commercial Men's Association*, 158 Ia. 544, 139 N. W. 472.

Massachusetts. *Noyes v. Commercial Travelers' Eastern Accident Association*, 190 Mass. 171, 76 N. E. 665.

Minnesota. *Lockway v. Modern Woodmen*, 121 Minn. 170, 141 N. W. 1.

North Carolina. *Scarborough v. American Nat. Ins. Co.*, 171 N. Car. 353, 88 S. E. 482.

Vermont. *Bianchi v. Montpelier & W. R. R. Co.*, — Vt. —, 104 Atl. 144.

² See § 2583.

³ **United States.** *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L.

ed. 216 (exception implied by construction); *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419.

Indiana. *Red Men's Fraternal Accident Association v. Rippey*, 181 Ind. 454, 50 L. R. A. (N.S.) 1006, 103 N. E. 345.

Iowa. *McDermott v. Hawkeye Commercial Men's Association*, 158 Ia. 544, 139 N. W. 472.

Massachusetts. *Noyes v. Commercial Travelers' Eastern Accident Association*, 190 Mass. 171, 76 N. E. 665.

Minnesota. *Lockway v. Modern Woodmen*, 121 Minn. 170, 141 N. W. 1.

North Carolina. *Scarborough v. American Nat. Ins. Co.*, 171 N. Car. 353, 88 S. E. 482.

policy shall not include liability in case the insured is executed by the authority of the law for the commission of a crime;¹ and such exception has been said to be implied in every policy of life insurance if no specific provision is made therefor.² Provisions are frequently found to the effect that the insurer is not to be liable in case the insured meets his death in violation of the law;³ and such provision is regarded as applying to a case in which the insured was killed by one upon whom he was committing an unprovoked assault of such character as to justify killing in self-defense.⁴ Such policies frequently contain exceptions in case of death from other specified causes,⁵ such as death from tuberculosis,⁶ or death resulting from the voluntary use of intoxicating liquor,⁷ or death resulting from voluntary exposure to unnecessary danger.⁸ Provisions of this sort are occasionally so worded as to amount to true conditions,⁹ as where it is provided in express terms that the policy of insurance shall become void if the insured shall use intoxicating liquors to excess habitually, or shall engage in other specified habits injurious to his health.¹⁰ Since such a provision may operate automatically as a termination of all rights under the policy,¹¹ and since it is not intended merely to prevent the insurance company from incurring liability in case of loss due to such conduct on the part

¹ *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. ed. 216 (condition implied by construction); *Scarborough v. American Nat. Ins. Co.*, 171 N. Car. 353, 88 S. E. 482.

² *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419.

³ *American National Life Ins. Co. v. White*, 126 Ark. 483, 101 S. W. 25; *Bosler v. Modern Woodmen of America*, 100 Neb. 570, L. R. A. 1917C, 195, 160 N. W. 966; *Baker v. Supreme Lodge*, 403 Miss. 374, 60 S. W. 333.

⁴ *Bosler v. Modern Woodmen of America*, 100 Neb. 570, L. R. A. 1917C, 195, 160 N. W. 966.

⁵ *Red Men's Fraternal Accident Association v. Rippey*, 181 Ind. 454, 50 L. R. A. (N.S.) 1006, 103 N. E. 345; *McDermott v. Hawkeye Commercial Men's Association*, 158 Ia. 544, 139 N. W. 472; *Noyes v. Commercial Travelers' Eastern Accident Association*, 190 Mass. 171, 76 N. E. 665; *Lockway v.*

Modern Woodmen, 121 Minn. 170, 141 N. W. 1.

⁶ *Red Men's Fraternal Accident Association v. Rippey*, 181 Ind. 454, 50 L. R. A. (N.S.) 1006, 103 N. E. 345.

⁷ *McDermott v. Hawkeye Commercial Men's Association*, 158 Ia. 544, 139 N. W. 472; *Lockway v. Modern Woodmen*, 121 Minn. 170, 141 N. W. 1.

⁸ *Noyes v. Commercial Travelers' Eastern Accident Association*, 190 Mass. 171, 76 N. E. 665.

⁹ *Aetna Life Ins. Co. v. Davey*, 123 U. S. 739, 31 L. ed. 315; *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 10 L. R. A. (N.S.) 136, 89 Pac. 661.

¹⁰ *Aetna Life Ins. Co. v. Davey*, 123 U. S. 739, 31 L. ed. 315; *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 10 L. R. A. (N.S.) 136, 89 Pac. 661.

¹¹ *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 10 L. R. A. (N.S.) 136, 89 Pac. 661.

of the insured, it is a condition and not an exception. Whether a condition attaches to a single covenant of a contract or to all the covenants, depends upon the intention of the parties.¹² A provision for paying a certain amount to the purchaser of stock, if dividends equaling such amount are not declared annually, and for repurchasing such stock at the election of the owner in case such dividends are not declared, will be regarded as binding the promisor to pay such dividend for the time for which the corporation failed to pay it upon such stock, and also to repurchase such stock.¹³ The promisor can not escape his obligation to repurchase the stock by paying such dividends.¹⁴

§ 2584. Condition distinguished from representation. The practice, whether erroneous or not, of using the term "condition" as applicable to present or past facts, as well as to future facts,¹ has led to a confusion between conditions and representations of different sorts. The confusion has been increased by the fact that in many cases the truth of the representation is expressly made a condition upon which the contract is to take effect, or upon which the contracts are to be discharged.² Except in cases in which a representation is made a condition by express terms, a representation, whether fraudulent or innocent, is to be distinguished sharply from a condition. The representation in the proper sense of the term is not a part of the contract, but is a preliminary matter of inducement thereto by which one of the parties was induced to enter into such contract.³ On the other hand, the condition is a term of the contract itself.⁴ Another important reason for distinguishing between the condition and the representation is that the falsity of the representation is ordinarily inoperative unless the representation concerns a material fact.⁵ If the representation concerns an immaterial fact, its falsity has no effect upon the validity of the contract, even if such false representation were made fraud-

¹² *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303.

¹³ *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303.

¹⁴ *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303.

¹ See §§ 2954 et seq.

² See §§ 222 and 2578 et seq.

³ *Bryant v. Modern Woodmen*, 86

Neb. 372, 27 L. R. A. (N.S.) 326, 125 N. W. 621. See §§ 217 et seq.

⁴ See § 2574.

⁵ *Cunat v. Supreme Tribe*, 249 Ill. 448, 34 L. R. A. (N.S.) 1192, 94 N. E. 925; *Bryant v. Modern Woodmen*, 86 Neb. 372, 27 L. R. A. (N.S.) 326, 125 N. W. 621. See §§ 308 et seq. and §§ 365 et seq.

ulently.⁶ On the other hand, if a fact is made a condition by the express terms of the contract, the legal effect of the contract depends upon the happening or not happening of the stipulated event, without any regard to its materiality.⁷

Whatever the rule may be as to the effect of innocent misrepresentations,⁸ the substantial inaccuracy of statements, the truth of which is made the condition of a contract, will defeat the contract, whether the party who made such statements knew that they were false or not.⁹

§ 2585. Condition used as equivalent to defense or discharge.

Another source of confusion in the use of the word condition has grown out of the fact that, unfortunately, it is sometimes used as a means of explaining the effect of facts which may prevent a contract from coming into existence, or which may operate as a discharge of a contract which has already been made. A mistake as to the existence of one of the essential elements of a contract, such as the parties, the subject-matter, and the like,¹ prevents the contract from coming into existence, although as a result of our defective terminology, we frequently are obliged to speak of it as a void contract.² This result is unfortunately explained sometimes by saying that the contract is entered into upon condition that the parties and the subject-matter are in existence, and upon condition that the parties to the contract are aware of the identity of each.³

If taken as a fiction or as a figure of speech, this method of explaining this result is harmless enough. It is an unfortunate explanation, however, in that it is likely to rise to confusion. In cases in which the contract fails to exist by reason of mistake as

⁶ See §§ 308 et seq.

⁷ *United States. Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 664; *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 46 L. ed. 213; *Franklin State Bank v. Maryland Casualty Co.*, 256 Fed. 356.

Illinois. Norwaysz v. Thuringia Ins. Co., 204 Ill. 334, 68 N. E. 551.

Louisiana. Bank of Cotton Valley v. McInnis, 143 La. 436, 78 So. 727.

Oklahoma. Deming Investment Co. v. Shawnee F. Ins. Co., 16 Okla. 1, 4 L. R. A. (N.S.) 607, 83 Pac. 918.

Virginia. Rochester German Ins. Co. v. Monumental Savings Association, 107 Va. 701, 60 S. E. 93.

⁸ See §§ 372 et seq.

⁹ *National Annuity Asso. v. McCall*, 103 Ark. 201, 48 L. R. A. (N.S.) 418, 146 S. W. 125; *Hughes v. Metropolitan Life Ins. Co.*, 117 Me. 244, 103 Atl. 465; *Pacific Mutual Life Ins. Co. v. Glaser*, 245 Mo. 377, 150 S. W. 549.

¹ See §§ 251 et seq.

² See § 54.

³ *Nickoll v. Ashton, Elbridge & Co.* [1901], 2 K. B. 126.

to one of the essential elements,⁴ the party who seeks relief did not contemplate the possibility of the non-existence of the adversary party, the subject-matter, and the like, or of his mistake as to the identity of the party or subject-matter. If he had contemplated such possibility, and if he had not seen fit to guard against it by inserting an express condition, he could not have avoided liability on the ground of mistake, since mistake is unconscious ignorance or forgetfulness; and in cases of this sort the party is conscious of the possibility of his ignorance or forgetfulness, and elects to enter into the contract, taking chances as to the outcome of the unknown event. If he does so enter into the contract, he can not thereafter escape liability on the ground that the event happened contrary to his hopes and expectations.⁵ If the parties attempt to enter into a contract, thinking that they are dealing with a subject-matter which has in fact ceased to exist,⁶ or if they are dealing with what they suppose to be legal rights, but to which the law denies a legal existence,⁷ no contract exists. This result is sometimes explained on the theory that there must be a subject-matter;⁸ and it is sometimes explained on the theory of mistake.⁹ It is probably better to explain cases of this sort as due to mistake than as due to the necessity of a subject-matter, since if the parties know that the subject-matter may have ceased to exist, and if they deliberately elect to take chances with reference to its existence, the contract can not be defeated by the fact that it is subsequently discovered that the subject-matter has ceased to exist when the contract was made.¹⁰

The parties may enter into a contract concerning a specific subject-matter or requiring services of a personal nature; and although such contract is valid when it is made, the subsequent death or disability of the party who is rendering such services, or the destruction of the specific subject-matter, may operate as a discharge of such contract on the theory of subsequent impossibility.¹¹ This result is unfortunately explained sometimes on the theory that the continued existence of the specific subject-matter or the continued ability of the party who is to render such personal service, is an

⁴ See §§ 251 et seq.

⁵ *Headley v. Aetna Ins. Co.*, — Ala. —, 80 So. 466; *Ins. Co. v. Carnahan*, 63 O. S. 258, 58 N. E. 805. See § 253.

⁶ See §§ 261 et seq. and § 658.

⁷ See § 659.

⁸ See §§ 658 et seq.

⁹ See §§ 261 et seq.

¹⁰ See § 658.

¹¹ See ch. LXXVIII.

implied condition of the contract.¹² Here again we have cases in which the parties have in all probability never thought of the possibility of the disability of the party, or the destruction of the specific subject-matter. If they had thought of it, they would probably have made some specific provision fixing their respective rights upon the happening of such event. In the absence of such specific agreement, the law attaches certain consequences to the transaction. To use the term condition, both of events upon which the parties agree as affecting the legal effect of the contract, and also of facts which operate as a discharge because of rules of law without regard to the actual intention of the parties, is simply furnishing another source of confusion.

§ 2586. Classes of conditions—Precedent and subsequent. Conditions are classified with reference to their effect on the contract, as conditions precedent and conditions subsequent. A condition precedent, as the name implies, is one which must be performed before the right, to which it is precedent, is acquired.¹ At the same time, in making this classification, the courts have not always asked themselves to what right the condition is precedent. The term precedent condition is sometimes used of a condition which is to take place before the contract takes effect at all.² Even if the

¹² See § 2667.

Discharge by subsequent legal impossibility is sometimes made a condition subsequent by the express provisions of the contract. *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

¹ *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760; *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 66 Atl. 714; *Board of Education v. Richmond Const. Co.*, 92 N. J. L. 496, 105 Atl. 220; *Adams v. Guyandotte Valley Ry. Co.*, 64 W. Va. 181, 61 S. E. 341.

² *England*. *Pym v. Campbell*, 6 El. & Bl. 370; *Wallis v. Littell*, 11 C. B. N. S. 369.

United States. *Ware v. Allen*, 123 U. S. 590, 32 L. ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698; *Tug River, Coal & Salt, etc., Co. v. Brigel*, 86 Fed. 818; *Beach v. Nevins*,

162 Fed. 129, 18 L. R. A. (N.S.) 288; *Storey v. Storey*, 214 Fed. 973.

Arkansas. *American Sales Book Co. v. Whitaker*, 100 Ark. 360, 37 L. R. A. (N.S.) 91, 140 S. W. 132; *Inman v. Quirey*, 128 Ark. 405, 194 S. W. 858.

Colorado. *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882; *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860; *Divine v. George*, — Colo. —, 106 Pac. 242.

Connecticut. *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408.

Illinois. *Price v. Hudson*, 125 Ill. 284, 17 N. E. 817.

Iowa. *Riechart v. Wilhelm*, 83 Ia. 510, 50 N. W. 19; *McCormick Harvesting Machine Co. v. Morlan*, 121 Ia. 451, 96 N. W. 976; *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760; *Garner v. Kratzer*, 173 Ia. 292, 155 N. W. 296.

during vacancy, but that it revives when the property is occupied again.² In a policy of fire insurance, a condition against change of location of the insured property without the consent of the insurer may be so worded that the policy is suspended while the property is in such changed location, if the insurer has not consented thereto, but that such policy will revive when the property is moved again to another location with the consent of the insurer.³

The term "suspensive condition" has been suggested for such conditions. While our legal nomenclature is sadly defective, and while these defects probably appear in contract law more clearly than in any other subject, it seems unfortunate to adopt a term from another system of law in which it has a definite meaning and use it in our system of law with a different meaning. The term "suspensive condition" was used in Roman law of a condition upon which the validity of a juristic act depended.⁴ It was, therefore, much like our condition precedent,⁵ and it seems unfortunate to use this term of a peculiar kind of condition subsequent.

Other conditions operate, not to suspend the right of action, but to destroy it entirely;⁶ and the fact that such state of affairs ceases to exist does not revive the contract and confers no rights upon

Mississippi. *Ins. Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

Missouri. *Obermeyer v. Globe Mutual Insurance Co.*, 43 Mo. 573.

Nebraska. *State Insurance Co. v. Schreck*, 27 Neb. 527.

Ohio. *Ohio Farmers' Ins. Co. v. Burget*, 65 O. S. 119, 87 Am. St. Rep. 596, 55 L. R. A. 825, 61 N. E. 712.

Pennsylvania. *Mutual Fire Insurance Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407.

South Dakota. *Edmonds v. Mutual L. Ins. Co.*, 33 S. D. 55, 50 L. R. A. (N.S.) 592, 144 N. W. 718.

Washington. *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36.

² *Ins. Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

³ *Ohio Farmers' Ins. Co. v. Burget*, 65 O. S. 119, 87 Am. St. Rep. 596, 55 L. R. A. 825, 61 N. E. 712.

⁴ Czychlarz, *Manual of the Institutes of Roman Law*, § 21; Sohm, *Institutes of Roman Law*, § 43.

⁵ For a discussion of the relation between the suspensive condition at French law and the condition precedent at common law, see *New Orleans v. Texas & Pacific Ry.*, 171 U. S. 312, 43 L. ed. 178.

⁶ *Canada. Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co.*, 33 Can. S. C. 94.

Kansas. *German Ins. Co. v. Russell*, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345.

Maine. *Dolliver v. Granite State Fire Ins. Co.*, 111 Me. 275, 89 Atl. 8.

Maryland. *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

Nebraska. *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 74 Am. St. Rep. 936, 78 N. W. 936 (obiter, as condition was waived).

the parties thereunder.⁷ If a provision in a policy of fire insurance, that it shall be void in case of vacancy, is construed literally, such policy does not revive when the building becomes occupied.⁸ The term "solutory condition" or "resolutive condition" has been suggested for conditions of this sort. Here again we have an attempt to take a term from Roman law in which it has a definite meaning, and to use it in Anglo-American law with a different meaning. In Roman law a condition was resolutive when the termination of a juristic act depended upon its happening or not happening.⁹ The term "resolutive condition" in Roman law was therefore about as broad as the term condition subsequent at our law. While the use of definite terms to indicate definite ideas would be of great help, it would be better to avoid terms which already have definite meanings different from those in which it is sought to use them.

§ 2589. Construction of conditions in general. Since contracts are ordinarily construed so as to prevent forfeiture,¹ a condition which tends to operate as a forfeiture of the rights of one of the parties to the contract will be construed strictly.² A condition for forfeiture in case of sale by the lessee or by his executor, and against sale by legal process, which does not expressly include transfer by operation of the law, will be held not to apply to trans-

New Hampshire. *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556.

Ohio. *Ohio Farmers' Insurance Co. v. Waters*, 65 O. S. 157, 61 N. E. 711.

⁷**Canada.** *Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co.*, 33 Can. S. C. 94.

Kansas. *German Ins. Co. v. Russell*, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345.

Maine. *Dolliver v. Granite State Fire Ins. Co.*, 111 Me. 275, 89 Atl. 8.

Maryland. *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

New Hampshire. *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556.

⁸*German Ins. Co. v. Russell*, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345; *Reynolds v. German-American Ins. Co.*, 107

Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

⁹*Czyhlarz*, Manual of the Institutes of Roman Law, § 21; *Sohn*, Institutes of Roman Law, § 43.

¹*Pyle v. Pyle*, 260 Pa. St. 532, 103 Atl. 918; *Warfield v. Kelly*, 262 Pa. St. 482, 106 Atl. 72; *Lyke v. First National Life & Accident Ins. Co.*, — S. D. —, 171 N. W. 603.

See § 2054.

²**Canada.** *Metropolitan L. Ins. Co. v. Montreal Coal & Towing Co.*, 35 Can. S. C. 266.

United States. *First National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. ed. 563; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 46 L. ed. 64; *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950; *Nelson v. Continental Ins. Co.*, 182 Fed. 783, 31 L. R. A. (N.S.) 598.

fer by operation of law,³ such as a transfer by the act of the law to the trustee of the lessee upon the bankruptcy of the lessee and to a subsequent sale by the trustee.⁴ A agreed to bring her aeroplane to a certain place and to make two flights of thirty minutes each on three different days, in consideration of which B agreed to pay to A a certain sum of money when the machine arrived, which was to be returned if no flights were made, and a certain sum on each day of the exhibition to be paid after the exhibition was completed. The machine arrived and B made the first payment to A. A made but one flight, remaining up only three minutes. The aeroplane was then injured and no further exhibitions were given, although B demanded further performance. B then brought action against A to recover the first payment. It was held that such pay-

Arkansas. Fidelity & C. Co. v. Meyer, 106 Ark. 91, 44 L. R. A. (N.S.) 493, 152 S. W. 995; Firemen's Ins. Co. v. Larey, 125 Ark. 93, L. R. A. 1917A, 29, 188 S. W. 7.

California. Lucy v. Davis, 163 Cal. 611, 126 Pac. 490.

Colorado. National Mutual Fire Insurance Co. v. Duncan, 44 Colo. 472, 98 Pac. 634 [sub nomine, Duncan v. National Mutual Fire Insurance Co., 20 L. R. A. (N.S.) 340].

Idaho. Allen v. Phoenix Assur. Co., 12 Ida. 653, 8 L. R. A. (N.S.) 903, 88 Pac. 245; Rasicot v. Royal Neighbors, 18 Ida. 85, 29 L. R. A. (N.S.) 433, 108 Pac. 1048.

Illinois. Spence v. Central Acci. Ins. Co., 236 Ill. 444, 19 L. R. A. (N.S.) 88, 86 N. E. 104.

Indiana. Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L. R. A. (N.S.) 708, 74 N. E. 964.

Iowa. Lakka v. Modern Brotherhood of America, 163 Ia. 159, 49 L. R. A. (N.S.) 902, 143 N. W. 513.

Nebraska. Merriman v. Grand Lodge, 77 Neb. 544, 8 L. R. A. (N.S.) 983, 110 N. W. 302; Walker v. Burtless, 82 Neb. 211, 117 N. W. 349 [modified on rehearing, 82 Neb. 214, 118 N. W. 113]; Goff v. Supreme Lodge Royal Achates,

90 Neb. 578, 37 L. R. A. (N.S.) 1191, 134 N. W. 239.

New Jersey. Smith v. Prudential Ins. Co., 83 N. J. L. 719, 43 L. R. A. (N.S.) 431, 85 Atl. 190.

Oklahoma. Nance v. Oklahoma F. Ins. Co., 31 Okla. 208, 38 L. R. A. (N.S.) 426, 120 Pac. 948.

Pennsylvania. Pyle v. Pyle, 260 Pa. St. 532, 103 Atl. 918; Warfield v. Kelly, 262 Pa. St. 482, 106 Atl. 72.

Rhode Island. Harrington v. Law (R. I.), 90 Atl. 660.

South Dakota. Lyke v. First National Life & Accident Ins. Co., — S. D. —, 171 N. W. 603.

Texas. Reppond v. National L. Ins. Co., 100 Tex. 519, 11 L. R. A. (N.S.) 981, 101 S. W. 786; Insurance Co. of N. America v. O'Bannon, — Tex. —, 206 S. W. 814.

West Virginia. Scott v. Dixie F. Ins. Co., 70 W. Va. 533, 40 L. R. A. (N.S.) 152, 74 S. E. 659.

Wisconsin. Cady v. Fidelity & C. Co., 134 Wis. 322, 17 L. R. A. (N.S.) 260, 113 N. W. 967; French v. Fidelity & C. Co., 135 Wis. 259, 17 L. R. A. (N.S.) 1011, 115 N. W. 869.

³ Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950.

⁴ Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950.

ment could not be recovered, since a part of one flight had been made; and by the provisions of the contract such payment was to be returned only if no flights were made.⁵ A provision to the effect that a policy of fire insurance should be void if the interest of the insured was any other than an unconditional ownership, was held to apply to the building which was insured, and not to the ground on which the building stood.⁶ A condition that a policy of fire insurance shall be void for misrepresentation of any material fact, is held not to render the policy void because of a misstatement as to the dimensions of the buildings which were insured.⁷ If a contract reserves to one party the right to terminate the contract if in the judgment of its engineer the work is not being prosecuted faithfully and diligently, and provides in another clause that in case of failure to complete the contract as agreed upon, the adversary party may recover damages due to such failure, the failure to perform, referred to in the latter clause, can not be regarded as equivalent to a termination at the discretion of the engineer of the adversary party; and the fact that such engineer terminated such contract is not conclusive of the fact that the contractor failed to perform.⁸

A provision in a policy of insurance will not be construed as a warranty, unless it appears to be the intention of the parties that it shall have such effect,⁹ and unless the language shows clearly that no other construction can fairly be given to the language used.¹⁰ A warranty against the suppression of any facts which would tend to influence the insurance company in issuing the policy, makes the statements to which reference is made representations and not warranties.¹¹ A warranty by the insured that he is in good health to the best of his knowledge and belief, is in

⁵ *Harrington v. Law* (R. I.), 90 Atl. 660.

⁶ *Tebeau v. Globe & Rutgers Fire Ins. Co.*, 271 Mo. 626, 2 A. L. R. 1041, 197 S. W. 130. (In the policy in question this result may be justified because of the fact that another clause made express provision for the location of the building on ground not owned by the insured in fee simple. The defect in title relied upon in this connection was an outstanding contingent dower interest.)

⁷ *National Mutual Fire Ins. Co. v.*

Duncan, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mutual Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

⁸ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481.

⁹ *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578, 37 L. R. A. (N.S.) 1191, 134 N. W. 239.

¹⁰ *Spence v. Central Acci. Ins. Co.*, 236 Ill. 444, 19 L. R. A. (N.S.) 88, 86 N. E. 104.

¹¹ *Reppond v. National L. Ins. Co.*, 100 Tex. 519, 11 L. R. A. (N.S.) 981, 101 S. W. 786.

effect a representation; and it is not broken because of his bad health if he believes in good faith that his health is good.¹² If the provision is a warranty, it is construed as strictly as possible in favor of the insured and against the insurer.¹³ The so-called condition precedent in a policy of fidelity insurance, to the effect that the acts of the insured would be examined and checked each week, is complied with if ordinary care is used in so doing.¹⁴

The rule that a condition is construed strictly if it will operate as a forfeiture, applies both to conditions precedent,¹⁵ and to conditions subsequent.¹⁶

§ 2590. Acts or events which may operate as conditions—Impossible and illegal conditions. If a condition is impossible, its effect upon the contract depends upon whether it is precedent or subsequent. If it is precedent, the contract can not, by its terms, take effect, in whole or in part, until such condition is performed; and, accordingly, if the condition is impossible, the contract or the covenant subject to such condition never takes effect.¹ It has also been said that the condition may be ignored, if impossible, meaningless, or absurd.² This statement has, however, been made in

¹² *Lakka v. Modern Brotherhood*, 163 Ia. 159, 49 L. R. A. (N.S.) 902, 143 N. W. 513; *Smith v. Prudential Ins. Co.*, 83 N. J. L. 719, 43 L. R. A. (N.S.) 431, 85 Atl. 190.

¹³ *Fidelity & C. Co. v. Meyer*, 106 Ark. 91, 44 L. R. A. (N.S.) 493, 152 S. W. 995; *Spence v. Central Acci. Ins. Co.*, 236 Ill. 444, 19 L. R. A. (N.S.) 88, 86 N. E. 104; *Cady v. Fidelity & C. Co.*, 134 Wis. 322, 17 L. R. A. (N.S.) 260, 113 N. W. 967; *French v. Fidelity & C. Co.*, 135 Wis. 259, 17 L. R. A. (N.S.) 1011, 115 N. W. 869.

¹⁴ *Fidelity & Deposit Co. v. Kane*, 182 Ky. 648, 206 S. W. 888.

¹⁵ *National Council v. Glenn*, — Fla. —, 2 A. L. R. 1503, 80 So. 516.

¹⁶ *Tebéau v. Globe & Rutgers Fire Ins. Co.*, 271 Mo. 626, 2 A. L. R. 1041, 197 S. W. 130.

¹ *Lord v. Tyler*, 31 Mass. (14 Pick.) 156 (obiter, as condition was construed so as to avoid impossibility, which in this case was requiring co-owner to

establish his interest in the chattel by action at law against his co-owner).

See, however, *Worsley v. Wood*, 6 T. R. 710 (refusal of minister and churchwardens, not parties to contract, to sign certificate, which was made condition precedent to bringing action on policy—probably refusal was justifiable; not true impossibility).

² *Stockton v. Turner*, 30 Ky. (7 J. J. Mar.) 192; *Merrill v. Bell*, 14 Miss. (6 Sm. & M.) 730.

"The general rule is that conditions which are impossible or insensible are void, and the obligation remains absolute, if it be not for the doing of an illegal thing. *Sheppard's Touchstone*, title *Obligation*, 372, 373. But if any sense or certainty can be made of it, the obligation and condition shall both stand." *Merrill v. Bell*, 14 Miss. (6 Sm. & M.) 730.

"A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incon-

obiter,³ or in cases in which performance on the part of the adversary party had taken place so far that forfeiture of his rights would have resulted if the impossibility of performing the condition were to operate as a discharge.⁴ If a contract for the compromise of a disputed claim provides for depositing a certain sum of money which is to be repaid if the party who makes such deposit shall make good and sufficient proof before a tribunal having competent jurisdiction, that he made a certain payment at a prior time, and if he shall also make such proof to the satisfaction of the administrators of his deceased creditor, the condition as to making proof is impossible, since no tribunal has jurisdiction to hear evidence or to make a finding if no case is pending before it; and such condition as to the manner of performance must therefore be rejected, but the rest of the contract will be enforced.⁵

If the condition is subsequent on the other hand, the contract has already taken effect, and by its terms its effect is to end only on the performance of the condition. If the condition, therefore, is impossible, the contract is unconditional in legal effect.⁶ The principle that an impossible or nonsensical provision will be rejected has been applied to cases of bonds which contained the condition that the debtor should make the payment to himself,⁷ or that the creditor should make the payment.⁸ These are really illustrations

gruous or uncertain—a fortiori, an uncertain or repugnant stipulation, or expression in a condition, consistent and certain in other respects, can not change or materially affect the import and effect of the contract. Thus, if the condition of a bond be that if the obligor do not pay, the bond shall be void, the obligation will be understood to be single, or as if there had been no condition—‘for when the condition recites a debt, and after lays an obligation not to pay it, it is in that repugnant and void.’ Bacon’s Abridgment, Cond. L. & Cooke v. Graham’s Administrators, 7 U. S. (3 Cranch) 229, 2 L. ed. 420.” Stockton v. Turner, 30 Ky. (7 J. J. Mar.) 192.

³It has been said that if a condition precedent to payment for value is impossible, such condition may be ignored at law as well as in equity. In this case, however, the event, namely, such

stage of water in the river as would permit the boat to go on a certain voyage, on the return from which the price for the boat was to become due, was not impossible. Peery v. Cooper, 8 Mo. 203.

⁴Merrill v. Bell, 14 Miss. (6 Sm. & M.) 730.

⁵Merrill v. Bell, 14 Miss. (6 Sm. & M.) 730.

⁶Stockton v. Turner, 30 Ky. (7 J. J. Mar.) 192.

It is said that “the condition * * * never really existed.” Racine County Bank v. Ayers, 12 Wis. 512 [citing, Hughes v. Edwards, 22 U. S. (9 Wheat.) 403, 6 L. ed. 143, and Merrill v. Bell, 10 Miss. (2 Sm. & M.) 730].

⁷Stockton v. Turner, 30 Ky. (7 J. J. Mar.) 192.

⁸Cooke v. Graham’s Administrator, 7 U. S. (3 Cranch) 229, 2 L. ed. 420.

of the application of the general principle that the intent of the parties as manifest from the entire instrument will prevail over grammatical errors and mistakes in expression which can be corrected from the instrument itself.⁹ If the condition is possible when the contract is made, but it becomes impossible thereafter by operation of law, such subsequent impossibility may operate as a discharge of the entire contract,¹⁰ as in case of covenants which subsequently become impossible by act of the law.¹¹ If a bond is conditioned upon the payment of the debt by the judgment debtor, or upon his rendering his body in execution, and arrest and imprisonment for debt, is subsequently forbidden by law, the sureties upon such bond are thereby discharged.¹²

Similar considerations apply to an illegal condition. If the illegal condition is a condition precedent, and the contract is entire, the effect of such condition, like that of an illegal covenant in an entire contract,¹³ is to defeat the entire contract. If the illegal condition is a condition subsequent, the contract has already taken effect; and since the law does not tolerate the performance of the condition, the contract is in legal effect unconditional.¹⁴ If the contract is intended to produce results which the law condemns as illegal, and if such contract is entire, the whole contract is illegal, whether the illegal provision is inserted by way of a covenant or by way of a condition.¹⁵

If the condition is void as distinct from illegal,¹⁶ it is treated as of no legal effect, in analogy to the rules which apply to void covenants;¹⁷ and if the remaining provisions of the contract are sufficient to make a valid contract after rejecting the void condition, full effect will be given thereto.¹⁸

The fact that there is comparatively little authority upon the impossible, absurd and illegal conditions, while there is such an amount of authority upon the uncertain¹⁹ or illegal and void²⁰

⁹ See §§ 2031 et seq.

¹⁰ *Brown v. Dillahunty*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499.

¹¹ See ch. LXXVIII.

¹² *Brown v. Dillahunty*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499.

¹³ See § 1031.

¹⁴ *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679.

¹⁵ See §§ 862 et seq. and 1029 et seq.

¹⁶ See §§ 1020 et seq.

¹⁷ See §§ 1035 et seq.

¹⁸ For similar provisions for arbitration of entire subject-matter, see § 721.

For the effect of conditions reducing the period of limitations, see §§ 732 et seq.

For the validity of contracts requiring notice, see §§ 735 and 2609 et seq.

¹⁹ See §§ 95 et seq.

²⁰ See §§ 657 et seq.

covenants, is no doubt due to the fact that provisions of this sort are usually intended by the parties as a part of the subject-matter or the consideration; and accordingly they must be considered in such connections. Events of this sort are rarely pure conditions which are not part of the subject-matter or of the consideration.

§ 2591. Present or past acts or events. The act which the parties select as a condition may undoubtedly be an act which is to take place in the future.¹ Whether it may be an act which has taken place in the past or which is taking place at the very moment that the promise is made, but the outcome of which is unknown to the parties to the contract, is a question upon which there has been a considerable amount of discussion in other systems of law, but very little in our own. In Roman law, a fact which had already occurred, or which was occurring when the promise was made, could not be regarded as a condition in the true sense of the term.² It is evident that such an event has happened when the contract is made, and that accordingly the contract is actually unconditional if the condition has been performed in accordance with the terms of the contract, or else the promise never took effect by its own terms, in case the condition has been broken so as to avoid the contract by its own terms. At the same time, the parties to the contract do not know how the event transpired. Where no element of fraud or mistake enters in, compromises of rights which are asserted in good faith are regarded as supported by sufficient consideration,³ and if the parties know that the subject-matter may have ceased to exist, and enter into the contract, agreeing to take chances upon its continued existence,⁴ the contract is valid although such subject-matter had in fact ceased to exist. Since the bona fide belief of the party in the existence and validity of his claim,

¹ See § 2595.

² "The following subsidiary provisions are not conditions in the juristic sense:

1. The *condicio in praesens vel in praeteritum collata*; for example, A promises 1000, si Titius consul fuit (if Titius has been consul). This transaction is conditional in outward form, it is true; but, on the other hand, it is unconditional in its true nature. Here there is no objective state of uncertainty, for it is objec-

tively certain at the time of concluding the transaction whether Titius was consul or not. If he was consul, the legal operation takes effect as soon as the transaction is concluded, and if he was not consul the transaction is without legal effect from the beginning." * * * Czychlarz, *Manual of the Institutes of Roman Law*, § 21.

³ See §§ 612 et seq.

⁴ See § 658.

or in the existence of the subject-matter, is sufficient, it is clear that the parties may make their contract turn upon the actual outcome of an event which has already happened, but of the result of which they are as yet in ignorance. The only real difficulty is one of name. Is it proper to say that such a contract is a contract upon a condition; or is it better to say that it is, on the one hand, an absolute contract from the beginning, and on the other hand, that it never had any legal effect? Occasionally it has been said that a true condition must look to the future.⁵ On the other hand, the fact that the event is present or past does not prevent the courts from calling it a condition.⁶ The fact that at our law ques-

⁵ Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449.

"Past or existing facts or states of things may, *when unknown to both parties to the contract*, form the basis of a valid provision in the contract whereby there is to be no contract in the event they do exist, and vice versa; but the principle upon which such a provision is to be upheld is that of mutual mistake of the parties in supposing such facts or states of things not to exist when they do exist. * * * But where the past or existing fact, act, or state of things is known by one of the parties, and the other knows he knows, then only a warranty or representation by the party knowing of such facts, acts or states of things, or some fraudulent concealment by him, could relieve the other party of the duty and necessity of ascertaining for himself, on his own responsibility, before he concluded the contract, such fact, act or event, if he deemed it material or important to the consideration, and of protecting himself by declining, on account of its existence, to enter into the contract at all. He can not, in the absence of such warranty, representation, or concealment, omit to do so, and enter into the contract and assume, for a valuable consideration, its obligations and at the same time protect himself from his own negligence by inserting in the contract a valid

condition whereby his obligation is to be void, but the consideration paid him therefor is to remain his, unless a fact, which does exist, does not exist. Such a condition, under such circumstances, would be void and must fall, because the party for whose benefit it was inserted knew, or is charged with knowing, at the time he entered into the contract and accepted the consideration from the other party that the condition was absolutely inconsistent with, destructive of, and repugnant to, the obligation which by the contract he assumed. In such case the condition and not the contract falls. * * * A party can not avoid a contract on account of facts which were known to him at the time he entered into the contract, or which he knew then that he could ascertain from the other party, unless relieved of the duty by the fraud or warranty of the other party. Unless so relieved, he is charged with a knowledge of such facts, and can not, because of their existence, exempt himself from liability under the contract. A condition so providing, if not predicated upon a warranty, is void, because repugnant to the obligation at the very inception of the contract." Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 454, 65 So. 449.

⁶ See § 2594.

tions of this sort are usually questions of mere name, and that as a rule no legal rights depend upon the determination thereof, is probably the reason why this subject is discussed so little at common law. Whether such an event is a true condition or not, its effect on the validity of the contract is the same.⁷ The practical difference arises when the right of the parties to recover in quasi-contract is involved,⁸ and the courts usually determine this question without considering the nature of such an event as a true condition.

§ 2592. Conditions as affecting entire and severable contracts—General principles. If a contract contains two or more covenants on one side, and one or more of such covenants is subject to a condition, the question frequently arises whether a breach of one of such conditions operates as a discharge of the entire contract. This question is to be solved, at least as the problem is stated by the courts, by the application of the principles which determine the validity of contracts when one or more of the covenants are illegal,¹ or to oral contracts when one or more of the covenants fall within the scope of the Statute of Frauds,² or to cases in which there has been performance of one or more covenants of a contract, and breach of one or more of the remaining covenants.³ It is said that if the contract is entire, a breach of one of the conditions will operate as a discharge of all of the covenants of the contract;⁴ while, on the other hand, if the contract is severable, a breach of a condition which relates to one covenant will not operate as a discharge of the remaining covenants.⁵ A provision for arbitration as to questions arising on one branch of the contract as a condition

¹ See §§ 222 and 2594.

² See ch. LXXXVIII.

³ See §§ 1029 et seq.

⁴ See §§ 1425 et seq.

⁵ See ch. LXXXIV.

⁴ **California.** *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 10 L. R. A. (N.S.) 876, 89 Pac. 130.

Georgia. *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 32 L. R. A. 70, 36 S. E. 821.

Maine. *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266, 17 Am. St. Rep. 482, 19 Atl. 396; *Carleton v. Patron's*

Androscoggin Mut. F. Ins. Co., 109 Me. 79, 39 L. R. A. (N.S.) 951, 82 Atl. 649.

Minnesota. *Parsons, Rich & Co. v. Lane*, 97 Minn. 98 [sub nomine, *In re Millers' & Manufacturers' Ins. Co.*, 4 L. R. A. (N.S.) 231, 106 N. W. 485].

Ohio. *Germania Fire Ins. Co. v. Schild*, 69 O. S. 136, 68 N. E. 706.

West Virginia. *Morgan v. American Central Ins. Co.*, 80 W. Va. 1, L. R. A. 1917D. 1049, 92 S. E. 84.

⁵ **Alabama.** *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379; *Manchester F. Ins. Co. v. Feibelman*, 118 Ala. 303, 23 So. 739.

precedent to a right of action thereon, does not apply to questions arising on another branch thereof.⁶

The practical difficulty in applying this principle grows out of the difficulty in determining what are entire and what are severable. It has already been pointed out that the courts are likely to employ somewhat different practical tests for distinguishing between entire and severable contracts in cases in which illegality is involved, from cases in which such questions as the application of the Statute of Frauds or the discharge of the contract by breach are involved.⁷ The breach of a true condition operates as a discharge of the contract without regard to the materiality of the condition,⁸ and it frequently leaves one of the parties who has furnished valuable consideration without any rights whatever. For these reasons the courts are sometimes unwilling in practice to apply the same tests for determining whether a contract is entire or severable, with reference to the effect of a breach of condition, that they apply when the question is one of the effect of an illegal covenant upon the remaining covenants of the contract.

District of Columbia. *Fontano v. Robbins*, 18 D. C. App. 402.

Illinois. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115.

Indiana. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 547; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498.

Iowa. *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Ia. 625, 93 Am. St. Rep. 261, 57 L. R. A. 328, 88 N. W. 807.

Kansas. *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983.

Mississippi. *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86.

Missouri. *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 76, 42 Am. St. Rep. 523, 23 L. R. A. 719, 25 S. W. 848.

Montana. *Wright v. Fire Ins. Co.*, 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87.

Nebraska. *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 6 L. R. A. 524, 43 N. W. 340; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Johansen v. Home F. Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839.

New York. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184.

Ohio. *Coleman v. New Orleans Ins. Co.*, 49 O. S. 310, 34 Am. St. Rep. 565, 16 L. R. A. 174, 31 N. E. 279.

Oklahoma. *Miller v. Delaware Ins. Co.*, 14 Okla. 81, 65 L. R. A. 173, 2 Am. & Eng. Ann. Cas. 17, 75 Pac. 1121; *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L. R. A. (N.S.) 775, 98 Pac. 552.

Washington. *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287.

Wisconsin. *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 20 Am. St. Rep. 96, 8 L. R. A. 834, 45 N. W. 813.

⁶ *Fontano v. Robbins*, 18 D. C. App. 402.

⁷ See §§ 2083 et seq.

⁸ See § 2577.

§ 2593. Specific tests for determining entire or severable character of contract. If two distinct and separate contracts have been made, the fact that each contains an identical condition does not render them entire; and a breach of such condition as to one contract will not affect the other.¹

If the parties have made but one contract which contains two or more covenants, the courts usually agree upon the general principle that the question turns on the entire or severable character of the contract, but they disagree sharply as to the nature of the specific contract in the particular case. In some jurisdictions it has been said that the test, like that in cases of illegal covenants,² is whether the consideration is apportioned between the different covenants or not, and that if such consideration is not apportioned, the contract is to be regarded as entire for the purpose of determining the effect of a breach of the condition.³ In other jurisdictions, however, the correctness of this view has been denied, and it has been said that even though the consideration is not apportioned between the different covenants, the contract may, nevertheless, be regarded as severable for the purpose of determining the effect of the breach of a condition.⁴

In some jurisdictions it is said that if different classes of property are insured, each for a specific amount, the contract is severable so that a breach of condition as to one class of property does not affect the insurance on the other classes of property.⁵ In other jurisdictions it is said that if the risk is entire the contract of

¹ *Williams v. Virginia State Ins. Co.*, 106 Va. 239, 55 S. E. 680.

² See §§ 1030 et seq.

³ *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 52 L. R. A. 70, 36 S. E. 821; *Burr v. German Ins. Co.*, 84 Wis. 76, 36 Am. St. Rep. 905, 54 N. W. 22; *Carey v. German Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267, 54 N. W. 18.

⁴ *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Ia. 625, 93 Am. St. Rep. 261, 57 L. R. A. 328, 88 N. W. 807; *Johansen v. Home F. Ins. Co.*, 54 Neb. 548, 74 N. W. 866 [citing, *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 6 L. R. A. 524, 43 N. W. 340, and *Phenix Ins. Co. v. Grimes*, 33 Neb. 340, 50 N. W. 168].

⁵ *Alabama. Manchester F. Ins. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759.

Illinois. Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115.

Indiana. Rogers v. Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498.

Kansas. German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Continental Ins. Co. v. Ward*, 60 Kan. 346, 31 Pac. 1079; *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983.

Mississippi. Mitchell v. Mississippi Home Ins. Co., 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86.

Missouri. Loehner v. Home Mut. Ins. Co., 17 Mo. 247; *Trabue v. Dwell-*

insurance is entire, even if there is a separate valuation of each kind of property.⁶ This principle has been carried so far that failure to keep books and inventories in an iron safe has been held to avoid not only the insurance upon the stock of goods which was directly affected by such failure; but also insurance upon the fixtures,⁷ and upon the building.⁸

In other jurisdictions it is said that a breach of condition which directly affects one covenant will avoid the entire contract only if such breach will in its nature affect the liability under such other covenant.⁹ Under this principle a breach of condition as to the

ing House Ins. Co., 121 Mo. 75, 42 Am. St. Rep. 523, 23 L. R. A. 719, 25 S. W. 848.

Montana. *Wright v. Fire Ins. Co.*, 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87.

Nebraska. *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 606, 6 L. R. A. 524, 43 N. W. 340; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Johansen v. Home F. Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839.

New York. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Pratt v. Dwelling House Mut. F. Ins. Co.*, 130 N. Y. 206, 29 N. E. 117.

Ohio. *Coleman v. New Orleans Ins. Co.*, 49 O. S. 310, 34 Am. St. Rep. 565, 16 L. R. A. 174, 31 N. E. 279.

Oklahoma. *Miller v. Delaware Ins. Co.*, 14 Okla. 81, 65 L. R. A. 173, 2 Am. & Eng. Ann. Cas. 17, 75 Pac. 1121; *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L. R. A. (N.S.) 775, 98 Pac. 552.

Washington. *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287.

Wisconsin. *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 20 Am. St. Rep. 96, 8 L. R. A. 834, 45 N. W. 813.

⁶**Alabama.** *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379.

California. *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 10 L. R. A. (N.S.) 876, 89 Pac. 130.

Indiana. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 547.

Maine. *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 109 Me. 79, 39 L. R. A. (N.S.) 951, 82 Atl. 649.

Minnesota. *Parsons, Rich & Co. v. Lane*, 97 Minn. 98 [sub nomine, *In re Millers' & Man. Ins. Co.*, 4 L. R. A. (N.S.) 231, 106 N. W. 485].

Maryland. *Joffe v. Niagara F. Ins. Co.*, 116 Md. 155, 51 L. R. A. (N.S.) 1047, 81 Atl. 281.

North Carolina. *Coggins v. Aetna Ins. Co.*, 144 N. Car. 7, 8 L. R. A. (N. S.) 839, 56 S. E. 506.

Ohio. *Germania Fire Ins. Co. v. Schild*, 69 O. S. 136, 68 N. E. 706.

Wisconsin. *Schumitsch v. American Ins. Co.*, 48 Wis. 26, 3 N. W. 595.

⁷*Joffe v. Niagara F. Ins. Co.*, 116 Md. 155, 51 L. R. A. (N.S.) 1047, 81 Atl. 281.

⁸**Southern F. Ins. Co. v. Knight, 111 Ga. 622, 78 Am. St. Rep. 216, 52 L. R. A. 70, 36 S. E. 821; *Coggins v. Aetna Ins. Co.*, 144 N. Car. 7, 8 L. R. A. (N. S.) 839, 56 S. E. 506.**

⁹**Alabama.** *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912.

Indiana. *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546.

Kansas. *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079.

ownership of the building does not render invalid insurance upon goods, as long as the risk as to the goods is not affected by such breach of condition.¹⁰ For the same reason a breach of a condition requiring that inventories and books be kept in an iron safe does not affect the insurance on the building.¹¹

In some jurisdictions the use of language in the contract to the effect that in case of breach of a condition relating to one covenant, the entire contract shall be void, is regarded as conclusive, and upon breach of such condition, although it relates to but one covenant, all the covenants are rendered inoperative.¹² In other jurisdictions, however, language of this sort is regarded as rendering the policy void only as far as it is affected by such breach of condition;¹³ and accordingly such a contract is regarded as a severable contract if there is a separate valuation of the property in spite of the use of language which apparently makes the entire contract invalid.¹⁴ Even in such jurisdictions, however, a provision to the effect that the "entire policy and every part of it shall be void," is given full force and effect, and a breach of a condition with reference to one covenant will render the entire contract invalid.¹⁵

The greater number of cases under which questions of this sort have arisen, are cases involving insurance, and the effect of treating the condition in question as defeating the entire contract would

Missouri. *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 42 Am. St. Rep. 523, 23 L. R. A. 719, 25 S. W. 848.

Montana. *Wright v. Fire Ins. Co.*, 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87.

Nebraska. *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 830.

Ohio. *Coleman v. New Orleans Ins. Co.*, 49 O. S. 310, 34 Am. St. Rep. 565, 16 L. R. A. 174, 31 N. E. 279.

¹⁰*Coleman v. New Orleans Ins. Co.*, 49 O. S. 310, 34 Am. St. Rep. 565, 16 L. R. A. 174, 31 N. E. 279.

¹¹*Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86; *Miller v. Delaware Ins. Co.*, 14 Okla. 81, 65 L. R. A. 173, 75 Pac. 1121; *Miller v. Scottish Union*

& I. F. Ins. Co., 14 Okla. 91, 75 Pac. 1135; *Fisher v. Sun Insurance Co.*, 74 W. Va. 694, L. R. A. 1915C, 619, 83 S. E. 729.

¹²*Dumas v. Northwestern National Ins. Co.*, 12 D. C. App. 245, 40 L. R. A. 358; *Germania Fire Ins. Co. v. Schild*, 69 O. S. 136, 100 Am. St. Rep. 663, 68 N. E. 706.

¹³*Donley v. Glens Falls Ins. Co.*, 184 N. Y. 107, 76 N. E. 914.

¹⁴*Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 42 Am. St. Rep. 523, 23 L. R. A. 719, 25 S. W. 848; *Donley v. Glens Falls Ins. Co.*, 184 N. Y. 107, 76 N. E. 914; *Miller v. Delaware Ins. Co.*, 14 Okla. 81, 65 L. R. A. 173, 75 Pac. 1121.

¹⁵*Smith v. Agricultural Ins. Co.*, 118 N. Y. 518, 23 N. E. 883.

ordinarily be to operate as a forfeiture. Since the courts are opposed to forfeitures, and since provision for forfeitures are construed as strictly as possible,¹⁶ they have frequently been driven to class contracts as severable in order to prevent the effect of a forfeiture which they would undoubtedly have classed as entire for every other purpose.

II

PAST, PRESENT OR FUTURE EVENTS AS CONDITIONS

§ 2594. Validity of contract conditioned on existence of past or present fact. Whether a past or present event can be a condition in the true sense of the term,¹ the validity of a contract is frequently made to turn upon the happening or not happening of such an event; and as far as the validity of the contract is concerned, full effect is given to such provision.² Provisions in insurance contracts making the validity of the contract conditioned upon the existence of certain facts, are given full force and effect as far as the validity of the contract itself is concerned.³ In contracts of fire insurance breach of a so-called condition as to the

¹⁶ See § 2054.

¹ See § 2591.

² *Colorado. National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

Florida. Insurance Co. of North America v. Erickson, 50 Fla. 419, 2 L. R. A. (N.S.) 512, 39 So. 495.

Illinois. Sterrick v. McBride, 157 Ill. 70, 41 N. E. 744.

Indiana. Miller v. Nugent, 12 Ind. App. 348, 40 N. E. 282.

Maine. Carleton v. Patrons' Androscoggin Mut. F. Ins. Co., 109 Me. 79, 39 L. R. A. (N.S.) 951, 82 Atl. 649.

Minnesota. Parson, Rich & Co. v. Lane, 97 Minn. 98 [sub nomine, *In re Millers' & Mfrs' Ins. Co.*, 4 L. R. A. (N.S.) 231, 106 N. W. 485].

Nebraska. Madsen v. Farmers' & M. Ins. Co., 87 Neb. 107, 29 L. R. A. (N.S.) 97, 126 N. W. 1086.

Oklahoma. Deming Investment Co. v. Shawnee F. Ins. Co., 16 Okla. 1, 4 L. R. A. (N.S.) 607, 83 Pac. 918; *Eminent Household of Col. Woodmen v. Prater*, 24 Okla. 214, 23 L. R. A. (N.S.) 917, 103 Pac. 558.

South Dakota. Dodson v. Crocker, 16 S. D. 481, 94 N. W. 391.

Texas. Supreme Lodge v. Payne, 101 Tex. 449, 15 L. R. A. (N.S.) 1277, 108 S. W. 1160.

Wisconsin. Harran v. Klaus, 79 Wis. 383, 48 N. W. 479.

³ *Colorado. National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

Florida. Insurance Co. v. Erickson, 50 Fla. 419, 2 L. R. A. (N.S.) 512, 39 So. 495.

Maine. Carleton v. Patrons' Androscoggin Mut. F. Ins. Co., 109 Me. 79, 39 L. R. A. (N.S.) 951, 82 Atl. 649.

existing state of the title or the possession of the property prevents the contract from existing.⁴ If the contract provides that it shall be void if the building which is insured is on ground not owned by the insured, such policy is void if such building is upon land which the owner of the building has leased.⁵ Insurance taken by a husband in his name upon a homestead, the title to which is in the wife, is invalid under such a clause,⁶ and after loss, the husband can not ignore the specific provisions of the contract and recover on the theory that he had an insurable interest on such property.⁷ The fact that the title has been transferred from the husband to the wife under a statute which makes such transfers void as against third persons, does not prevent the title from passing as between husband and wife; and, accordingly, the insurance company is not to be regarded as a third person within the meaning of such statutory provision.⁸ Such a condition is broken if insurance is effected by a vendor who has entered into an unconditional contract of sale.⁹ The fact that the contract has not been recorded and that the title still stands on the record in the name of the vendor, does not prevent a breach of such condition.¹⁰ Conversely, the vendee is to be regarded as the owner,¹¹ even if the

Minnesota. *Parsons, Rich & Co. v. Lane*, 97 Minn. 98 [sub nomine, *In re Millers' & Mfr's Ins. Co.*, 4 L. R. A. (N.S.) 231, 106 N. W. 485].

Nebraska. *Madsen v. Farmers' & M. Ins. Co.*, 87 Neb. 107, 29 L. R. A. (N.S.) 97, 126 N. W. 1086.

Oklahoma. *Deming Investment Co. v. Shawnee F. Ins. Co.*, 16 Okla. 1, 4 L. R. A. (N.S.) 607, 83 Pac. 918; *Eminent Household v. Prater*, 24 Okla. 214, 23 L. R. A. (N.S.) 917, 103 Pac. 558.

Texas. *Supreme Lodge v. Payne*, 101 Tex. 449, 15 L. R. A. (N.S.) 1277, 108 S. W. 1160.

⁴ *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 52 L. R. A. (N.S.) 670, 138 Pac. 708; *Insurance Co. v. Erickson*, 50 Fla. 419, 2 L. R. A. (N.S.) 512, 39 So. 495; *Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 144 Mich. 440, 6 L. R. A. (N.S.) 852, 108 N. W. 393; *Bacot v. Phenix Ins. Co.*, 96 Miss. 223, 25 L. R. A. (N.S.) 1226, 50 So. 729.

⁵ *Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 144 Mich. 440, 6 L. R. A. (N.S.) 852, 108 N. W. 393.

⁶ *Bacot v. Phenix Ins. Co.*, 96 Miss. 223, 25 L. R. A. (N.S.) 1226, 50 So. 729.

⁷ *Bacot v. Phenix Ins. Co.*, 96 Miss. 223, 25 L. R. A. (N.S.) 1226, 50 So. 729.

⁸ *Groce v. Phenix Ins. Co.*, 94 Miss. 201, 22 L. R. A. (N.S.) 732, 48 So. 298.

⁹ *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 52 L. R. A. (N.S.) 670, 138 Pac. 708; *Insurance Co. v. Erickson*, 50 Fla. 419, 2 L. R. A. (N.S.) 512, 39 So. 495.

¹⁰ *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 52 L. R. A. (N.S.) 670, 138 Pac. 708; *Insurance Co. v. Erickson*, 50 Fla. 419, 2 L. R. A. (N.S.) 512, 39 So. 495.

¹¹ *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L. R. A. (N.S.) 775, 98 Pac. 552; *Evans v. Crawford County Farmers' Mut. F. Ins. Co.*, 130 Wis. 189, 9 L. R. A. (N.S.) 485, 109 N. W. 952.

policy is conditioned upon the insured's being the unconditional and sole owner.¹² One to whom a conveyance in fee has been made is the sole and unconditional owner,¹³ although he has not paid the entire purchase price and although the realty is subject to a vendor's lien.¹⁴

The general principle that conditions are to be construed strictly, if they will result in total forfeiture,¹⁵ applies to conditions of this sort.¹⁶ An outstanding contingent dower interest to which the insured holds subject, does not prevent him from being the owner in fee within the meaning of such a condition.¹⁷ Such a condition does not defeat insurance of undivided interests,¹⁸ such as an interest in a party wall,¹⁹ or an interest in partnership property, the title to which is in the surviving partners and the heir of a deceased partner.²⁰ The fact that the land is a homestead claim, the title to which is in the United States Government until final proof, which is not made until after the fire, does not defeat a policy under such condition.²¹ Such a condition does not render invalid insurance upon the material in a building which is being torn down.²²

Whether such condition is limited to the present state of title or whether it applies to future changes, is a matter upon which

¹² *Groce v. Phenix Ins. Co.*, 94 Miss. 201, 22 L. R. A. (N.S.) 732, 48 So. 298; *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L. R. A. (N.S.) 775, 98 Pac. 552; *Evans v. Crawford County Farmers' Mut. F. Ins. Co.*, 130 Wis. 189, 9 L. R. A. (N.S.) 485, 109 N. W. 952.

¹³ *Insurance Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

¹⁴ *Insurance Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

¹⁵ See § 2054.

¹⁶ *United States. Nelson v. Continental Ins. Co.*, 182 Fed. 783, 31 L. R. A. (N.S.) 598.

Idaho. Allen v. Phoenix Assur. Co., 12 Ida. 653, 8 L. R. A. (N.S.) 903, 88 Pac. 245.

Missouri. Tebeau v. Globe & Rutgers Fire Ins. Co., 271 Mo. 626, 2 A. L. R. 1041, 197 S. W. 130.

Ohio. Ensel v. Lumber Insurance Co., 88 O. S. 269, 102 N. E. 955.

West Virginia. Scott v. Dixie F. Ins. Co., 70 W. Va. 533, 40 L. R. A. (N.S.) 152, 74 S. E. 659.

See also, *Nance v. Oklahoma F. Ins. Co.*, 31 Okla. 208, 38 L. R. A. (N.S.) 426, 120 Pac. 948.

¹⁷ *Tebeau v. Globe & Rutgers Fire Ins. Co.*, 271 Mo. 626, 2 A. L. R. 1041, 197 S. W. 130.

¹⁸ *Nelson v. Continental Ins. Co.*, 182 Fed. 783, 31 L. R. A. (N.S.) 598; *Scott v. Dixie F. Ins. Co.*, 70 W. Va. 533, 40 L. R. A. (N.S.) 152, 74 S. E. 659.

¹⁹ *Nelson v. Continental Ins. Co.*, 182 Fed. 783, 31 L. R. A. (N.S.) 598.

²⁰ *Scott v. Dixie F. Ins. Co.*, 70 W. Va. 533, 40 L. R. A. (N.S.) 152, 74 S. E. 659.

²¹ *Allen v. Phoenix Assur. Co.*, 12 Ida. 653, 8 L. R. A. (N.S.) 903, 88 Pac. 245.

²² *Ensel v. Lumber Insurance Co.*, 88 O. S. 269, 102 N. E. 955.

there has been some difference of opinion. It has been said that such a provision applies to existing conditions and not to future changes;²³ but on the other hand, it has been said that such a condition is to be construed, if possible, as not applying to existing conditions.²⁴

A provision to the effect that a policy of fire insurance shall be void if the insured does not disclose the incumbrances upon the property, is given full effect.²⁵ An unfiled chattel mortgage is an incumbrance within the meaning of such a provision.²⁶ Under a provision warranting the statement of value of the property which is insured, the policy will be rendered void in case of gross overvaluation;²⁷ and a valuation of a building at seven times its actual value is regarded as defeating the policy under such a provision.²⁸

The validity of policies of life insurance is frequently made to depend upon the health, physical condition, and the like, of the insured at the time that the policy is delivered.²⁹ A condition to the effect that a member can not be reinstated for non-payment of dues unless in good health at the time of the reinstatement, is not broken by the fact that such member is pregnant at the time of reinstatement.³⁰ Conditions as to the occupation³¹ or habits of the

²³ *Parsons, Rich & Co. v. Lane*, 97 Minn. 98 [sub nomine, *In re Millers' & Man. Ins. Co.*, 4 L. R. A. (N.S.) 231, 106 N. W. 485].

²⁴ *Glens Falls Ins. Co. v. Michael*, 167 Ind. 650, 8 L. R. A. (N.S.) 708, 74 N. E. 964.

²⁵ *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Madsen v. Farmers' & M. Ins. Co.*, 87 Neb. 107, 29 L. R. A. (N.S.) 97, 126 N. W. 1086; *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188.

²⁶ *Madsen v. Farmers' & M. Ins. Co.*, 87 Neb. 107, 29 L. R. A. (N.S.) 97, 126 N. W. 1086.

²⁷ *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

²⁸ *National Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine,

Duncan v. National Mut. Fire Ins. Co., 20 L. R. A. (N.S.) 340].

²⁹ *Haapa v. Metropolitan L. Ins. Co.*, 150 Mich. 467, 16 L. R. A. (N.S.) 1165, 114 N. W. 380; *Metropolitan Life Ins. Co. v. Howle*, 68 O. S. 614, 68 N. E. 4; *Supreme Lodge v. Payne*, 101 Tex. 449, 15 L. R. A. (N.S.) 1277, 108 S. W. 1160.

³⁰ *National Council v. Glenn*, — Fla. —, 2 A. L. R. 1503, 80 So. 516.

³¹ *California. Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 172 Cal. 261, L. R. A. 1916F, 1028, 156 Pac. 481 (breach of other conditions also involved).

Connecticut. Fell v. Hancock Mutual Life Ins. Co., 76 Conn. 494, 57 Atl. 175.

Kentucky. National Council v. Thompson, 153 Ky. 636, 45 L. R. A. (N.S.) 1148, 156 S. W. 132.

Montana. Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 108 Am.

insured,³² or as to the time at which insured last consulted a physician,³³ are given full effect so that a policy of life insurance does not take effect in case of breach of such condition. A contract for the sale of realty may be conditioned expressly upon the state of the title.³⁴

If a policy of life insurance contains a provision rendering it void in case the insured has failed to disclose prior applications by him for life insurance which have been rejected,³⁵ or to state correctly the amount of insurance in force upon his life, full effect has been given to such provisions. Such a provision in a life insurance policy, however, is held not to be broken by a failure to disclose existing insurance payable only in case of death by accident.³⁶ Full effect is also given to provisions in policies of fire insurance rendering such insurance void if other insurance is in effect upon the property insured without the consent of the subsequent insurer.³⁷

The validity of a contract may be made contingent upon the fact that the adversary party has paid a certain price for the property in question,³⁸ that a third person buys property at a certain price,³⁹ or that a seam of stone does not exist on a certain tract of realty.⁴⁰ A contract whereby A agrees to construct a street railway as a connecting line between two roads owned by other persons, is discharged where the other roads refused to connect with such line.⁴¹ The principles of fraud, misrepresentation and mistake

St. Rep. 578, 80 Pac. 609 [rehearing denied, 32 Mont. 329, 80 Pac. 1092 (obiter, as representation was substantially true)].

Wisconsin. *Murphey v. American Mutual Accident Association*, 90 Wis. 206, 62 N. W. 1057.

³² *Mengel v. Northwestern Mutual Life Ins. Co.*, 176 Pa. St. 280, 35 Atl. 197.

³³ *Crosse v. Supreme Lodge*, 254 Ill. 80, 45 L. R. A. (N.S.) 162, 98 N. E. 261.

³⁴ *Lewis v. Brock*, 123 La. 1, 48 So. 563.

³⁵ *Jeffries v. Economical Mutual Life Ins. Co.*, 89 U. S. (22 Wall.) 47, 22 L. ed. 833 (other breach of condition also involved); *Hardy v. Phoenix Mut. Life Ins. Co.*, 167 N. Car. 22, 83 S. E. 5.

³⁶ *Metropolitan L. Ins. Co. v. Montreal Coal & Towing Co.*, 35 Can. S. C. 266.

³⁷ *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 109 Me. 79, 39 L. R. A. (N.S.) 951, 82 Atl. 649; *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869 (other breach of condition); *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188.

³⁸ *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479.

³⁹ *Miller v. Nugent*, 12 Ind. App. 348, 40 N. E. 282.

⁴⁰ *Sterricker v. McBride*, 157 Ill. 70, 41 N. E. 744.

⁴¹ *Simonds v. Ry.*, 73 Conn. 513, 48 Atl. 210. Accordingly, parties who had owned such franchise, and had transferred it to A, in consideration of his agreement to build the road, can not

have no application to cases like these, where the validity of the contract is made to depend on the existence of specified facts. Hence, it makes no difference whether the fact stipulated for is an essential element of the contract or a collateral fact, or whether it is material or immaterial.⁴²

§ 2595. Performance due at future time or on future event as condition—General principles. There is an additional confusion in terms, which arises in cases in which there is a promise to perform at a future time, or upon the happening of a future event. Even where the promise is to perform at a future definite time, it is sometimes said that the expiration of such time is a condition upon which the right to performance depends. If failure to perform by a certain time is made a condition subsequent,¹ as in cases in which time is of the essence of the contract,² lapse of time without performance may be the event which is the condition subsequent to the contract or to certain covenants thereof. Under a provision to the effect that certain classes of defenses can not be set up after a certain time, such provision, if not invalid on the ground of public policy,³ is analogous to a condition subsequent, and the lapse of the specified time prevents the use of such defense.⁴

In other cases, it is comparatively rare at the present time to find provisions for postponing performance for a definite period of time, classed as conditions; but when the performance is to take place on the happening of a future event, instead of at the end of

recover the franchise from A where he has surveyed the road and stopped further work, only on refusal of the other roads to make connections.

⁴² See § 222.

¹ *Colorado*. *Clason v. Mutual Life Ins. Co.*, — Colo. —, 184 Pac. 296.

Iowa. *Collman v. Equitable L. Assur. Soc.*, 133 Ia. 177, 8 L. R. A. (N.S.) 1019, 110 N. W. 444; *Exchange Bank v. Illinois Life Ins. Co.*, — Ia. —, 174 N. W. 260.

Nebraska. *Bogue v. New York Life Ins. Co.*, — Neb. —, 173 N. W. 591.

North Dakota. *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Ohio. *Ohio Farmers' Ins. Co. v. Wilson*, 70 O. S. 354, 71 N. E. 715 [dis-

tinguishing, *Ins. Co. v. French*, 30 O. S. 240].

Oregon. *Hinkson v. Kansas City Life Ins. Co.*, — Or. —, 183 Pac. 24.

Pennsylvania. *Shuman v. Main, Beaver & Black Creek Mutual Fire Ins. Co.*, — Pa. St. —, 108 Atl. 265.

Utah. *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

² See §§ 2103 et seq.

³ *Reagan v. Union Mut. L. Ins. Co.*, 180 Mass. 555, 2 L. R. A. (N.S.) 821, 76 N. E. 217.

See §§ 727 and 732 et seq.

⁴ *Mutual Reserve Fund L. Asso. v. Austin*, 142 Fed. 398, 6 L. R. A. (N.S.) 1064; *Great Western L. Ins. Co. v. Snavelly*, 206 Fed. 20, 46 L. R. A.

a definite period of time, questions of greater difficulty are presented.⁵

On the one hand, the event may be one which is bound to happen, although the time at which it is to happen may not be capable of being foreseen. The stock illustration of this is the promise which is to be performed upon the death either of one of the parties to the transaction or of a third party.⁶ An agreement to pay the consideration for a conveyance to the grantor's grandson when he reaches the age of twenty-one, is not discharged by his death before reaching such age, but his legal representatives may recover the amount when such grandson would have been twenty-one had he lived.⁷ While events of this sort are sometimes called conditions, they are not ordinarily regarded as conditions in the true sense of the term, since they merely fix the time for performance and since they never operate to prevent performance.⁸

The event upon which performance is due, may, on the other hand, be one which may never happen. In cases of this sort, there

(N.S.) 1056; *Indiana Nat. L. Ins. Co. v. McGinnis*, 180 Ind. 9, 45 L. R. A. (N.S.) 192, 101 N. E. 289; *Citizens' L. Ins. Co. v. McClure*, 138 Ky. 138, 27 L. R. A. (N.S.) 1026, 127 S. W. 749; *Independent L. Ins. Co. v. Rider*, 150 Ky. 505, 42 L. R. A. (N.S.) 560, 150 S. W. 649.

See §§ 727 and 732 et seq.

The effect of such provision may be overcome by another covenant which provides for adjustment of benefits in case the age of the insured has been misstated. *Mutual Life Ins. Co. v. New*, 125 La. 41, 27 L. R. A. (N.S.) 431, 51 So. 61.

Such provision does not apply to a policy which was void ab initio on the ground of want of insurable interest. *Bromley v. Washington L. Ins. Co.*, 122 Ky. 402, 5 L. R. A. (N.S.) 747, 92 S. W. 17.

⁵ See on this subject:

California. Remy v. Olds, 88 Cal. 537, 26 Pac. 355.

Kansas. Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596.

Kentucky. Collins v. Park, 93 Ky. 6, 18 S. W. 1013; *Fox v. Commercial Press Co. (Ky.)*, 88 S. W. 1063, 28 Ky. L. Rep. 44.

Massachusetts. Magnolia Metal Co. v. Gale, 180 Mass. 124, 75 N. E. 219.

Michigan. McKinnon Mfg. Co. v. Fish Co., 102 Mich. 221, 60 N. W. 472.

Minnesota. Yanish v. J. Neils Lumber Co., 101 Minn. 78, 11 L. R. A. (N.S.) 92, 111 N. W. 921.

Ohio. Wright v. Hull, 83 O. S. 385, 94 N. E. 813.

Oklahoma. Leeper Bros. Lumber Co. v. Gunter, — Okla. —, 160 Pac. 606.

Utah. White v. Century Gold Min. & Mill. Co., 28 Utah, 331, 78 Pac. 868.

⁶ See § 865.

This was the favorite illustration at Roman law. See, *Czyhlarz Manual of the Institutes of Roman Law*, § 21.

⁷ *Haines v. Weirick*, 155 Ind. 548, 58 N. E. 712.

⁸ Such a provision does not render performance conditional and, therefore, does not prevent an instrument from being negotiable. See § 2326.

is more justification for referring to such an event as a condition than in the preceding cases. At the same time in contracts of this sort, the event does not affect the validity of the contract, nor does it postpone a performance which is otherwise due by the terms of the contract.⁹ An illustration of a contract of this sort is to be found in contracts of insurance, in which the destruction of the property through one of the risks against which the insurance has issued, or the death of the insured, is the event upon which the insurance company is, by the terms of the contract, to pay the money agreed upon.

The practical question which arises most frequently under provisions of this sort is whether the failure of the event to happen operates as a discharge, or whether performance is, thereupon, due in a reasonable time.¹⁰

Another question which may arise is whether repudiation by one party before performance is due gives an immediate right of action to the adversary party. A promise by A to marry B as soon as A's mother recovers her health, is said not to be conditional, but absolute, although performance is, by the terms of the contract, not due until such future event.¹¹ Accordingly, if A repudiates such contract before his mother has recovered her health, B may bring action at once,¹² as in the case of other absolute contracts.¹³

§ 2596. Construction as between condition and covenant fixing reasonable time for performance. A provision is frequently made for performance upon the happening of some extrinsic act. While the happening of such act is occasionally made in form a condition, it is ordinarily rather a definition of the circumstances under which performance is due, than a condition which renders the policy or certain covenants thereunder void in case of breach.¹ Questions of this sort are so clearly related to questions of time, that they are discussed in that connection.² The problem which arises most frequently in connection with contracts, which by their terms are to be performed upon the happening of a future event, is whether such event is selected merely as a means of fixing the time of performance, or whether the happening of such event is a condition prece-

⁹ *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197.

¹⁰ See §§ 2506 et seq.

¹¹ *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197.

¹² *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197.

¹³ See ch. LXXXIV.

¹ See § 2100.

² See § 2100.

dent to the right of the adversary party to demand performance. If sufficient consideration exists, the parties may word the contract so that performance is not due until the specified event happens, and if such event does not take place, performance is never to become due. Accordingly, if the contract shows that the parties intended to make such act or event a condition precedent to performance, full effect must be given to such intention, and such performance can not be demanded until such act or event occurs.³ Under a provision that one who saws logs into lumber is not to be paid until the adversary party has sold the lumber, payment is not due until such sale.⁴ If B has made a deposit with the United States Government under a contract for cutting timber, and B subsequently assigns such contract to A under an agreement by which A agrees to pay such deposit to B when the government permits such deposit to be applied in payment of such timber, A must pay to B such parts of such deposit as the United States Government permits to be applied to payments under such contract by a change in their rules.⁵ A promise to make certain payments which are not, however, to begin until a certain corporation has paid certain amounts to the estate of a deceased creditor, can not be enforced unless it is shown that such amounts have been paid or that the promisor is at fault in preventing such payment.⁶

If the contract in question is based upon a pre-existing obligation of some sort, and if the effect of treating such event as a condition which will operate as a discharge of all liability in case it does not occur, will be to relieve one of the parties to the contract from such pre-existing liability entirely, the tendency of modern judicial decision is to hold that unless the language of the contract shows unequivocally that the event is a condition,⁷ the provision with reference to such future act or event will be construed as a provision inserted in order to fix the time of performance, and to indicate what the parties regard as a reasonable or proper time for

³ Kentucky. Fox v. Commercial Press Co. (Ky.), 88 S. W. 1063, 28 Ky. L. Rep. 44.

North Carolina. Gardner v. Edwards, 119 N. Car. 566, 26 S. E. 155.

Ohio. Pfantz v. Humburg, 82 O. S. 1, 91 N. E. 863; Thomas v. Matthews, 94 O. S. 32, L. R. A. 1917A, 1068, 113 N. E. 669.

Oklahoma. Leeper Bros. Lumber Co. v. Gunter, — Okla. —, 160 Pac. 606.

⁴ Gardner v. Edwards, 119 N. Car. 566, 26 S. E. 155.

⁵ Yanish v. J. Neils Lumber Co., 101 Minn. 78, 11 L. R. A. (N.S.) 92, 111 N. W. 921.

⁶ Thomas v. Matthews, 94 O. S. 32, L. R. A. 1917A, 1068, 113 N. E. 669.

⁷ See note 3, this section.

performance, but that such provision is not intended to make the doing of such act or the happening of such event a condition precedent.⁸ Under this view of the intention of the parties, the contract is not discharged by the non-performance of such future act, but the performance which was promised upon the happening of such act will be regarded as due in a reasonable time,⁹ especially if the event on which performance is due is wholly or partially within the control of the promisor.¹⁰ Under this principle, a promise to pay or to perform when certain property is sold,¹¹ as when the promisor

* **United States.** Nunez v. Dautel, 86 U. S. (19 Wall.) 560, 22 L. ed. 161

Alabama. Crass v. Scruggs, 115 Ala. 258, 22 So. 81.

California. Poirier v. Gravel, 88 Cal. 70, 25 Pac. 962.

Florida. Whiting v. Gray, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

Georgia. Eaton v. Yarborough, 19 Ga. 82; Bryant v. Atlantic Coast Line Ry., 119 Ga. 607, 46 S. E. 820.

Illinois. Harlow v. Boswell, 15 Ill. 56; McCarty v. Howell, 24 Ill. 341.

Kansas. Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596.

Maine. Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687.

Massachusetts. Alvord v. Cook, 174 Mass. 120, 75 Am. St. Rep. 288, 54 N. E. 409.

Mississippi. Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365; Hughes v. McEwen, 112 Miss. 35, L. R. A. 1917B, 1048, 72 So. 848.

Ohio. Wright v. Hull, 83 O. S. 385, 94 N. E. 813.

Oregon. Noland v. Bull, 24 Or. 479, 33 Pac. 983.

Tennessee. Walters v. McBee, 69 Tenn. (1 Lea) 364.

Utah. White v. Century Gold Min. & Mill. Co., 28 Utah, 331, 78 Pac. 868.

See also, Jacoby v. Jacoby, 103 Fed. 473.

See § 2597.

* **United States.** Nunez v. Dautel, 86 U. S. (19 Wall.) 560, 22 L. ed. 161.

Alabama. Crass v. Scruggs, 115 Ala. 258, 22 So. 81.

Florida. Whiting v. Gray, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

Georgia. Eaton v. Yarborough, 19 Ga. 82; Bryant v. Atlantic Coast Line Ry., 119 Ga. 607, 46 S. E. 820.

Illinois. Harlow v. Boswell, 15 Ill. 56; McCarty v. Howell, 24 Ill. 341.

Kansas. Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596.

Maine. Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687.

Massachusetts. Alvord v. Cook, 174 Mass. 120, 75 Am. St. Rep. 288, 54 N. E. 409.

Mississippi. Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365; Hughes v. McEwen, 112 Miss. 35, L. R. A. 1917B, 1048, 72 So. 848.

Ohio. Wright v. Hull, 83 O. S. 385, 94 N. E. 813.

Oregon. Noland v. Bull, 24 Or. 479, 33 Pac. 983.

Tennessee. Walters v. McBee, 69 Tenn. (1 Lea) 364.

Utah. White v. Century Gold Min. & Mill. Co., 28 Utah, 331, 78 Pac. 868.

¹⁰ Bryant v. Atlantic Coast Line Ry., 119 Ga. 607, 46 S. E. 820; Sears v. Wright, 24 Me. 278; Hughes v. McEwen, 112 Miss. 35, L. R. A. 1917B, 1048, 72 So. 848.

¹¹ Hughes v. McEwen, 112 Miss. 35, L. R. A. 1917B, 1048, 72 So. 848; Simon v. Etgen, 213 N. Y. 589, 107 N. E. 1066.

Contra, Blake v. Coleman, 22 Wis. 415, 99 Am. Dec. 53.

sells the place he lives in,¹² or "as soon as the crop can be sold or the money raised from any other source,"¹³ or when other specified property is sold at a specified price,¹⁴ is regarded as performable in any event, and if such sale is not made or becomes impossible, such performance is due in at least a reasonable time. If A agrees for value to pay a certain amount to B when A's residence can be sold for a certain price, A's promise is not discharged by the fact that the house burns; and if A collects insurance thereon, such debt becomes due and payable within a reasonable time after A has collected such insurance.¹⁵ A promise to pay a certain amount "out of the first receipts from coal lands," after the promisor was reimbursed for a certain amount which he had invested, imposes a duty to pay in at least a reasonable time.¹⁶ If a mining company makes a promise for value to pay an amount out of the proceeds of ore sales and compromises, it is bound absolutely if the amount received from ore sales and compromises is not sufficient to pay such debt within a reasonable time.¹⁷ Under a contract to pay a certain sum when it is realized from the sale of the products of certain lands, such sum is due at once as soon as the promisor has made literal performance impossible by selling such land.¹⁸ A promise to pay when the maker has finished a church which is then in process of construction;¹⁹ or to pay in a certain time, "or as soon as I can sell the above amount of Allen's Vegetable Tonic";²⁰ or to pay when a certain dispute is settled;²¹ or to pay in four months; or as soon as the promisor shall collect a certain note;²² or to pay by a certain date, "on the condition that the banks of Tennessee have resumed specie payment at that time—if not, as soon thereafter as they do resume specie payment";²³ or to pay by a certain

¹² Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687. (Hence judgment and levy on such property do not relieve the promisor from liability to pay in a reasonable time.)

¹³ Nunez v. Dautel, 86 U. S. (19 Wall.) 560, 22 L. ed. 161.

¹⁴ Noland v. Bull, 24 Or. 479, 33 Pac. 983.

As to pay a commission by conveying realty when other realty is exchanged. Alvord v. Cook, 174 Mass. 120, 75 Am. St. Rep. 288, 54 N. E. 490.

¹⁵ Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596.

¹⁶ Wright v. Hull, 83 O. S. 385, 94 N. E. 813. (In such a case a reasonable time would expire, at least at the end of ten years.)

¹⁷ White v. Century Gold Min. & Mill. Co., 28 Utah 331, 78 Pac. 868.

¹⁸ Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962.

¹⁹ Eaton v. Yarborough, 19 Ga. 82.

²⁰ Harlow v. Boswell, 15 Ill. 56.

²¹ Bryant v. Atlantic Coast Line Ry., 110 Ga. 607, 46 S. E. 829.

²² McCarty v. Howell, 24 Ill. 341.

²³ Walters v. McBee, 69 Tenn. (1 Lea) 364.

day, "or as soon thereafter as said railroad company" shall make certain payments to the promisor;²⁴ or to credit the amount of the debtor's cigars sold by the creditor, upon the debt, and thus extinguish it,²⁵ has been held in each case not to be conditioned upon the happening of such event, but to be performable in at least a reasonable time if such event does not occur. A contract to deliver lumber at a certain time, "or as soon thereafter as vessel can be got ready," must be performed in at least a reasonable time after July 10th,²⁶ at least if the party did not contemplate any specific vessel.²⁷ If a note is payable ninety days after the return of a specified ship, and such ship is lost, such note must be paid in ninety days after the time usually required for such a trip.²⁸

§ 2597. Promise of performance "when able." Whether a promise to pay or to perform when the promisor "is able," is a promise upon condition, or whether such provision as to ability is inserted merely in order to indicate what is regarded as a reasonable time for performance, is a question upon which there is a conflict of authority. In a number of jurisdictions it is held that such a promise is upon condition and that accordingly the promisee can recover only in case he is able to show that the promisor is able to perform.¹

²⁴ *Crass v. Scruggs*, 115 Ala. 258, 22 So. 81.

²⁵ *Jacoby v. Jacoby*, 103 Fed. 473.

²⁶ *Whiting v. Gray*, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

²⁷ *Whiting v. Gray*, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

²⁸ *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365.

¹ *England*. *Davies v. Smith*, 4 Esp. 36; *Hart v. Prendergast*, 14 Mees. & W. 741.

Indiana. *Veasey v. Reeves*, 6 Ind. 406 (obiter, as a prima facie case of ability to pay was made out).

Kentucky. *Stainton v. Brown*, 36 Ky. (6 Dana) 249; *Eckler v. Galbraith*, 75 Ky. (12 Bush.) 71; *Chism v. Barnes*, 104 Ky. 310, 47 S. W. 232, 875.

Maine. *Mattocks v. Chadwick*, 71 Me. 313.

Massachusetts. *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361.

Michigan. *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799.

Mississippi. *Denney v. Wheelwright*, 60 Miss. 733. (If ability once exists, the condition is performed even if the debtor becomes unable to perform thereafter.)

New Hampshire. *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222.

New York. *Cocks v. Weeks*, 7 Hill (N. Y.) 45; *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383.

North Carolina. *Cooper v. Jones*, 128 N. Car. 40, 38 S. E. 28.

Pennsylvania. *Nelson v. Von Bonnhorst*, 29 Pa. St. 352.

Tennessee. *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236.

In some jurisdictions a promise to pay as the debtor "might feel able to pay," is held to leave the time of payment in the bona fide and honest judgment of the debtor, though a legal liability is created by such contract.²

In other jurisdictions such a promise has been held to amount in legal effect to a promise to pay or to perform in at least a reasonable time.³ Accordingly, a promise to pay "as soon as I can,"⁴ or "when I can make it convenient,"⁵ or "as fast as I can spare the same from my salary,"⁶ or as fast as the promisor was financially able without sacrificing his interests in a given corporation, for stock in which the contract in question was made,⁷ or "when payor and payee mutually agree,"⁸ has been held in each case to require payment in a reasonable time.

Accordingly, in some cases it has been held that the promisee is not obliged to show that the promisor is able to perform, but that an action may be brought upon such promise after a reasonable time has elapsed without alleging or proving such ability.⁹ An additional reason for this result has been said to be the improbability of the parties intending that the contract should never be performed unless the promisor should be able to perform his entire obligation at once.¹⁰ In any event, if the debtor is in fact financially able to pay, he is bound to make the payment stipulated

² *Pistel v. Ins. Co.*, 88 Md. 552, 43 L. R. A. 219, 42 Atl. 210.

³ *Alabama*. *Culver v. Caldwell*, 137 Ala. 125, 34 So. 13.

Connecticut. *Norton v. Shepard*, 48 Conn. 141, 40 Am. Rep. 157.

Iowa. *Jenckes v. Rice*, 119 Ia. 451, 93 N. W. 384 (apparently not necessary to show ability).

Kansas. *Benton v. Benton*, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378.

Ohio. *Lewis v. Tipton*, 10 O. S. 88, 75 Am. Dec. 498a.

Vermont. *Cummings v. Gassett*, 10 Vt. 308.

Wyoming. *Chadwick v. Hopkins*, 4 Wyom. 379, 62 Am. St. Rep. 38, 34 Pac. 899.

⁴ *Benton v. Benton*, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378.

⁵ *Lewis v. Tipton*, 10 O. S. 88, 75 Am. Dec. 498.

⁶ *Culver v. Caldwell*, 137 Ala. 125, 34 So. 13 (payable after a reasonable time for getting money from that source has elapsed).

⁷ *Chadwick v. Hopkins*, 4 Wyom. 379, 62 Am. St. Rep. 38, 34 Pac. 899 (a delay of four years was held more than a reasonable time).

⁸ *Page v. Cook*, 164 Mass. 116, 49 Am. St. Rep. 449, 28 L. R. A. 759, 41 N. E. 115.

⁹ *Norton v. Shepard*, 48 Conn. 141, 40 Am. Rep. 157; *Jenckes v. Rice*, 119 Ia. 451, 93 N. W. 384 (apparently unnecessary to prove ability to pay); *Benton v. Benton*, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378; *Cummings v. Gassett*, 19 Vt. 308.

¹⁰ *Benton v. Benton*, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378.

under such contract,¹¹ even if such financial ability does not persist to the date of the trial.¹²

§ 2598. Contract conditioned on future event—In general. A contract may provide in express terms that the happening or not happening of some specified event after the contract is made, shall operate as a termination of some or all of the rights thereunder. Since a condition of this sort is to take place after the contract is made, there is no doubt that it is a true condition,¹ and full effect is given to it in accordance with its terms,² subject, however, to the general rule that a condition which operates as a forfeiture is construed strictly in favor of the party against whom it is sought to exact the forfeiture.³ The termination of a contract by one party in accordance with a provision therein, is not breach,⁴ and does not discharge the adversary party if the termination was not by the terms of the contract to act as a discharge,⁵ and does not entitle the adversary party to damages.⁶

¹¹ Denney v. Wheelwright, 60 Miss. 733.

¹² Denney v. Wheelwright, 60 Miss. 733.

¹ See §§ 2574 and 2594 et seq.

² Florida. Mulliken v. Harrison, 53 Fla. 255, 44 So. 426.

Kansas. Burns v. Alliance Co-operative Ins. Co., 103 Kan. 803, 176 Pac. 985.

Louisiana. United Fruit Co. v. Louisiana Petroleum Co., 115 La. 181, 38 So. 958.

Maryland. Eastern Advertising Co. v. McGaw, 80 Md. 72, 42 Atl. 923.

Massachusetts. Way v. Greer, 106 Mass. 237, 81 N. E. 1002; Swaine v. Teutonia Fire Ins. Co., 222 Mass. 108, 100 N. E. 825.

New Jersey. Grunauer v. Westchester F. Ins. Co., 72 N. J. L. 289, 3 L. R. A. (N.S.) 107, 62 Atl. 418.

New York. Matter of Petition of the Argus Co., 138 N. Y. 557, 34 N. E. 338.

Ohio. Ohio Farmers' Ins. Co. v. Waters, 65 O. S. 157, 61 N. E. 711.

South Dakota. Smith v. Retail Merchants' F. Ins. Co., 29 S. D. 332, 42 L. R. A. (N.S.) 173, 137 N. W. 47.

Tennessee. American Steam Laundry Co. v. Hamburg-Bremen F. Ins. Co., 121 Tenn. 13, 21 L. R. A. (N.S.) 442, 113 S. W. 394.

Washington. Moller v. Niagara F. Ins. Co., 54 Wash. 439, 24 L. R. A. (N.S.) 807, 103 Pac. 449.

West Virginia. Bronson v. New York F. Ins. Co., 64 W. Va. 494, 19 L. R. A. (N.S.) 643, 63 S. E. 283.

³ See § 2054.

⁴ Sibley v. Life Association, 87 Ga. 738, 13 S. E. 838; Over v. Bryam Foundry Co., 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Sirk v. Ela, 163 Mass. 304, 40 N. E. 183; Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 150 N. W. 344.

⁵ Lowell v. Washington County R. R., 90 Me. 80, 37 Atl. 869.

⁶ Merriman v. Machine Co., 96 Wis. 600, 71 N. W. 1050.

In like manner, a future act or event may be made a condition precedent to the taking effect of the contract or to the right of one of the parties to the contract to demand performance of the other.¹

§ 2599. Specific illustrations of conditions—Change of title, possession, location, etc. Policies of fire insurance frequently contain provisions to the effect that change of title, ownership, and the like, shall operate as a termination of the liability of the insurer. Full effect is given to such provisions;¹ but wherever such provisions will operate as a forfeiture they are construed strictly in favor of the insured.² Such a condition is not broken by filing a

¹United States. *Vanhorne v. Dorrance*, 2 U. S. (2 Dall.) 304, 1 L. ed. 301.

Iowa. *Perrin v. Cathcart*, 115 Ia. 553, 89 N. W. 12.

Kentucky. *Walling v. Wainscott*, 152 Ky. 365, 153 S. W. 453.

Minnesota. *Yanish v. J. Neils Lumber Co.*, 101 Minn. 78, 111 N. W. 921.

New Mexico. *Caledonia Coal Co. v. Young*, 22 N. M. 675, 167 Pac. 274.

Ohio. *Pfantz v. Humburg*, 82 O. S. 1, 91 N. E. 863.

Pennsylvania. *White v. Carnegie Steel Co.*, 255 Pa. St. 100, 99 Atl. 460.

Utah. *William B. Hughes Produce Co. v. Pulley*, 47 Utah, 544, L. R. A. 1916D, 728, 155 Pac. 337.

Wisconsin. *Gimbel Bros. v. McConnell*, 159 Wis. 325, 150 N. W. 495.

¹Kansas. *Burns v. Alliance Co-operative Ins. Co.*, 103 Kan. 803, 176 Pac. 985.

Massachusetts. *Swaine v. Teutonia Fire Ins. Co.*, 222 Mass. 108, 109 N. E. 825.

New Jersey. *Grunauer v. Westchester F. Ins. Co.*, 72 N. J. L. 289, 3 L. R. A. (N.S.) 107, 62 Atl. 418.

Ohio. *Ohio Farmers' Ins. Co. v. Waters*, 65 O. S. 157, 61 N. E. 711.

South Dakota. *Smith v. Retail Merchants' F. Ins. Co.*, 29 S. D. 332, 42 L. R. A. (N.S.) 173, 137 N. W. 47.

Tennessee. *American Steam Laun-*

dry Co. v. Hamburg-Bremen F. Ins. Co., 121 Tenn. 13, 21 L. R. A. (N.S.) 442, 113 S. W. 394.

Washington. *Moller v. Niagara F. Ins. Co.*, 54 Wash. 439, 24 L. R. A. (N.S.) 807, 103 Pac. 449.

West Virginia. *Bronson v. New York F. Ins. Co.*, 64 W. Va. 494, 19 L. R. A. (N.S.) 643, 63 S. E. 283.

²Arkansas. *Firemen's Ins. Co. v. Larey*, 125 Ark. 93, L. R. A. 1917A, 29, 188 S. W. 7.

Illinois. *Kelley v. People's National F. Ins. Co.*, 262 Ill. 158, 50 L. R. A. (N.S.) 1164, 104 N. E. 188.

Kansas. *Garner v. Milwaukee Mechanics' Ins. Co.*, 73 Kan. 127, 4 L. R. A. (N.S.) 654, 84 Pac. 717; *Pomeroy v. Aetna Ins. Co.*, 86 Kan. 214, 38 L. R. A. (N.S.) 142, 120 Pac. 344; *Dabney v. Connecticut Fire Ins. Co.*, 104 Kan. 796, 180 Pac. 784.

Louisiana. *Gordon v. Mechanics' & T. Ins. Co.*, 120 La. 441, 15 L. R. A. (N.S.) 827, 45 So. 384.

Michigan. *O'Toole v. Ohio German F. Ins. Co.*, 159 Mich. 187, 24 L. R. A. (N.S.) 802, 123 N. W. 796; *Phillips v. Farmers' Mutual Fire Insurance Co.*, — Mich. —, 175 N. W. 144.

Mississippi. *Mechanics' & Traders' Ins. Co. v. Boyce*, 114 Miss. 165, L. R. A. 1917E, 328, 74 So. 821.

Pennsylvania. *Marcello v. Concordia F. Ins. Co.*, 234 Pa. St. 31, 39 L. R. A. (N.S.) 366, 82 Atl. 1090.

petition in voluntary bankruptcy,³ nor by appointing a receiver in bankruptcy if the receiver does not oust the insured of possession,⁴ nor by rendering judgment which becomes a lien upon the property insured,⁵ nor by levying an attachment thereon.⁶ Whether an executory contract of sale operates as a breach of such condition, is a question upon which there is a conflict of authority. In some jurisdictions it is held that an executory sale does not operate as a forfeiture under such a condition,⁷ even if the deed has been placed in escrow to be delivered upon the performance of the specified conditions of the sale.⁸ In other jurisdictions an executory sale operates as a breach of such a condition.⁹ If an administrator has sold the property which is insured, and his sale has been confirmed, such condition is broken.¹⁰ A condition against change of title or possession is not broken by placing the insured property in the custody of a commission merchant.¹¹ A condition against change in interest, title or possession in a mortgage protecting a mortgagee's interest, is not broken by his pledging the mortgage notes as collateral security.¹²

Conditions in fire insurance policies upon personal property, frequently provide for terminating the policy in case of the removal of the property.¹³ A promise to remove such property to a specified

³ *Texas. Insurance Co. v. O'Bannon*,
Tex. —, 206 S. W. 814.

⁴ *Wisconsin. Evans v. Crawford*
County Farmers' Mut. F. Ins. Co., 130
Wis. 189, 9 L. R. A. (N.S.) 485, 109
N. W. 952.

⁵ *Gordon v. Mechanics' & T. Ins. Co.*,
120 La. 441, 15 L. R. A. (N.S.) 827,
45 So. 384.

⁶ *Marcello v. Concordia F. Ins. Co.*,
234 Pa. St. 31, 39 L. R. A. (N.S.) 366,
82 Atl. 1000.

⁷ *Kelley v. People's National F. Ins.*
Co., 262 Ill. 158, 50 L. R. A. (N.S.)
1164, 104 N. E. 188.

⁸ *O'Toole v. Ohio German F. Ins. Co.*,
159 Mich. 187, 24 L. R. A. (N.S.) 802,
123 N. W. 795.

⁹ *Garner v. Milwaukee Mechanics'*
Ins. Co., 73 Kan. 127, 4 L. R. A. (N.S.)
654, 84 Pac. 717; *Evans v. Crawford*
County Farmers' Mut. F. Ins. Co., 130
Wis. 189, 9 L. R. A. (N.S.) 485, 109
N. W. 952.

¹⁰ *Pomeroy v. Aetna Ins. Co.*, 86
Kan. 214, 38 L. R. A. (N.S.) 142, 120
Pac. 344.

If the deed is not intended to pass
title it is not a breach of condition,
even though fraudulent. *Phillips v.*
Farmers' Mutual Fire Insurance Co.,
— Mich. —, 175 N. W. 144.

¹¹ *Grunauer v. Westchester F. Ins.*
Co., 72 N. J. L. 289, 3 L. R. A. (N.S.)
107, 62 Atl. 418.

¹² *Moller v. Niagara F. Ins. Co.*, 54
Wash. 439, 24 L. R. A. (N.S.) 807, 103
Pac. 449.

¹³ *Dabney v. Connecticut Fire Ins.*
Co., 104 Kan. 796, 180 Pac. 784.

¹⁴ *Mechanics' & Traders' Ins. Co. v.*
Boyce, 114 Miss. 165, L. R. A. 1917E,
328, 74 So. 821.

¹⁵ *Palatine Ins. Co. v. Kehoe*, 197
Mass. 354, 15 L. R. A. (N.S.) 1007, 83
N. E. 866.

location, does not waive such condition if the property is temporarily in another building, although it is placed there as a part of the work of removing it to the designated location.¹⁴

§ 2600. Conditions against incumbrances. Policies of fire insurance upon personal property frequently contain provisions for terminating such policy in case the property shall be incumbered by a chattel mortgage.¹ Such provisions are, however, construed strictly.² Such a condition is not broken by a chattel mortgage which has ceased to be a lien upon the property at the time of loss;³ nor is it broken by a bill of sale which is intended as collateral security, since it is not a chattel mortgage.⁴ However, a waiver of such provision in favor of mortgagees under a purchase money mortgage, does not operate as a waiver of a subsequent mortgage upon other property given to the same mortgagees.⁵

§ 2601. Conditions as to additional insurance. Insurance policies frequently contain provisions for avoiding the policy in case additional insurance is taken without the consent of the insurer, and full effect is given to such conditions.¹ While such conditions are construed fairly for the purpose of preventing over-insurance, they are construed strictly if over-insurance does not result.² A condition against additional insurance upon the property described in the insurance policy or on property in buildings insured by the insurer, does not include insurance upon the contents of a barn

¹⁴Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 15 L. R. A. (N.S.) 1007, 83 N. E. 866.

¹Hartford F. Ins. Co. v. Liddell Co., 130 Ga. 8, 14 L. R. A. (N.S.) 168, 60 S. E. 104; Riley v. Aetna Insurance Co., 80 W. Va. 236, L. R. A. 1917E, 983, 92 S. E. 417.

²Petello v. Teutonia Fire Ins. Co., 89 Conn. 175, L. R. A. 1915D, 812, 93 Atl. 137; Ensel v. Lumber Ins. Co., 88 O. S. 269, 102 N. E. 955; Gould v. St. Paul Fire & Marine Ins. Co., 105 Wash. 250, 177 Pac. 787.

³Ensel v. Lumber Ins. Co., 88 O. S. 269, 102 N. E. 955; Gould v. St. Paul Fire & Marine Ins. Co., 105 Wash. 250, 177 Pac. 787.

⁴Petello v. Teutonia Fire Ins. Co., 89 Conn. 175, L. R. A. 1915D, 812, 93 Atl. 137.

⁵Hartford F. Ins. Co. v. Liddell Co., 130 Ga. 8, 14 L. R. A. (N.S.) 168, 60 S. E. 104.

¹Bowlus v. Phenix Ins. Co., 133 Ind. 106, 20 L. R. A. 400, 32 N. E. 319 (obiter); Pettijohn v. St. Paul Fire & Marine Ins. Co., 100 Kan. 482, 104 Pac. 1096; Camden Wholesale Grocery v. National Fire Ins. Co., 106 S. Car. 467, 91 S. E. 732.

²England. Equitable Fire & Acci. Office, Ltd., v. Ching Wo Hong [1907], A. C. 96.

Colorado. National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac.

which is not covered by the original insurance upon the barn itself.³ A condition against additional insurance is not broken by insurance which never took effect.⁴ Even if the condition against additional insurance expressly provides that the policy shall become void in case of additional insurance, whether the additional insurance is valid or not, such condition does not include an application for additional insurance on which it is understood that no risk attaches.⁵ Such a condition does not apply to insurance which is taken to make the total amount of insurance which it is understood at the outset, is to be placed upon the property;⁶ nor does it apply where the policy limits the liability of the insurer to the proportion which his insurance bears to the total insurance up to a certain percentage of the valuation of the property.⁷ Such a condition is not avoided by the fact that the mortgagee, without the authority of the mortgagor, effected insurance to protect his own interest in the property.⁸ Such a condition in a policy of insurance upon cattle is not avoided by the fact that the stockyards to which the cattle are shipped takes out insurance on all cattle which are shipped into the yards, if the owner does not know of such custom.⁹

§ 2602. Conditions as to appliances for extinguishing fires, watchmen, etc. Effect is given to conditions in a policy of fire insurance requiring the insured to maintain certain specified appli-

634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

Illinois. *Kelley v. People's Nat. F. Ins. Co.*, 262 Ill. 158, 50 L. R. A. (N.S.) 1164, 104 N. E. 188.

Kansas. *Dabney v. Connecticut Fire Ins. Co.*, 104 Kan. 796, 180 Pac. 784.

Kentucky. *Hurst Home Ins. Co. v. Deatley*, 175 Ky. 728, L. R. A. 1917E, 750, 194 S. W. 910.

Virginia. *Norfolk F. Ins. Corp. v. Wood*, 113 Va. 310, 39 L. R. A. (N.S.) 1020, 74 S. E. 186.

West Virginia. *Bond v. National Fire Ins. Co.*, — W. Va. —, 97 S. E. 692.

See also, *Austin v. Dixie Fire Ins. Co.*, — Mass. —, 122 N. E. 382.

³ *Hurst Home Ins. Co. v. Deatley*, 175 Ky. 728, L. R. A. 1917E, 750, 194 S. W. 910.

⁴ *Equitable Fire & Acci. Office, Ltd., v. Ching Wo Hong* [1907], A. C. 96.

⁵ *National Mutual Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

⁶ *Norfolk Fire Ins. Corp. v. Wood*, 113 Va. 310, 39 L. R. A. (N.S.) 1020, 74 S. E. 186.

⁷ *Bond v. National Fire Ins. Co.*, — W. Va. —, 97 S. E. 692.

⁸ *Kelley v. People's Nat. F. Ins. Co.*, 262 Ill. 158, 50 L. R. A. (N.S.) 1164, 104 N. E. 188.

⁹ *Dabney v. Connecticut Fire Ins. Co.*, 104 Kan. 796, 180 Pac. 784.

ances for extinguishing fires.¹ Such condition is not broken by the fact that such appliances are temporarily out of order,² as for the purpose of making extensions to such appliances,³ at least if there is no express provision in the policy making it void under such circumstances.⁴

A breach of a condition that a watchman shall at all times be upon the property insured, renders the insurance invalid if the loss occurs in the absence of a watchman,⁵ even though the watchman has left temporarily and without the knowledge of the owner.⁶

§ 2603. Conditions against increase of risk. Policies of fire insurance frequently contain provisions that the policy shall be avoided by any subsequent increase of risk; and full effect is given to such a provision.¹ A change in the purpose for which a manufacturing establishment is used, making the risk more hazardous, avoids the policy under such a condition.² Such a condition, however, is construed strictly.³ Unless the condition is expressly worded so as to terminate the policy absolutely, it does not apply to a temporary increase of risk which terminated before the loss

¹ *Sierra Milling, Smelting & Mining Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, 18 Pac. 267 (obiter, as condition was not broken).

² *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 59 Wash. 501, 28 L. R. A. (N.S.) 593, 110 Pac. 36 [rehearing of, 56 Wash. 681, 106 Pac. 194].

³ *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 59 Wash. 501, 28 L. R. A. (N.S.) 593, 110 Pac. 36 [rehearing of, 56 Wash. 681, 106 Pac. 194].

⁴ *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.*, 59 Wash. 501, 28 L. R. A. (N.S.) 593, 110 Pac. 36 [rehearing of, 56 Wash. 681, 106 Pac. 194].

⁵ *Whealton Packing Co. v. Aetna Ins. Co.*, 185 Fed. 108, 34 L. R. A. (N.S.) 563.

⁶ *Whealton Packing Co. v. Aetna Ins. Co.*, 185 Fed. 108, 34 L. R. A. (N.S.) 563.

¹ *Harris v. Columbiana Mutual Ins. Co.*, 4 O. S. 286; *Progress Spinning & Knitting Mills Co. v. Southern Na-*

tional Ins. Co., 42 Utah, 263, 45 L. R. A. (N.S.) 122, 130 Pac. 63.

² *Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co.*, 42 Utah, 263, 45 L. R. A. (N.S.) 122, 130 Pac. 63.

³ *Nash v. American Ins. Co.*, — Ia. —, 174 N. W. 378; *Dabney v. Connecticut Fire Ins. Co.*, 104 Kan. 796, 180 Pac. 784; *Sumter Tobacco Warehouse Co. v. Phoenix Assurance Co.*, 76 S. Car. 76, 10 L. R. A. (N.S.) 736, 56 S. E. 654; *Farmers' State Bank v. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, — S. D. —, 170 N. W. 638; *Williamsburg City F. Ins. Co. v. Weeks Drug Co.*, 103 Tex. 608, 31 L. R. A. (N.S.) 603, 132 S. W. 121.

It applies only to changes in the property itself. *Germania Insurance Co. v. Werner*, 76 O. S. 543, 81 N. E. 980.

Whether risk is increased is a question of fact. *Walradts v. Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063.

took place.⁴ It does not apply to necessary repairs,⁵ such as the use of gasoline for removing rust from machinery.⁶ It does not apply where an unsuccessful attempt has been made by an unknown person to burn an insured building, since it can not fairly be presumed that such attempt will be repeated.⁷ If a policy of insurance is issued upon personal property to cover it wherever it may be located, the shipment of such property to another place which in itself is not especially dangerous, is not an increase of risk.⁸

§ 2604. Conditions against inflammable articles, etc. Policies of fire insurance frequently contain provisions that the policy shall terminate if certain specified articles, usually explosives or inflammables, are kept or used upon the premises. If such provisions are clear and unequivocal, full effect is given to them.¹ A condition rendering the policy invalid if gasoline is kept or allowed on the premises, is broken if the insured keeps an automobile in the building with a substantial quantity of gasoline in its tank.² Such provisions are, however, construed very strictly in favor of the insured.³ Conditions of this sort are not broken by keeping such articles if they are a part of the general stock of goods upon which

⁴*Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.*, 76 S. Car. 76, 10 L. R. A. (N.S.) 736, 56 S. E. 654.

It has no application to temporary negligence. *Nash v. American Ins. Co.*, — Ia. —, 174 N. W. 378.

⁵*Farmers' State Bank v. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, — S. D. —, 170 N. W. 638.

⁶*Farmers' State Bank v. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, — S. D. —, 170 N. W. 638.

⁷*Williamsburg City F. Ins. Co. v. Weeks Drug Co.*, 103 Tex. 608, 31 L. R. A. (N.S.) 603, 132 S. W. 121.

⁸*Dabney v. Connecticut Fire Ins. Co.*, 104 Kan. 796, 180 Pac. 784. (In this case cattle were insured and subsequently shipped from the pasture to the stockyards.)

¹*United States. Liverpool and London Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. ed. 575; *Gunther v. Liverpool and London and Globe Ins. Co.*, 134 U. S. 110, 33 L. ed. 857.

Georgia. Edwards v. Farmers' Mut. Ins. Association, 128 Ga. 353, 12 L. R. A. (N.S.) 484, 57 S. E. 707.

Kansas. Morgan v. Germania Fire Ins. Co., 104 Kan. 383, 179 Pac. 330.

Pennsylvania. Lutz v. Royal Ins. Co., 205 Pa. St. 159, 54 Atl. 721.

Virginia. Norfolk Fire Ins. Co. v. Talley, 112 Va. 413, 71 S. E. 534.

²*Morgan v. Germania Fire Ins. Co.*, 104 Kan. 383, 179 Pac. 330.

³*England. Thompson v. Equity Fire Ins. Co.* [1910], A. C. 592.

California. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N.S.) 6, 84 Pac. 182.

New Jersey. Garrebrant v. Continental Ins. Co., 75 N. J. L. 577, 12 L. R. A. (N.S.) 443, 67 Atl. 90.

Pennsylvania. Lebanon County v. Franklin F. Ins. Co., 237 Pa. St. 360, 44 L. R. A. (N.S.) 148, 85 Atl. 410; *McClure v. Mutual F. Ins. Co.*, 242 Pa. St. 59, 48 L. R. A. (N.S.) 1221, 83 Atl. 921.

the insurance is effected;⁴ nor are they broken, at least as a matter of law, by the use of a gasoline torch to remove paint,⁵ or by the use of gasoline to remove rust,⁶ or by the presence on the premises of a small quantity of gasoline for the purpose of cleaning,⁷ or for cleaning an automobile and vulcanizing tires,⁸ or for use in a gasoline stove used for cooking,⁹ or for use in an engine which operates machinery necessary for the business.¹⁰ Such a condition is not broken by the temporary presence of gasoline which is delivered at such building by mistake and which is removed immediately.¹¹ Unless such a condition is limited to cases in which such articles are kept on the premises with the knowledge of the insured, such a condition is broken if the tenant of the insured keeps such articles upon the premises without his knowledge.¹²

§ 2605. Conditions against vacancy, etc. Full effect is given to a condition in a policy of fire insurance to the effect that the policy shall terminate if the insured premises become vacant.¹ Since a provision of this sort may be highly material, it is probably not

South Dakota. *Farmers' State Bank v. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, — S. D. —, 170 N. W. 638.

Wisconsin. *Clute v. Clintonville Mut. F. Ins. Co.*, 144 Wis. 638, 32 L. B. A. (N.S.) 240, 129 N. W. 661.

⁴ *McClure v. Mutual F. Ins. Co.*, 242 Pa. St. 59, 48 L. R. A. (N.S.) 1221, 88 Atl. 921.

⁵ *Smith v. German Ins. Co.*, 107 Mich. 270, 30 L. R. A. 368, 65 N. W. 236; *Garrebrant v. Continental Ins. Co.*, 75 N. J. L. 577, 12 L. R. A. (N.S.) 443, 67 Atl. 90; *Lebanon County v. Franklin Fire Ins. Co.*, 237 Pa. St. 360, 44 L. R. A. (N.S.) 148, 85 Atl. 419.

The use of a gasoline torch to remove paint is a breach of condition if it increases the risk. *Rockland First Congregational Church v. Holyoke Mutual Fire Ins. Co.*, 158 Mass. 475, 35 Am. St. Rep. 508, 19 L. R. A. 587, 33 N. E. 572.

⁶ *Farmers' State Bank v. Tri-State Mut. Grain Dealers' Fire Ins. Co.*, — S. D. —, 170 N. W. 638.

⁷ *Arnold v. American Ins. Co.*, 148 Cal. 660, 25 L. R. A. (N.S.) 6, 84 Pac. 182.

⁸ *Home Ins. Co. v. Bridges*, 172 Ky. 161, L. R. A. 1917C, 276, 189 S. W. 6.

⁹ *Thompson v. Equity Fire Ins. Co.*, [1910] A. C. 592.

¹⁰ *McClure v. Mutual F. Ins. Co.*, 242 Pa. St. 59, 48 L. R. A. (N.S.) 1221, 88 Atl. 921.

¹¹ *Clute v. Clintonville Mut. F. Ins. Co.*, 144 Wis. 638, 32 L. R. A. (N.S.) 240, 129 N. W. 661.

¹² *Edwards v. Farmers' Mut. Ins. Asso.*, 128 Ga. 353, 12 L. R. A. (N.S.) 484, 57 S. E. 707.

¹ *United States. Connecticut F. Ins. Co. v. Buchanan*, 141 Fed. 877, 4 L. R. A. (N.S.) 758.

Iowa. *Baldwin v. German Ins. Co.*, 105 Ia. 379, 75 N. W. 326.

Maine. *Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 100 Me. 481, 2 L. R. A. (N.S.) 517, 62 Atl. 289.

Nebraska. *Schmidt v. Williamsburg City F. Ins. Co.*, 95 Neb. 43, 51 L. R. A. (N.S.) 261, 144 N. W. 1044.

construed as strictly as some of the other conditions for avoiding liability.² If no one lives in the house, it is vacant within the meaning of this provision, although the occupant is about the premises frequently,³ or although goods are stored therein.⁴ A statute which provides that an insurance company must pay loss by fire in the absence of a change increasing the risk without the consent of the insurer, does not apply to a condition with reference to vacancy.⁵ Such a condition applies to a vacancy caused by a fire which partially destroys the building which is insured,⁶ even though the insured has reserved an option to repair or rebuild,⁷ at least if he has not exercised such option. Such provisions, however, are not favored in construction.⁸ If the language of the policy permits, a condition with reference to vacancy will be construed as suspending the policy, while the premises are vacant, so that the policy revives when the premises are again occupied.⁹ Such a condition does not apply where the tenants occupy the building during each night, although most of the furniture has been removed;¹⁰ nor does it apply where the tenant has left the

New Jersey. *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 45 L. R. A. (N.S.) 847, 86 Atl. 399.

Ohio. *Germania F. Ins. Co. v. Werner*, 76 O. S. 543, 12 L. R. A. (N.S.) 456, 81 N. E. 980.

²For construction of such a provision, see *Connecticut F. Ins. Co. v. Buchanan*, 141 Fed. 877, 4 L. R. A. (N.S.) 758; *Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 100 Me. 481, 2 L. R. A. (N.S.) 517, 62 Atl. 289; *Germania F. Ins. Co. v. Werner*, 76 O. S. 543, 12 L. R. A. (N.S.) 456, 81 N. E. 980.

³*Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 100 Me. 481, 2 L. R. A. (N.S.) 517, 62 Atl. 289.

⁴*Connecticut F. Ins. Co. v. Buchanan*, 141 Fed. 877, 4 L. R. A. (N.S.) 758.

⁵*Germania F. Ins. Co. v. Werner*, 76 O. S. 543, 12 L. R. A. (N.S.) 456, 81 N. E. 980.

⁶*Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 45 L. R. A. (N.S.) 847, 86 Atl. 399.

⁷*Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 45 L. R. A. (N.S.) 847, 86 Atl. 399.

⁸*Arkansas. Home Ins. Co. v. North Little Rock Ice & E. Co.*, 86 Ark. 538, 23 L. R. A. (N.S.) 1201, 111 S. W. 994.

Colorado. *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

Indiana. *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 3 L. R. A. (N.S.) 966, 76 N. E. 977.

Mississippi. *Insurance Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

South Dakota. *Seubert v. Fidelity-Phenix Ins. Co.*, 29 S. D. 261, 40 L. R. A. (N.S.) 53, 136 N. W. 103.

West Virginia. *Bond v. National Fire Ins. Co.*, — W. Va. —, 97 S. E. 692.

⁹*Insurance Co. v. Pitts*, 88 Miss. 587, 7 L. R. A. (N.S.) 627, 41 So. 5.

¹⁰*Seubert v. Fidelity-Phenix Ins. Co.*, 29 S. D. 261, 40 L. R. A. (N.S.) 53, 136 N. W. 103.

premises without notice to the owner, and the owner has had no reasonable opportunity of learning of the vacancy.¹¹ A provision to the effect that vacancies shall be reported at certain specified intervals, does not apply where a permit for vacancy has issued.¹² If buildings and personal property are valued separately, a condition with reference to the continued operation of the mill will be regarded as applying only to the mill.¹³ A condition against vacancy is independent of a condition against increase of risk;¹⁴ where both conditions are found in the same policy, and breach of the condition against vacancy is shown, it is not necessary to show that it resulted in an increase of risk.¹⁵

§ 2606. Conditions as to books, inventories, etc. Fire insurance policies, especially those issued upon stocks of merchandise, frequently contain clauses requiring the insured to keep certain specified books, to take inventories and to keep books, inventories, and the like, in an iron safe, for protection against fire. Provisions of this sort are reasonable and valid, and full effect will be given to them.¹ The fact that the account books are left unprotected in an empty store when the insured is temporarily absent, is a breach

¹¹ *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 3 L. R. A. (N.S.) 966, 76 N. E. 977.

¹² *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

¹³ *Bond v. National Fire Ins. Co.*, — W. Va. —, 97 S. E. 692.

¹⁴ *Knowlton v. Patrons' Androscoggin Mut. F. Ins. Co.*, 100 Me. 481, 2 L. R. A. (N.S.) 517, 62 Atl. 289.

¹⁵ *Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 100 Me. 481, 2 L. R. (N.S.) 517, 62 Atl. 289.

¹ *Alabama. Day v. Home Ins. Co.*, 177 Ala. 600, 40 L. R. A. (N.S.) 652, 58 So. 549.

Georgia. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 9 L. R. A. (N.S.) 667, 56 S. E. 643.

Kansas. Crandon v. Home Ins. Co., 99 Kan. 785, 163 Pac. 458.

Louisiana. Morris v. Stuyvesant Fire Ins. Co., — La. —, 82 So. 586.

Maryland. Reynolds v. German-American Ins. Co., 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262; *Joffe v. Niagara F. Ins. Co.*, 116 Md. 153, 51 L. R. A. (N.S.) 1047, 81 Atl. 281.

Mississippi. Aetna Ins. Co. v. Mount, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162.

North Carolina. Coggins v. Aetna Ins. Co., 144 N. Car. 7, 8 L. R. A. (N.S.) 839, 56 S. E. 506.

Oklahoma. Gish v. Insurance Co., 16 Okla. 59, 13 L. R. A. (N.S.) 826, 87 Pac. 869.

Virginia. Hartford Fire Ins. Co. v. Farris, 116 Va. 880, 83 S. E. 377.

Evidence of the value of the property destroyed is not a substitute for such books and inventories. *Morris v. Stuyvesant Fire Ins. Co.*, — La. —, 82 So. 586.

of such condition.² Failure to keep records which will show the condition of the stock of goods at the time of the fire, is a breach of such condition.³ If the policy requires an inventory and books, the lack of an inventory can not be supplied by the books and the original invoices;⁴ and this result has been reached even where the stock of goods was not removed from the storehouse and was covered by the original invoices.⁵ Such condition is broken if the balances from an earlier set of books were carried into new books, and the old books were not protected from fire and were lost.⁶ Failure to take an inventory within the time specified operates as a discharge of the policy if the policy so specifies;⁷ and in such case the policy does not revive by reason of taking an inventory after the specified time has expired.⁸

If the insurer, however, is protected, such provisions are to be construed liberally in favor of the insured.⁹ Such condition is performed if the books which are kept enable a man of ordinary intelligence to ascertain from them with reasonable certainty the condition of the stock at the time of the loss.¹⁰ An inventory has been held to be sufficient though prepared in general terms and giving full details,¹¹ especially if the agent of the insured has approved such inventory.¹² If the business has just been begun, and it is shown that the goods described in the invoice were received, invoices may serve as a substitute for an inventory.¹³ Irregularities

² *Joffe v. Niagara F. Ins. Co.*, 116 Md. 155, 51 L. R. A. (N.S.) 1047, 81 Atl. 281.

³ *Aetna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L. R. A. (N.S.) 667, 56 S. E. 643; *Coggins v. Aetna Ins. Co.*, 144 N. Car. 7, 8 L. R. A. (N.S.) 839, 56 S. E. 506.

⁴ *Day v. Home Ins. Co.*, 177 Ala. 600, 40 L. R. A. (N.S.) 652, 58 So. 549 (obiter, as waiver of such provision was involved).

⁵ *Day v. Home Ins. Co.*, 177 Ala. 600, 40 L. R. A. (N.S.) 652, 58 So. 549 (obiter).

⁶ *Aetna Ins. Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162.

⁷ *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

⁸ *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

⁹ *Aetna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L. R. A. (N.S.) 667, 56 S. E. 643; *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672; *German-Alliance Ins. Co. v. Newbern*, 25 Okla. 489, 28 L. R. A. (N.S.) 337, 106 Pac. 826; *Springfield Fire & M. Ins. Co. v. Hays*, 57 Okla. 266, L. R. A. 1917A, 1078, 156 Pac. 673; *Pauley v. Sun Insurance Office*, 79 W. Va. 187, L. R. A. 1918E, 473, 90 S. E. 552.

¹⁰ *Springfield Fire & M. Ins. Co. v. Hays*, 57 Okla. 266, L. R. A. 1917A, 1078, 156 Pac. 673.

¹¹ *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672.

¹² *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672.

¹³ *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672.

in conducting a small retail business, which are not serious enough to prejudice the insurer, will not operate to defeat the policy by reason of such condition.¹⁴ If an inventory has been stolen from an unlocked safe, while the store was open for business, the failure to produce such inventory does not operate as a discharge of the policy.¹⁵ If the inventory has been duly kept and it is destroyed by accident because the insured attempts to remove them with other books and papers from the safe when the fire is discovered, the failure to produce such inventory does not operate as a discharge of the policy.¹⁶

§ 2607. Writing or signature as condition precedent. The parties to a contract may frequently agree that such contract shall not take effect unless it is reduced to writing. If such agreement is one of the terms of the contract, and if the parties mean to stipulate for such reduction to writing as a condition precedent to its validity, and not merely as a convenient means of securing evidence of the terms of the contract,¹ the reduction of the contract to writing is a condition precedent to its validity.² In like manner, a written contract frequently contains a provision that no modification thereof can be made unless such modification is in writing. Unless such provision is waived,³ full effect must be given thereto; and a modification of such contract is without legal effect unless it is reduced to writing in accordance with the provisions of the original contract.⁴ In like manner, it is sometimes provided that a contract shall not take effect unless it is not only reduced to writing, but is signed by the parties thereto. Unless such provision is waived,⁵ full effect must be given thereto, and the contract does not come into existence until it is signed by the parties whose signatures are thus made a condition precedent to its validity.⁶ In

¹⁴ *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672.

¹⁵ *German-Alliance Ins. Co. v. Newbern*, 25 Okla. 489, 28 L. R. A. (N.S.) 337, 106 Pac. 826.

¹⁶ *Liverpool and London and Globe Ins. Co. v. Kearney*, 180 U. S. 132, 45 L. ed. 460.

¹ See § 213.

² *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Winn v. Bull*, L. R. 7, Ch. D. 29; *Watson v. McCallum*, 87 Law T. 547; *Lynch v. Sneed Architectural Iron*

Works, 132 Ky. 241, 21 L. R. A. (N.S.) 852, 116 S. W. 693.

³ See §§ 2475 and 2485.

⁴ *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 986; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Coorsen v. Ziehl*, 103 Wis. 321, 79 N. W. 562; *Davis v. La Crosse Hospital Ass'n.*, 121 Wis. 579, 99 N. W. 351.

⁵ See §§ 1175 and 2652.

⁶ *Fourchy v. Ellis*, 140 Fed. 149; *Hardwood Package Co. v. Courtney Co.*, 253 Fed. 929.

like manner, a contract which is to be signed by two or more joint parties, or joint and several parties, may be an agreement of all the parties to such contract, but without legal effect, until it is signed by all of the joint parties on one side, or by all of the joint and several parties on one side. Under such a provision such contract does not come into existence if it is signed by less than all of the requisite parties,⁷ in the absence of circumstances which give rise to an estoppel or to waiver.⁸

§ 2608. Other illustrations of conditions. A contract may be conditioned on ability to perform so that no liability is incurred for delay due to strikes and the like.¹ Under an express provision for the cancellation of a contract, in case of war,² or in case of a public calamity or casualty,³ an opera company may terminate a contract with an opera singer on the outbreak of the World War, although such contract was to be performed in the United States, and although the United States had not, at that time, entered the war.

A contract for the sale of property may be conditioned upon the quality of such property at a specified date.⁴ A promise by a property owner in the absence of the contractor, to pay subcontractors and materialmen if the contractor did not return, is discharged if the contractor returns and begins performance in a reasonable time.⁵ A contract for furnishing oil on condition that the wells should continue to gush, is discharged if the wells cease to gush.⁶ A contract for repaying to the assignor the amount which the latter has deposited in the treasury of the United States, whenever the United States Government should permit such deposit to be applied, his payment of such contract requires repayment whenever the government permits such application, either in whole or in part.⁷ A contract appointing a broker to sell realty may provide

¹ Russell v. Annable, 100 Mass. 72, 12 Am. Rep. 665; Bruch v. Shafer, 235 Pa. St. 590, 84 Atl. 515.

² See §§ 1109 and 2652.

³ Bennett v. Howard, 175 Ky. 797, L. R. A. 1917E, 1075, 195 S. W. 117; Hardie-Tynes Foundry & Machine Co. v. Glen Allen Oil Mill, 84 Miss. 259, 36 So. 262.

⁴ In re Boston Opera Co., 249 Fed. 271.

⁵ In re Boston Opera Co., 249 Fed. 260.

⁶ Stevens v. Lakewood Utilities Co., 180 Mich. 203, 155 N. W. 402.

⁷ Mulliken v. Harrison, 53 Fla. 255, 44 So. 426.

⁸ United Fruit Co. v. Louisiana Petroleum Co., 115 La. 181, 38 So. 958.

⁹ Yanish v. J. Neils Lumber Co., 101 Minn. 78, 111 N. W. 921.

for payment when the property in question is sold.⁸ A contract which provides for payment for drilling a well when the well has reached a certain depth, and conforms to certain specifications, is conditioned upon demonstration by the driller to the property owner of the fact that the well has reached such depth and is of the required character as a condition precedent to payment.⁹ In a contract of fidelity insurance, the prosecution of the embezzler may, by the terms of the policy, be a condition precedent to the recovery of indemnity.¹⁰ A provision in a policy of burglary insurance, to the effect that "all combination and time locks will continue to be regularly used," while the policy is in force, is a condition the breach of which discharges the insurance company from liability.¹¹ Under a contract providing for additional compensation in case one of the parties to the contract refrains from the use of intoxicating liquor during the period of performance of a contract, which is personal in character, no recovery of such additional compensation can be had in case of breach of such condition.¹² A contract for street car advertising to last until the termination of the right of the street car company to maintain advertisements in its street cars, has been held to terminate when the street car company sells all its advertising interests.¹³ An agreement between stockholders that on sale of stock by any party thereto, the others should have the first chance to purchase, the contract to terminate whenever either party should have disposed of the shares at the time owned by him, was held to terminate as to all the parties by the transfer by one stockholder of her stock to a person not a party to such contract, the other stockholders consenting.¹⁴ A provision requiring completion of a building contract by a certain time, only "provided there be no interference from labor strikes," does not excuse the contractor for delay caused by his employes' quitting work because the contractor did not pay them their wages.¹⁵ A contract providing for termination by one party if the other is in default can not be terminated by one who is himself in default and whose default has caused the default of the adversary party. Thus

⁸ *Pfantz v. Humburg*, 82 O. S. 1, 91 N. E. 863.

⁹ *Bain v. White*, 256 Fed. 428.

¹⁰ *London Guarantee and Accident Co. v. Fearnley*, 5 App. Cas. 911

¹¹ *Franklin State Bank v. Maryland Casualty Co.*, 256 Fed. 356.

¹² *Clark v. West*, 103 N. Y. 349, 86 N. E. 1.

¹³ *Eastern Advertising Co. v. McGaw*, 80 Md 72, 42 Atl. 923.

¹⁴ *Matter of the Petition of the Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

¹⁵ *McLeod v. Genius*, 31 Neb. 1, 47 N. W. 473.

in such a contract a bridge company did not pay for work done and materials delivered as by its contract it was bound to do. By reason of such default the contractors were unable to proceed. The bridge company can not, on their default, exercise its option to terminate such contract.¹⁶ Under a provision to that effect, a vendor may rescind a contract for the sale of realty if any objection is made to the title which he is unable or unwilling to remove,¹⁷ and he may exercise such option after the purchaser has sued for rescission subject to a liability for costs.¹⁸

III

NOTICE AS CONDITION

§ 2609. Notice as condition precedent or subsequent. If a contract provides for notice, either by its express terms or by necessary implication, and either as a condition precedent to the duty of the party to whom notice is to be given to perform, or as a condition subsequent to terminating rights under the contract, full effect is given to such provision, and a substantial compliance therewith is necessary.¹ Under a contract to keep a pavement in good condition and repair for five years, the city engineer to determine whether such pavement is in satisfactory condition, and repairs to be made upon notice by the board of public works, no liability rests upon the contractor until such notice is given,² and if none is given during the five years he may recover an installment of the price for laying the pavement reserved to secure performance of his contract to repair.³ If notice is to be given to the vendee of

¹⁶ *O'Connor v. Bridge Co*, 95 Ky. 633, 27 S. W. 251, 983.

¹⁷ *In re Deighton's Contract* (1898) (C. A.), 1 Ch. 458.

¹⁸ *Isaacs v. Towell* (1898), 2 Ch. 285.

¹ *United States. Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 152 C. C. A. 493.

Georgia. Georgia Railroad & Banking Co. v. Haas, 127 Ga. 187, 119 Am. St. Rep. 327, 56 S. E. 313.

Iowa. Banco de Sonora v. Bankers' Mutual Casualty Co., 124 Ia. 576, 104 Am. St. Rep. 367, 100 N. W. 532; *Bonewell v. Jacobson*, 130 Ia. 170, 5 L. R. A. (N.S.) 436, 106 N. W. 614; *Wheeler*

v. McStay, 160 Ia. 745, L. R. A. 1915B, 181, 141 N. W. 404; *Erisman v. Chicago, B. & Q. R. Co.*, 180 Ia. 759, 163 N. W. 627.

Louisiana. Mathieu v. North American Land & Timber Co., 119 La. 896, 121 Am. St. Rep. 548, 44 So. 721.

New Mexico. Culp v. Sandoval, 22 N. M. 71, L. R. A. 7917A, 1157, 159 Pac. 956.

Oklahoma. Chicago, R. I. & P. Ry. Co. v. Gray. — Okla. —, 165 Pac. 157.

² *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 152 C. C. A. 493.

³ *Southern Paving Co. v. Chattanooga* (Tenn. Ch. App.), 48 S. W. 92.

the time and place at which goods are to be delivered,⁴ as where such vendee is to furnish the means for transporting such goods,⁵ such notice is a condition precedent to the liability of the vendee. If an irrigation company agrees to furnish water within a certain time after written notice is given, the giving of such notice is a condition precedent to the liability of the irrigation company.⁶ A contract to furnish a certain amount of water if required, is operative only when clear and explicit notice to that effect is given.⁷ If notice of delay by reason of epidemics, strikes, and the like, must be given to obtain an extension of time by the terms of the contract, the happening of such event does not extend the time unless such notice is given.⁸

If a notice of forfeiture for breach of condition subsequent is provided for as a means of taking advantage of such forfeiture, such forfeiture can not be enforced unless such notice is given.⁹ A provision in a contract for the sale of realty to the effect that, in case of default by the vendee, the vendor may declare the contract void, impliedly requires notice by the vendor to the vendee of his election to terminate the contract on default.¹⁰ A provision in a building contract that the contractor shall for each day that he is in default pay to the owner five dollars as liquidated damages, but that if delays are due to default of other contractors, such contractor is discharged from liability thereof on giving written notice of such fact to the owner, the contractor is not discharged if he does not give such notice.¹¹ If the provision for arbitration in effect makes it necessary on demand of either party, such demand or offer of arbitration is a condition precedent to the operation of the arbitration clause.¹²

Different principles apply if the notice is to be evidence, though not necessarily the sole evidence of performance. If a payment is

⁴ *Bonewell v. Jacobson*, 130 Ia. 170,
5 L. R. A. (N.S.) 436, 106 N. W. 614.

⁵ *Culp v. Sandoval*, 22 N. M. 71, L.
R. A. 1917A, 1157, 159 Pac. 956.

⁶ *Mathieu v. North American Land
& Timber Co.*, 119 La. 896, 121 Am.
St. Rep. 548, 44 So. 721.

⁷ *Wilson v. Charlotte*, 110 N. Car.
449, 14 S. E. 961.

⁸ *Florida Northern Ry. v. Supply Co.*,
112 Ga. 1, 37 S. E. 130; *Davis v. La
Crosse Hospital Assn.*, 121 Wis. 579,
99 N. W. 351.

⁹ *Georgia Railroad & Banking Co. v.
Haas*, 127 Ga. 187, 119 Am. St. Rep.
327, 56 S. E. 313.

¹⁰ *Higinbotham v. Frock*, 48 Or. 129,
120 Am. St. Rep. 796, 7 L. R. A. (N.S.)
791, 83 Pac. 536.

¹¹ *Feeney v. Bardsley*, 66 N. J. L. 239,
49 Atl. 443.

¹² *Grand Rapids Fire Ins. Co. v. Finn*,
60 O. S. 513, 71 Am. St. Rep. 736, 50
L. R. A. 555, 54 N. E. 545.

to be made when certain work is done, and a notice to that effect given by the party to do such work is to be conclusive that it has been done, payment may be enforced when the work is done, even if the notice is defective.¹³

Questions as to the validity at common law, of provisions which require notice as a condition precedent and as to the effect of legislation, are discussed elsewhere.¹⁴

In the absence of an express provision in the contract, requiring notice, notice is not necessary if the adversary party is not prejudiced by failure to give such notice.¹⁵ Unless notice is required by the terms of the contract, it is not necessary that notice of performance on the part of the party who omits to give such notice, should be made.¹⁶ Unless the terms of the contract require it, it is not necessary to give notice requiring performance, to the party from whom performance is due.¹⁷

Under some statutes written notice of an intent to forfeit certain classes of contracts,¹⁸ such as contracts of insurance,¹⁹ must be given. Under such statutes such written notice can not be waived by the party who is entitled thereto under such statute.²⁰

§ 2610. Notice of loss as condition to right of action. In contracts with common carriers, a provision is frequently made for notice of injury to the property which is transported. If such provisions are fair and reasonable,¹ full effect is given thereto.² In the

¹³ Hall v. Sims, 106 Ala. 561, 17 So. 534.

¹⁴ See §§ 733 et seq.

¹⁵ Ollinger & Bruce Dry Dock Co. v. Gibbony, — Ala. —, 81 So. 18; Costantino v. Lodjiodice, — Conn. —, 105 Atl. 465; Reynor v. Mackrill, 181 Ia. 210, 1 A. L. R. 523, 164 N. W. 335.

¹⁶ Reynor v. Mackrill, 181 Ia. 210, 1 A. L. R. 523, 164 N. W. 335.

¹⁷ Ollinger & Bruce Dry Dock Co. v. Gibbony, — Ala. —, 81 So. 18; Costantino v. Lodjiodice, — Conn. —, 105 Atl. 465.

¹⁸ Reynolds v. Metropolitan Life Ins. Co., — Kan. —, 185 Pac. 1051.

¹⁹ Reynolds v. Metropolitan Life Ins. Co., — Kan. —, 185 Pac. 1051.

²⁰ Reynolds v. Metropolitan Life Ins. Co., — Kan. —, 185 Pac. 1051.

¹ See §§ 735 et seq.

² United States. Chesapeake & O. R. Co. v. McLaughlin, 242 U. S. 142, 61 L. ed. 207; Olson v. Chicago, B. & Q. R. Co., 250 Fed. 372.

Iowa. Frisman v. Chicago, B. & Q. R. Co., 180 Ia. 759, 163 N. W. 627.

New Jersey. Olivit Bros. v. Pennsylvania R. Co., 88 N. J. L. 241, 96 Atl. 582.

North Carolina. Taft v. Atlantic Coast Line R. Co., 174 N. Car. 211, 93 S. E. 752.

North Dakota. Shark v. Great Northern Ry. Co., 37 N. D. 342, 164 N. W. 39.

Oklahoma. St. Louis & S. F. R. Co. v. Pickens, 51 Okla. 455, 151 Pac. 1055;

absence of specific statutory provisions to the contrary,³ conditions requiring notice of loss within a specified time are construed liberally in favor of the shipper,⁴ especially if the carrier is not deprived of an opportunity to make the investigation necessary to protect his own interests. Such a condition has been held not to apply where the injuries were not apparent when the property was delivered,⁵ or where the carrier delivered the wrong property to the consignee, and the consignee did not discover such mistake within the time limited.⁶ If the injuries are not discovered within the time specified, it has been held that the shipper is not bound to give notice within a reasonable time after discovering the injuries.⁷ Conditions requiring notice have been restricted to the kind of injury or damage specified in the contract.⁸ Such a condition has been held not to apply to damage sustained because the railway refused to comply with a provision of the contract for transportation, giving to the shipper the privilege of removing the goods at an intermediate station,⁹ or to special damages caused by delay,¹⁰

Chicago, R. I. & P. Ry. Co. v. Craig, — Okla. —, 157 Pac. 87; Missouri, K. & T. Ry. Co. v. Lynn, — Okla. —, 161 Pac. 1058; Chicago, R. I. & P. Ry. Co. v. Brightwell, — Okla. —, 162 Pac. 484; Chicago, R. I. & P. Ry. Co. v. Gray, — Okla. —, 165 Pac. 157.

South Dakota. Strommer v. Chicago, M. & St. P. Ry. Co., 38 S. D. 368, 161 N. W. 346.

³ See § 737.

⁴ Emery v. Wabash R. Co., 183 Ia. 687, 106 N. W. 600; Snyder v. King, 199 Mich. 345, 165 N. W. 840; Boyd v. King, 201 Mich. 436, 167 N. W. 901; Chicago, R. I. & P. Ry. Co. v. Pruitt, — Okla. —, 171 Pac. 718; J. Van Lindley Nursery Co. v. Southern Ry. Co., 109 S. Car. 433, 96 S. E. 221.

For various questions of construction, see:

United States. Olson v. Chicago, B. & Q. R. Co., 250 Fed. 372.

Illinois. Babbitt v. Grand Trunk Western Ry. Co., 285 Ill. 267, 120 N. E. 803.

Kansas. Ott v. Atchison, T. & S. F. Ry. Co., 102 Kan. 254, 169 Pac. 957.

Mississippi. Pickle v. Receivers of St. Louis & S. F. R. Co., 115 Miss. 322, 75 So. 448; Illinois Central Ry. Co. v. Rogers, 116 Miss. 99, 76 So. 686.

North Carolina. Gilikin v. Norfolk Southern R. Co., 174 N. Car. 137, 93 S. E. 469.

⁵ Eoff v. Scullin, 120 Ark. 452, 179 S. W. 663.

⁶ Chesapeake & O. Ry. Co. v. Reberman, 120 Va. 71, 90 S. E. 629.

⁷ Eoff v. Scullin, 129 Ark. 452, 179 S. W. 663.

⁸ Cincinnati, N. O. & T. P. Ry. Co. v. Luke, 160 Ky. 560, 184 S. W. 1132 [rehearing denied, 171 Ky. 50, 186 S. W. 875]; Louisville & N. R. Co. v. Murphy, 182 Ky. 136, 206 S. W. 268; McElwain v. Union Pacific Railroad Co., 101 Neb. 484, 1 A. L. R. 533, 163 N. W. 845; Dowling v. Seaboard Air Line Ry., 108 S. Car. 186, 93 S. E. 863.

⁹ Cincinnati, N. O. & T. P. Ry. Co. v. Luke, 169 Ky. 560, 184 S. W. 1132 [rehearing denied, 171 Ky. 50, 186 S. W. 875].

¹⁰ Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 So. 151.

or to damages arising from the fact that the carrier refused to perform the contract and return the goods to the shipper at the place from which they were shipped,¹¹ or to incidental damages,¹² such as the loss of an opportunity to sell the goods or for shrinkage in weight or cost of preserving the goods,¹³ or to damages arising from the wrongful act of the carrier in converting the goods and selling them.¹⁴ In the absence of statutory provisions which in effect prevent waiver,¹⁵ such a condition does not apply to cases in which the carrier knows of the injury,¹⁶ as where animals have died while in the possession of the carrier;¹⁷ nor to cases in which the carrier could have discovered the injury if it had performed its contract,¹⁸ as where the carrier was bound to unload the property, and the injury would have been discovered if it had done so.¹⁹ Notice of injury while the goods are in transit has been held to be sufficient,²⁰ especially if the injured articles were examined by representatives of the carrier.²¹

§ 2611. Contents and form of notice. The notice must set forth the requisite facts and where necessary must advise the adversary party of the steps which the party who gives the notice proposes to take.¹ Under clauses in a building contract which give the owner the right to terminate the contract and to proceed in two or more different ways upon giving notice to the contractor, the notice must indicate under which clause the owner proposes to

¹¹ *Louisville & N. R. Co. v. Murphy*, 182 Ky. 136, 206 S. W. 268.

¹² *McElwain v. Union Pacific Ry. Co.*, 101 Neb. 484, 1 A. L. R. 533, 163 N. W. 845.

¹³ *McElwain v. Union Pacific Railroad Co.*, 101 Neb. 484, 1 A. L. R. 533, 163 N. W. 845.

¹⁴ *Dowling v. Seaboard Air Line Ry.*, 108 S. Car. 186, 93 S. E. 863.

¹⁵ See §§ 737.

¹⁶ *Southern Pac. Co. v. Stewart*, 233 Fed. 956, 147 C. C. A. 630; *Lusk v. Long*, 127 Ark. 261, 192 S. W. 213.

¹⁷ *Lusk v. Long*, 127 Ark. 261, 192 S. W. 213; *Patterson v. Missouri, Kansas & Texas Ry. Co.*, 24 Okla. 747, 104 Pac. 31.

¹⁸ *Ferebee v. Atlantic Coast Line R. Co.*, 109 S. Car. 105, 95 S. E. 349.

¹⁹ *Ferebee v. Atlantic Coast Line R. Co.*, 109 S. Car. 105, 95 S. E. 349.

²⁰ *Castner v. Oregon-Washington Railroad & Navigation Co.*, 89 Wash. 694, 155 Pac. 167.

²¹ *Castner v. Oregon-Washington Railroad & Navigation Co.*, 89 Wash. 694, 155 Pac. 167.

¹ *Valente v. Weinberg*, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 369.

If by its terms a contract may be terminated on thirty days' notice in writing of the intention so to do, a written notice which states that "we * * * as per terms of the contract, are notifying you 30 days in advance of our intention to terminate the contract," is sufficient. *Emerson-Brantingham Co. v. Lyons*, 102 Kan. 733, 172 Pac. 513.

act.² If the notice of loss sustained in transportation is in writing, and if it gives to the carrier sufficient information with reference to the damage which the shipper claims was sustained by the goods to enable the carrier to protect himself by an investigation if he so desires, such notice is sufficient, since no particular form is required.³ Notice by telegram is sufficient if the telegram gives the requisite information to the shipper.⁴ If the shipper requires the agent of the carrier to note the fact of injury to the property upon the freight bill, this is held to be a sufficient notice,⁵ although in some jurisdictions the sufficiency of such notice is denied.⁶ A communication by the local agent of the carrier has been held to be a substantial compliance with a condition requiring notice;⁷ and so has a report of damage made by the inspector of the carrier and filed by the consignee.⁸ A memorandum on a freight receipt, which probably is delivered to the proper officials of the railway company by the inspecting agent of the carrier, has been held to be a sufficient notice.⁹ Letters written by the shipper, in which he sets up his claim, may be sufficient as a notice, although not intended as a formal notice.¹⁰ If the agent of the carrier has noted the condition of the goods on the freight receipt, and the shipper has given notice that he would file a claim for damages, such notice is sufficient, even though no formal notice is filed thereafter.¹¹ An evident clerical error as to date will not render a notice invalid.¹² However, a notice that a certain shipment will be injured unless the carrier takes certain specified steps to prevent it, is not suf-

² Valente v. Weinberg, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 360.

³ United States. Georgia, F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. ed. 948.

⁴ Iowa. Emery v. Wabash R. Co., 183 Ia. 687, 166 N. W. 600.

⁵ Michigan. Snyder v. King, 199 Mich. 345, 1 A. L. R. 803, 165 N. W. 840; Boyd v. King, 201 Mich. 436, 167 N. W. 901.

⁶ Mississippi. Illinois Central Ry. Co. v. Rogers, 116 Miss. 99, 76 So. 686.

⁷ Oklahoma. Chicago, R. I. & P. Ry. Co. v. Pruitt, — Okla. —, 171 Pac. 718.

⁸ Oregon. United Brokers' Co. v. Southern Pac. Co., 86 Or. 607, 169 Pac. 114.

⁹ Georgia, F. & A. Ry. Co. v. Blish

Milling Co., 241 U. S. 190, 60 L. ed. 948; Boyd v. King, 201 Mich. 436, 167 N. W. 901.

¹⁰ Illinois Central Ry. Co. v. Rogers, 116 Miss. 99, 76 So. 686.

¹¹ Taft v. Atlantic Coast Line R. Co., 174 N. Car. 211, 93 S. E. 752.

¹² Snyder v. King, 199 Mich. 345, 1 A. L. R. 803, 165 N. W. 840.

¹³ United Brokers' Co. v. Southern Pac. Co., 86 Or. 607, 169 Pac. 114.

¹⁴ Emery v. Wabash R. Co., 183 Ia. 687, 166 N. W. 600.

¹⁵ Chicago, R. I. & P. Ry. Co. v. Pruitt, — Okla. —, 171 Pac. 718.

¹⁶ Emery v. Wabash R. Co., 183 Ia. 687, 166 N. W. 600.

¹⁷ Baird v. Denver & R. G. R. Co., 49 Utah 58, 162 Pac. 79.

ficient as a notice of damage.¹³ Under a statutory provision to the effect that notice of filing a claim should not be made a condition precedent,¹⁴ filing an action within the time limited for filing notice was held to be sufficient.¹⁵ If the option to rescind a contract in case of dissatisfaction is reserved to one party, his conduct in tendering what he has received under the contract and demanding what he has paid under the contract is sufficient notice of his election to exercise such option.¹⁶

§ 2612. Giving notice by mail. If provision is made for giving notice either as a condition precedent or as a condition subsequent, such provision is regarded as analogous to the acceptance of an offer which by its terms is to remain open for a certain specified time,¹ rather than as analogous to the acceptance of an offer which does not by its terms specify the time for which it is to remain open;² and accordingly such notice is not given by mailing the letter which contains such notice, but only by the receipt thereof.³ At any rate, it must be mailed in time to be transmitted to the adversary party, in the usual course of post, within the time specified in the contract.⁴ Accordingly, if such notice is mailed within the time specified for giving such notice, but not in time to be delivered in due course of mail within the time specified by the contract, and it is not received until after such time has expired, such notice is given too late,⁵ if time is of the essence of such pro-

¹³ *Olson v. Chicago, B. & Q. R. Co.*, 250 Fed. 372.

¹⁴ 34 U. S. Stats. at L. 595, c. 3591, § 7; the Act of June 29, 1906, the so-called Carmack Amendment.

¹⁵ *J. Van Lindley Nursery Co. v. Southern Ry. Co.*, 109 S. Car. 433, 96 S. E. 221.

¹⁶ *Rose v. Monarch*, 150 Ky. 129, 42 L. R. A. (N.S.) 660, 150 S. W. 56.

¹ See § 146.

² See §§ 199 et seq.

³ *Shea v. Massachusetts Ben. Association*, 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Hoban v. Hudson*, 129 Minn. 335, L. R. A. 1916B, 1114, 152 N. W. 723; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L. R. A. 956, 59 N. E. 818.

⁴ *Wheeler v. McStay*, 160 Ia. 745, L. R. A. 1915B, 181, 141 N. W. 404.

⁵ *Wheeler v. McStay*, 160 Ia. 745, L. R. A. 1915B, 181, 141 N. W. 404; *German Union Fire Ins. Co. v. Fred G. Clarke Co.*, 116 Md. 622, 39 L. R. A. (N.S.) 829, 82 Atl. 974; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L. R. A. 956, 59 N. E. 818; *Field v. Mann*, 42 Vt. 61.

Contra, *Manufacturers' and Merchants' Mutual Ins. Co. v. Zeitinger*, 168 Ill. 286, 61 Am. St. Rep. 105, 48 N. E. 179; *Walters v. Laurens Cotton Mill Co.*, 53 S. Car. 155, 31 S. E. 1 (service of notice of appeal); *Craig v. United States Health & Accident Ins. Co.*, 80 S. Car. 151, 128 Am. St. Rep. 877, 18 L. R. A. (N.S.) 106, 61 S. E. 423 (obiter, as notice mailed too late).

visions,⁶ as it usually is.⁷ If a provision for notice stipulates that it shall be "deposited in the postoffice," placing it in a mail-box is not sufficient.⁸

The fact that the adversary party has changed his address and that the party who attempts to give the notice by mail does not know of such change, does not make the notice date from the mailing thereof.⁹

IV

VALUATION, ARBITRATION OR APPRAISEMENT AS
CONDITION

§ 2613. Valuation by arbitration or appraisement as condition precedent. Provision is occasionally made for determining the amount of the consideration to be paid or for the amount of compensation to be paid under the contract by arbitration or appraisement as a condition precedent to the right of one or both of the parties to demand further performance. If such provisions do not amount to covenants for renouncing in advance the right of one or both of the parties to seek redress at law,¹ they are valid; and full effect is given thereto in accordance with the provisions of the contract.² Whether such provisions amount to a renunciation in advance of the right of one or both of the parties to invoke redress

This question was raised, but not decided, in *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845, as the delay, if any, was waived.

⁶ See §§ 2103 et seq.

⁷ See § 2112.

⁸ *Banco de Sonora v. Bankers' Mutual Casualty Co.*, 124 Ia. 576, 104 Am. St. Rep. 367, 100 N. W. 532.

⁹ *Hoban v. Hudson*, 129 Minn. 335, L. R. A. 1916B, 1114, 152 N. W. 723.

¹ See §§ 719 et seq.

² *England. Spurrier v. La Cloche* [1902], A. C. 446.

United States. Hamilton v. Liverpool, London & Globe Ins. Co., 136 U. S. 242, 34 L. ed. 419.

Alabama. Headley v. Aetna Ins. Co., — Ala. —, 80 So. 466.

California. Old Saucelito Land and Dry Dock Co. v. Commercial Union As-

surance Co., 66 Cal. 253, 5 Pac. 232; *Adams v. South British and National Fire and Marine Ins. Companies*, 70 Cal. 198, 11 Pac. 627; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863.

Georgia. Southern Mutual Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975.

Iowa. Zalesky v. The Home Ins. Co., 102 Ia. 613, 71 N. W. 566.

Maine. Perry v. Cobb, 88 Me. 435, 49 L. R. A. 389, 34 Atl. 278.

Maryland. Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13.

Massachusetts. Hutchinson v. Liverpool and London and Globe Ins. Co., 153 Mass. 143, 10 L. R. A. 558, 26 N. E. 439; *Lamson Consolidated Store Service, etc., Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N. E. 943; *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N. E. 384.

at law, is discussed elsewhere.³ The effect of the conduct of one of the parties in refusing to appoint the necessary arbitrators or appraisers, is a question which frequently arises in connection with such conditions, and it is discussed subsequently. Under a contract for submitting disputes as to value to arbitration or appraisal, such submission is a condition precedent to recovery.⁴

In some jurisdictions the determination of a third party or of arbitrators may be made *prima facie* valid by the agreement of the

Michigan. Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

Minnesota. Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252; Mossness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.

New Jersey. Wolff v. Liverpool and London and Globe Ins. Co., 50 N. J. L. 453, 14 Atl. 561.

North Carolina. Pioneer Mfg. Co. v. Phoenix Assurance Co., 106 N. Car. 28, 10 S. E. 1057.

North Dakota. Leu v. Commercial Mut. Fire Ins. Co., 15 N. D. 360, 107 N. W. 59.

Ohio. Phoenix Insurance Co. v. Carnahan, 63 O. S. 258, 58 N. E. 805; Graham v. Ins. Co., 75 O. S. 374, 79 N. E. 930.

Texas. Scottish Union and National Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630.

Wisconsin. Chapman v. Rockford Ins. Co., 89 Wis. 572, 28 L. R. A. 405, 62 N. W. 422; Montgomery v. American Central Ins. Co., 108 Wis. 146, 84 N. W. 175.

Contra, German-American Insurance Co. v. Etherton, 25 Neb. 505, 41 N. W. 406; Hartford Fire Insurance Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725, 60 L. R. A. 436, 92 N. W. 746.

Contra, by statute, Insurance Co. v. Kempner, 132 Ark. 215, 200 S. W. 986.

³See §§ 719 et seq.

⁴England. Scott v. Avery, 5 H. L. Cas. 811.

United States. Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.

S. 242, 34 L. ed. 419; Mundy v. Louisville & N. Ry., 67 Fed. 633, 14 C. C. A. 583; Connors v. United States, 130 Fed. 609.

Connecticut. Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356.

New Jersey. Wolff v. Liverpool and London and Globe Ins. Co., 50 N. J. L. 453, 14 Atl. 561.

New York. Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250.

North Dakota. Leu v. Commercial Mutual Fire Insurance Co., 15 N. D. 360, 107 N. W. 59.

Ohio. Mansfield and Sandusky City, &c., Ry. v. Veeder, 17 Ohio 385; Phoenix Insurance Co. v. Carnahan, 63 O. S. 258, 58 N. E. 805; Graham v. Ins. Co., 75 O. S. 374, 79 N. E. 930.

Pennsylvania. Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519.

Contra:

California. Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54.

Michigan. Weggenner v. Greenstine, 114 Mich. 310, 72 N. W. 170.

Nebraska. Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725, 60 L. R. A. 436, 92 N. W. 746.

Oregon. Ball v. Doud, 26 Or. 14, 37 Pac. 70.

Pennsylvania. Needy v. German-American Ins. Co., 197 Pa. St. 460, 47 Atl. 739.

West Virginia. Baer's Sons Grocer Co. v. Fruit Packing Co., 42 W. Va. 359, 26 S. E. 191.

parties, but it can not be made final and conclusive.⁵ Where this view prevails, the construction of a contract made by an engineer,⁶ or his estimates,⁷ may be made correct *prima facie* but not conclusively. Under a contract of guaranty insurance, the employe may agree that a voucher showing a payment by the insurance company to his employer shall be *prima facie* evidence of such payment; but a provision to the effect that such voucher is conclusive is inoperative.⁸ A provision in a contract of guaranty insurance, to the effect that the receipts which the creditor gave to the guaranty company on account of the principal debtor, shall be regarded as conclusive evidence of the liability of such principal debtor, and of the amount of such liability, except in case of fraud, is valid,⁹ although a provision that such receipt should be conclusive even as against the defense of fraud is invalid.¹⁰

§ 2614. Specific illustrations of provisions for arbitration or appraisal. Provisions of this sort are frequently found in policies of insurance which provide that in case of loss the amount of such loss may be fixed by arbitration or appraisal. Such a provision is a condition precedent in the sense that an insured who has refused to comply with such provision can not ignore it and maintain an action upon the policy to recover the amount of loss.¹ In

⁵ *Baltimore, etc., Ry. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156; *Fidelity and Casualty Co. v. Crays*, 76 Minn. 450, 79 N. W. 531; *Wortman v. Montana Central Ry.*, 22 Mont. 266, 56 Pac. 316.

⁶ *Wortman v. Ry.*, 22 Mont. 266, 56 Pac. 316.

⁷ *Baltimore, Ohio and Chicago, etc., Ry. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156.

⁸ *Fidelity and Casualty Co. v. Eickhoff*, 63 Minn. 170, 56 Am. St. Rep. 464, 30 L. R. A. 586, 65 N. W. 351; *Fidelity and Casualty Co. v. Crays*, 76 Minn. 450, 79 N. W. 531.

⁹ *Guarantee Co. v. Pitts*, 78 Miss. 837, 30 So. 758.

Contra, Guarantee Co. v. Charles, 92 S. Car. 282, 75 S. E. 387.

¹⁰ *Fidelity & Deposit Co. v. Nordmarken*, 32 N. D. 19, 155 N. W. 669.

¹ *England. Spurrier v. La Cloche* [1902], A. C. 446.

United States. Hamilton v. Liverpool, London & Globe Ins. Co., 136 U. S. 242, 34 L. ed. 419.

Alabama. Headley v. Aetna Ins. Co., — Ala. —, 80 So. 466.

California. Old Saucelito, etc., Co. v. The Commercial Union Assurance Co., 66 Cal. 253, 5 Pac. 232; *Adams v. South British and National Fire and Marine Ins. Co.*, 70 Cal. 198, 11 Pac. 627; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863.

Georgia. Southern Mutual Ins. Co. v. Turnley, 100 Ga. 296, 27 S. E. 975.

Iowa. Zalesky v. Home Ins. Co., 102 Ia. 613, 71 N. W. 566; *George Dee & Sons Co. v. Kansas City Fire Ins. Co.*, 104 Ia. 167, 73 N. W. 504.

Maine. Perry v. Cobb, 88 Me. 435, 49 L. R. A. 389, 34 Atl. 278.

case of disagreement as to the amount of loss, the insured must demand appraisal as a condition precedent.² Contracts of insurance in benefit associations frequently provide that no action can be brought upon the contract until the claimant has first resorted to the tribunals of the company which issued such insurance,³ or that the claimant must exhaust the means of appeal provided for by such contract,⁴ or that no recovery can be had until after arbitration, and then only for the amount awarded by arbitration.⁵

Maryland. *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13.

Massachusetts. *Hutchinson v. Liverpool & London & Globe Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558, 28 N. E. 439; *Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N. E. 943; *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N. E. 384.

Michigan. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055.

Minnesota. *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932; *Hamberg v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 335, 71 N. W. 388.

New Jersey. *Wolff v. Liverpool & London & Globe Ins. Co.*, 50 N. J. L. 453, 14 Atl. 561.

North Carolina. *Pioneer Mfg. Co. v. Phoenix Assurance Co.*, 106 N. Car. 28, 10 S. E. 1057.

North Dakota. *Leu v. Commercial Mut. Fire Ins. Co.*, 15 N. D. 360, 107 N. W. 59.

Ohio. *Phoenix Insurance Co. v. Carahan*, 63 O. S. 258, 58 N. E. 805.

Texas. *Scottish Union & National Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. 630.

Wisconsin. *Chapman v. Ins. Co.*, 89 Wis. 572, 28 L. R. A. 405, 62 N. W. 422; *Montgomery v. American Central Ins. Co.*, 108 Wis. 146, 84 N. W. 175.

Contra, *German-American Insurance Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406; *Hartford Fire Insurance Co. v. Hon*, 66 Neb. 555, 103 Am. St. Rep. 725, 60 L. R. A. 436, 92 N. W. 746.

² *Headley v. Aetna Ins. Co.*, — Ala. —, 80 So. 466; *Graham v. German-American Ins. Co.*, 75 O. S. 374, 79 N. E. 930 [overruling, *Grand Rapids Ins. Co. v. Finn*, 60 O. S. 513, 54 N. E. 545].

³ *Georgia.* *Harrington v. Workmen's Benevolent Association*, 70 Ga. 340.

Indiana. *Bauer v. Sampson Lodge*, 102 Ind. 262, 1 N. E. 571; *Supreme Council, etc., v. Forsinger*, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L. R. A. 501, 25 N. E. 129.

Maine. *Jeane v. Grand Lodge, etc.*, 86 Me. 434, 30 Atl. 70.

⁴ **Montana.** *Cotter v. Grand Lodge, etc.*, 23 Mont. 82, 57 Pac. 660.

New Hampshire. *Levy v. Iron Hall*, 67 N. H. 593, 38 Atl. 18.

Ohio. *Myers v. Jenkins*, 63 O. S. 101, 81 Am. St. Rep. 613, 57 N. E. 1089.

⁴ *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Supreme Council v. Forsinger*, 125 Ind. 52, 21 Am. St. Rep. 196, 9 L. R. A. 501, 25 N. E. 129; *Myers v. Jenkins*, 63 O. S. 101, 81 Am. St. Rep. 613, 57 N. E. 1089.

⁵ *Hembeau v. Knights*, 101 Mich. 161, 45 Am. St. Rep. 400, 49 L. R. A. 592, 59 N. W. 417; *Patrons' Mut. Fire Ins. Co. v. Attorney General*, 166 Mich. 438, 131 N. W. 1119.

A contract between landlord and tenant may provide for fixing the value of improvements by arbitration or appraisement.⁶ Adjoining property owners may agree that the damage done by trespassing cattle may be settled by arbitration.⁷

§ 2615. Refusal of appraisement or arbitration by one party as affecting rights of adversary party—Contracts of sale. In contracts for the sale either of real property,¹ or personal property,² provisions are occasionally found for determining the price to be paid for such property by a valuation which is to be made by one or more third persons, who are to be appointed by the parties to the original transaction of sale. If the price is fixed by such third persons in accordance with the terms of the contract, such action on their part is conclusive if they have acted in good faith,³ both in contracts for the sale of personal property,⁴ and in those for the sale of real property.⁵ If the contract is entirely executory, and the only loss which will be suffered by either party is the loss of the bargain, the refusal of one of the parties to the contract of sale to appoint appraisers, or the refusal of the appraisers to act, prevents the determination of the price; and accordingly no action can be brought on the contract itself,⁶ except an action to recover damages if one of the parties has broken his covenant to appoint an appraiser.⁷ Only nominal damages, however, can be recovered in cases of this sort,⁸ since it is impossible to show what price the

⁶ Diepenbrock v. Luiz, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89.

⁷ Berry v. Carter, 19 Kan. 135.

¹ Emery v. Wase, 5 Ves. Jr. 846 (obiter, as some of the parties were married women, whose contracts were not binding, see § 1658); Brown v. Bellows, 21 Mass. (4 Pick.) 179.

² Brown v. Bellows, 21 Mass. (4 Pick.) 179; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432.

³ Emery v. Wase, 5 Ves. Jr. 846; Brown v. Bellows, 21 Mass. (4 Pick.) 179; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432.

⁴ Brown v. Bellows, 21 Mass. (4 Pick.) 179; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432.

⁵ Emery v. Wase, 5 Ves. Jr. 847;

Brown v. Bellows, 21 Mass. (4 Pick.) 179.

⁶ Street v. Rigby, 6 Ves. Jr. 815; Gourley v. Somerset, 19 Ves. Jr. 431 (obiter); Vickers v. Vickers, L. R. 4 Eq. 529; Elberton Hardware Co. v. Hawes, 122 Ga. 858, 50 S. E. 964; Louis Werner Sawmill Co. v. O'Shee, 111 La. 817, 35 So. 919; Stern v. Farah, 17 N. M. 516, 133 Pac. 400.

⁷ Mitchell v. Harris, 2 Ves. Jr. 129 (obiter); Livingston v. Ralli, 5 El. & Bl. 132; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

That such action will not lie, see Tattersall v. Groote, 2 B. & P. 131.

⁸ Brunadon v. Board, 1 Cab. & E. 272; Munson v. Straits of Dover S. S. Co., 99 Fed. 787 [affirmed, Munson v. Straits of Dover S. S. Co., 102 Fed. 926].

appraisers would have fixed if they had been appointed; and accordingly it is impossible to show the actual damages which were sustained. In jurisdictions in which a demurrer will be sustained to a declaration or petition which shows on its face that only nominal damages can be recovered, a demurrer may be sustained to a declaration or petition which sets up a contract for an appraisal, together with a refusal, to perform such covenant.⁹ This applies both to contracts for the sale of personalty,¹⁰ and to contracts for the sale of realty.¹¹ If the contract has not been performed in whole or in part on either side, and if the only consequences of breach will be that the adversary party will lose the benefit of the bargain, equity will not give relief; and it will not attempt to compel either party to appoint an appraiser, nor will it attempt to fix a value upon the property or right which is involved without submitting such question to the determination of appraisers.¹² If such party refuses to appoint an appraiser,¹³ or if he revokes the authority of the appraiser after he has appointed one,¹⁴ equity can give no relief but will leave the parties to their remedy at law.

There is some recent authority, however, which has expressed a contrary view and which has held that equity will give relief in cases of this sort,¹⁵ at least where an appraiser has been appointed

⁹ *Tattersall v. Groot*, 2 B. & P. 131; *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787 [affirmed, *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926].

¹⁰ *Vickers v. Vickers*, L. R. 4 Eq. 529; *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964; *Stern v. Farah*, 17 N. M. 516, 133 Pac. 400.

¹¹ *Gourley v. Somerset*, 19 Ves. Jr. 429; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 So. 919.

¹² *England. Street v. Rigby*, 6 Ves. Jr. 815; *Price v. Williams*, cited in 6 Ves. Jr. 818 [compare opinion in 1 Ves. Jr. 365]; *Gourley v. Somerset*, 19 Ves. Jr. 429; *Agar v. Mackleu*, 2 Sim. & St. 418; *Vickers v. Vickers*, L. R. 4 Eq. 529.

Iowa. Kennedy v. Monarch Mfg. Co., 123 Ia. 344, 98 N. W. 796.

Missouri. Hug v. Van Burkleo, 58 Mo. 202.

New Jersey. Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4; *Davila v. United Fruit Co.*, 88 N. J. Eq. 602, 103 Atl. 519.

Ohio. Conner v. Drake, 1 O. S. 166.

Wisconsin. Hopkins v. Gilman, 22 Wis. 476; *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682.

¹³ *Hopkins v. Gilman*, 22 Wis. 476; *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682.

¹⁴ *Vickers v. Vickers*, L. R. 4 Eq. 529.

¹⁵ "The method provided in this lease for ascertaining the value of the demised premises, either for the purposes of sale or as a basis upon which the rental is to be calculated for an additional term, is one frequently resorted to in the business world. Agree-

and where the party who appointed him has attempted to revoke his authority after appointment and when he was able to render his finding.¹⁶

If one of the parties has performed so far that he will suffer a serious financial loss by reason of such performance over and above the loss of his bargain, equity will give relief so as to prevent such inequitable result.¹⁷ One of the most frequent illustrations of this principle is found in cases in which a lease has been taken with a provision for renewal at a valuation to be made by appraisers or with an option to buy at a valuation to be fixed by appraisers, and in reliance upon such lease or option the lessee has made valuable and expensive improvements upon the property which is leased. In cases of this sort, equity will give relief,¹⁸ ordinarily, by ignoring the provision for an appraisal and by determining the value of the property without regard to such provision for valuation. It has, however, been said that even in cases of this sort, equity would not give specific performance,¹⁹ and that it would not undertake to make independent valuation of the property to be conveyed;²⁰ but that it would retain the case for the purpose of determining the value of the improvements thus made, for which restitution must be given to the purchaser by the vendor.²¹ A special difficulty

ments of this character are being entered into almost daily and, in the absence of fraud or mistake, there is neither justice nor common sense in permitting the parties to repudiate them. If appellants' contention is sound, the appraisal feature of a lease is unenforceable and a mere nullity. It would amount to 'a mere scrap of paper.'" *Martin v. Vansant*, 99 Wash. 106, 168 Pac. 900.

¹⁶ *Martin v. Vansant*, 99 Wash. 106, 168 Pac. 900.

¹⁷ *United States. Castle Creek Water Co. v. Aspen*, 146 Fed. 8.

Indiana. Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161.

Ohio. Lowe v. Brown, 22 O. S. 463.

Pennsylvania. Kaufmann v. Liggett, 209 Pa. St. 87, 67 L. R. A. 353, 58 Atl. 129.

Rhode Island. Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304.

Apparently to the same effect, where the lessee had, in bad faith, appointed an appraiser who would not make a fair valuation. *Biddle v. Ramsey*, 52 Mo. 153.

Mandamus is said to be the remedy in contracts of public utilities. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69.

¹⁸ *United States. Castle Creek Water Co. v. Aspen*, 146 Fed. 8.

Indiana. Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161.

Ohio. Lowe v. Brown, 22 O. S. 463.

Pennsylvania. Kaufmann v. Liggett, 209 Pa. St. 87, 67 L. R. A. 353, 58 Atl. 129.

Rhode Island. Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304.

¹⁹ *Hopkins v. Gilman*, 22 Wis. 476.

²⁰ *Hopkins v. Gilman*, 22 Wis. 476.

²¹ *Hopkins v. Gilman*, 22 Wis. 476.

arises in cases in which the lessee has an option to buy at an appraisalment and in which he wishes the appraisalment to be made before he exercises his option, so that he can determine whether he will exercise such option or not. It has been held that in such cases relief will be given in equity if the lessee elects to take the property,²² but that relief will not be given in equity if the lessee has not elected to take the property and if he wishes such appraisalment to be made in order to enable him to decide whether to exercise his option or not.²³

§ 2616. Contracts of insurance, etc. In striking contrast with the way in which courts have treated cases in which provisions are found in contracts of sale for the purpose of fixing the value of property by appraisalment,¹ is the attitude of the courts toward contracts of insurance which contain provisions for fixing the amount of loss by arbitration or appraisalment.² While such a provision is a condition precedent, so that the insured can not recover if he refuses to submit such question to arbitration,³ it is regarded either as not a condition precedent in the sense that the insurer can refuse to submit to such arbitration or appraisalment and defeat recovery on the policy, or else such conduct on his part is held to amount to a waiver of such condition.⁴ Whichever theory is invoked, the insured may recover without appraisalment or arbitration if the insurance company refuses to submit thereto,⁵ or if the insurance company, after submitting thereto, so acts as to prevent such arbitration or appraisalment from being completed.⁶ In such cases the insured may maintain an action upon the policy and have the amount of loss determined by a jury.⁷ If the appraiser who is appointed by the insurance company withdraws, it is the duty of

²² *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825.

²³ *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856.

¹ See § 2615.

² See §§ 721 et seq.

³ See § 2614.

⁴ See notes 5 to 9, this section.

⁵ *Western Assurance Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48, 24 So. 936; *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186.

⁶ *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 47 Am. St. Rep. 562, 26 L. R. A. 623, 61 N. W. 67; *Fire Association v. Appel*, 76 O. S. 1, 80 N. E. 952; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172, 33 S. W. 1041; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 28 L. R. A. 405, 62 N. W. 422.

⁷ *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 47 Am. St. Rep. 562, 26 L. R. A. 623, 61 N. W. 67; *Fire Association v. Appel*, 76 O. S. 1, 80 N. E. 952; *Hickerson v. German-American*

the insurance company to appoint another appraiser, and if the insurance company fails or refuses to do so, this is said to amount to a waiver of the provision for appraisement.⁸ The insured is not bound to submit to a new appraisement, but he may insist that the insurance company shall appoint an additional appraiser in place of the one who was appointed originally.⁹ Denial of all liability does not waive a provision for ascertaining the amount of loss by appraisement.¹⁰

If a contract provides for determining by arbitration the damage caused by total breach of the contract, refusal to arbitrate does not defeat the right of the party who is not in default.¹¹

V

SATISFACTION OF PARTY OR THIRD PERSON AS
CONDITION

§ 2617. Mental state as condition—In general. By the terms of the contract, the mental state of one of the parties to the contract, or of a third party, may be selected as the condition upon which performance depends. The contract may provide that performance is to be to the satisfaction of the adversary party, and if such provision is to be treated literally, the right to compensation of the party who has performed, depends upon the satisfaction of the adversary party.¹ The courts are strongly inclined to treat such a covenant outside of matters involving personal taste as a covenant to perform in such a way that a reasonable man would be satisfied. While the contract might be so worded that a declaration by the adversary party, to the effect that he was dissatisfied, might be conclusive, it would be difficult to find consideration for such a promise. A transaction of this sort would amount to little more than an offer which was to be accepted after performance, on the one side, by acceptance as satisfactory performance, on the other side.²

Ins. Co., 96 Tenn. 103, 32 L. R. A. 172, 33 S. W. 1041; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 28 L. R. A. 405, 62 N. W. 422.

⁸ *Fire Association v. Appel*, 76 O. S. 1, 80 N. E. 952.

⁹ *Fire Association v. Appel*, 76 O. S. 1, 80 N. E. 952.

¹⁰ *Phoenix Ins. Co. v. Carnahan*, 63 O. S. 258, 58 N. E. 805.

¹¹ *Harlow v. Oregonian Pub. Co.*, 45 Or. 520, 78 Pac. 737.

¹ See §§ 2618 et seq.

See, *Non-Satisfaction as a Defense in Case of Contract*, by Grosvenor Nicholas, 9 Yale Law Journal, 114.

² See §§ 75 et seq., 575 et seq. and ch. LXXX.

The mental state, which by the terms of the contract is made a condition, may be the mental state of one who is not a party to the contract, although he may be the agent or employe of one of the parties.

Contracts frequently contain provisions to the effect that performance is to be to the satisfaction of an architect, engineer, and the like, and that his certificate of satisfactory performance is to be a condition precedent to the contractor or builder to recover under his contract. Full effect is ordinarily given to provisions of this sort, subject to the restriction that the satisfaction or dissatisfaction must exist in good faith.³

§ 2618. Contract to be performed to satisfaction of adversary party—General nature. A contract by which one party agrees to perform to the "satisfaction" of the adversary party, presents questions which, in some respects, are intermediate between the questions which arise out of performance or breach of express conditions, and the questions which arise out of the performance or breach of covenants. The difficulty of classifying such provisions either as conditions or covenants arises in part out of the fact that in some conditions such provisions are treated as true conditions for some classes of contract at least, and in addition to substantial performance of the covenants, the satisfaction of the adversary party must be shown as a condition in order to enable the party who has performed to recover on the contract, even if he is able to show substantial performance;¹ while in other jurisdictions, in some classes of contract at least, the courts are inclined to regard such provision as little more than a covenant for performance, and accordingly to hold that the party who seeks to recover upon such contract, need not do more than show performance of the covenants on his part.² Some doubt has been expressed as to whether such a transaction can, properly speaking, be called a contract, or whether it is a preliminary negotiation in which the offer consists in performance according to the preliminary negotiations, leaving the adversary party free then to accept or to reject.³ If the contract is so worded as to leave the adversary party free to accept or to

³ See §§ 2625 et seq.

¹ See §§ 2619 et seq.

² See § 2622.

³ *Joliet Bottling Co. v. Joliet Citi-*
sens' Brewing Co., 254 Ill. 215, 98 N. E.

263; *Gibson v. Carnage*, 39 Mich. 49,
33 Am. Rep. 351; *Midgley v. Campbell*
Building Co., 38 Utah 293, 112 Pac.
820.

reject at his pleasure, whether he is actually dissatisfied or whether he alleges dissatisfaction as a pretext, this view of the transaction is undoubtedly correct. If, on the other hand, the contract is construed as one which must be performed to the actual satisfaction of the adversary party, but if on performance to his actual satisfaction he is bound to perform on his part, and if he can not evade such contract by alleging dissatisfaction, a positive obligation on his part undoubtedly exists, which furnishes consideration for the promise on the part of the adversary party; and the transaction amounts to a contract.⁴

Whether such transactions are to be regarded as contracts or not, full effect must be given to such provisions in accordance with their true meaning.⁵

Dissatisfaction such as justifies termination of the contract may exist before performance has begun,⁶ as it may be caused by the delay of the adversary party in commencing performance.⁷

⁴ *Lilienthal v. Stearns*, 121 Fed. 197; *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946; *Northern Central Ry. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

⁵ *United States. Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 1 L. R. A. 645.

Alabama. Electric Lighting Co. v. Elder, 115 Ala. 138, 21 So. 983.

Connecticut. Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446.

Kansas. Hollingsworth v. Colthurst, 78 Kan. 455, 18 L. R. A. (N.S.) 741, 96 Pac. 851.

Maryland. Goldberg v. Feldman, 108 Md. 330, 70 Atl. 245.

Massachusetts. McCarren v. McNulty, 73 Mass. (7 Gray) 139; *Williams Mfg. Co. v. Brass Co.*, 173 Mass. 356, 53 N. E. 862.

Michigan. Sullivan v. Ross, 124 Mich. 287, 82 N. W. 1071; *Carlisle v. Spain*, 147 Mich. 158, 110 N. W. 532.

Oregon. Livesley v. Johnston, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

Rhode Island. Pennington v. How-

land, 21 R. I. 65, 79 Am. St. Rep. 774, 41 Atl. 891.

West Virginia. Osborne v. Francis, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591.

Wisconsin. Manning v. School District, 124 Wis. 84, 102 N. W. 356.

"It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent on a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." *McCarren v. McNulty*, 73 Mass. (7 Gray) 139, 141 [quoted in *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 415; 1 L. R. A. 645].

⁶ *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781.

⁷ *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781.

As far as it is important to distinguish between contracts which must be performed to the satisfaction of the adversary party, and contracts which are to be performed to the satisfaction of a third person, such as an architect, engineer, and the like,⁸ a contract which is to be performed to the satisfaction of a corporation and one of its designated officers, is regarded as a contract to be performed to the satisfaction of the adversary party, and not one to be performed to the satisfaction of a third person.⁹

It has been said that there is no practical distinction between a contract which is to be performed to the satisfaction of an architect or engineer, and one which is to be performed to the satisfaction of the adversary party.¹⁰

⁸ See §§ 2625 et seq.

⁹ *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446.

¹⁰ "Had Mr. Sergeant been a third person and not an officer of the defendant corporation, the provisions of the specifications would have been enough to make him a quasi-arbitrator within the rule applied in *Atkins v. Barnstable*, 97 Mass. 428; *Palmer v. Clark*, 106 Mass. 373; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 120 Mass. 145; *National Contracting Co. v. Commonwealth*, 183 Mass. 89; *Norcross v. Wyman*, 187 Mass. 25.

"But Mr. Sergeant represented the railway company in this transaction, and was not a third person. That being so, the provision that the work was to be done 'subject to acceptance by the railway company and its vice-president' would have brought this case within *Hawkins v. Graham*, 149 Mass. 284, without a doubt, had that been the only provision of the contract on this point. In such a case Mr. Sergeant in accepting or not accepting the work would have acted for and represented the railway company, and would not have been a third person acting as arbitrator.

"Although, as we have said, the provisions in the specifications look the other way, we are of opinion on the

whole that Mr. Sergeant must be taken to have been the representative of the defendant and not a third person in this matter. This conclusion is enforced by the fact that all the correspondence set forth in the report which took place under the contract was carried on by Mr. Sergeant in behalf of the railway company." *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446.

¹⁰ *Keachie v. Starkweather Drainage District*, 168 Wis. 298, 170 N. W. 236.

"Given the premise that one may lawfully contract to perform certain work according to plans and specifications to the satisfaction of a third party, and that contracts to be executed to the satisfaction of one of the contracting parties will be enforced, it is difficult to appreciate the logic which condemns a contract to be performed according to plans and specifications to the satisfaction of the other contracting party. Certainly no consideration of public policy calls for the condemnation of one that does not also condemn the other. The powers and duties of the one appointed as arbiter are not materially different in the one case than in the other. In neither case can the arbiter act arbitrarily or capriciously. There must be the exercise of honest judgment, and the per-

§ 2619. Necessity of genuine dissatisfaction. The difficulties which arise in dealing with provisions of this sort are to a large extent questions of construction. Since the courts prefer to construe a contract so as to give it legal effect if possible,¹ they prefer to construe such a provision if possible, so as to require actual bona fide dissatisfaction on the part of the adversary party as a condition precedent to his evading liability thereunder.² Even in contracts which are personal in their nature, or which involve matters of personal or artistic taste, this principle has been applied, and the party to whose satisfaction performance is to be made, can

son performing the contract is not to be denied the fruits thereof by a fraudulent, arbitrary or capricious action on the part of the other.

"Such considerations, however, do not constitute the underlying reason for upholding the contract. That reason is well stated in *Delaware & H. C. Co. v. Pennsylvania C. Co.*, 50 N. Y. 258, as follows:

"When the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand and the parties made to abide by it, and the judgment of the tribunal of their choice."

"Whether this is a wise or provident contract is entirely beside the question. That is something with which courts are not concerned. There is no doubt that parties may contract in such cases to submit such differences to an umpire or arbiter and agree that his decision shall be final. The validity of that agreement is not dependent upon the relation which the arbiter bears to the parties. They may agree to partial as well as impartial arbiters if they see fit to do so. Courts have no reason to interfere with the rights of parties to voluntarily contract in the one case that they do not have in

the other. We therefore hold that this provision of the contract is valid and operates to confer upon the commissioners the same powers that are conferred upon architects by similar provisions in building contracts." *Keachie v. Starkweather Drainage District*, 168 Wis. 298, 170 N. W. 236.

¹ See § 2050.

² *United States. Silsby Mfg. Co. v. Chico*, 24 Fed. 893; *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 1 L. R. A. 645.

Alabama. Electric Lighting Co. v. Elder, 115 Ala. 138, 21 So. 983; *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382, 24 So. 730; *Jones v. Lanier*, — Ala. —, 73 So. 535.

Colorado. McCartney v. Badovinac, 62 Colo. 76, L. R. A. 1917A, 1146, 160 Pac. 100.

Georgia. Mackenzie v. Minis, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

Iowa. Hay v. Hassett, 174 Ia. 601, 156 Ia 734.

Montana. Waite v. Shoemaker, 50 Mont. 264, 146 Pac. 736.

New Jersey. Williams v. Hirshhorn, 91 N. J. L. 419, 103 Atl. 23.

Oregon. Paulson v. Weeks, 80 Or. 468, 157 Pac. 590.

Pennsylvania. Singerly v. Thayer, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230; *Adams, etc., Works v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 893, 26 Atl. 745.

not evade liability by alleging that he is dissatisfied if it can be shown that in fact he is satisfied.³ Under a contract for personal services, the termination of such contract for any other reason than genuine dissatisfaction, is breach, and not discharge by condition.⁴ Thus one who is employed as brakeman permanently, as long as his services are satisfactory in consideration of his release of damages for personal injury, can recover where he is discharged because brakemen were no longer to be employed where he was working.⁵ It has been said, however, that in cases involving personal taste, the person to whose satisfaction the contract is to be performed is "the only person who had a right to decide this question";⁶ but in this case it was, on the one hand, doubtful whether the transaction amounted to a contract,⁷ and, on the other hand, it appeared that the party who was dissatisfied with the picture of his deceased daughter, was acting in good faith, although he was unable clearly to indicate in what respect it was a poor likeness.⁸

In contracts which are not personal in their nature, or which do not involve matters of personal or artistic taste, there is no doubt that genuine dissatisfaction is necessary;⁹ but whether such contracts are to be so construed that a genuine dissatisfaction on the part of the adversary party is sufficient to enable him to avoid liability, or whether such provision is merely equivalent to a covenant for full and complete performance, is a question upon which there is a conflict of authority.¹⁰

§ 2620. Sufficiency of genuine dissatisfaction—Contracts involving personal taste or personal services. If the dissatisfaction is genuine, the question is presented whether this alone will prevent liability from existing, or whether the dissatisfaction must not only

Vermont. *Daggett v. Johnson*, 49 Vt. 345; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583.

Wisconsin. *Exhaust Ventilator Co. v. Ry.*, 66 Wis. 218, 57 Am. Rep. 257, 28 N. W. 343; *Manning v. Ft. Atkinson School District*, 124 Wis. 84, 102 N. W. 356.

³ *Mackenzie v. Minis*, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900; *Lieberman v. Weil*, 141 Wis. 635, 124 N. W. 262.

⁴ *Mackenzie v. Minis*, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900; *Sax*

v. Detroit, G. H. & Milwaukee R. R. Co., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; *Lieberman v. Weil*, 141 Wis. 635, 124 N. W. 262.

⁵ *Sax v. R. R.*, 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314.

⁶ *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351.

⁷ *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351.

⁸ *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351.

⁹ See § 2621.

¹⁰ See §§ 2621 and 2622.

be genuine, but must also be caused by such omissions or defects as would cause a reasonable man to be dissatisfied. This depends in part upon the nature of the contract. If the subject-matter of the contract involves personal taste or feeling, dissatisfaction, if genuine, prevents liability from existing, even if a reasonable man under similar circumstances would have been satisfied.¹ An artist who agreed to paint for A a portrait of A and his wife, which he agreed should be "satisfactory" to A, can not recover if A is not satisfied, no matter how good the picture is.² The same result has been reached under a contract to make a portrait of a deceased child from a photograph, to the satisfaction of the father,³ although the father is unable to indicate in what respect the picture was a poor likeness,⁴ or under a contract to make a plaster bust of a deceased husband to the satisfaction of the widow.⁵ The fact that the dissatisfaction is unreasonable, since the bust was as good as a plaster bust could be, but that, being in plaster, it lacked the expression of the deceased, is sufficient to permit the widow to escape liability therefor.⁶ Thus a contract for furnishing roofing tile of a rare and peculiar color,⁷ or for making a suit of clothes⁸ to the satisfaction of the adversary party, is not performed unless he is satisfied. If the person for whom the clothes are to be made is dissatisfied in good faith, he is not bound to pay therefor, although his dissatisfaction is unreasonable,⁹ and although he refuses to try them on for alterations after they have been made.¹⁰

¹ Connecticut. *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446.

Massachusetts. *Brown v. Foster*, 11 Mass. 136, 18 Am. Rep. 463.

Michigan. *Gibson v. Carnage*, 39 Mich. 49, 33 Am. Rep. 351; *Walter A. Wood, etc., Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906.

Rhode Island. *Pennington v. Howland*, 21 R. I. 65, 79 Am. St. Rep. 774, 41 Atl. 891.

Vermont. *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *McClure Bros. v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583.

"It is not for any one else to decide whether a refusal to accept is or is

not reasonable." *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

² *Pennington v. Howland*, 21 R. I. 65, 79 Am. St. Rep. 774, 41 Atl. 891.

³ *Gibson v. Carnage*, 39 Mich. 49, 33 Am. Rep. 351.

⁴ *Gibson v. Carnage*, 39 Mich. 49, 33 Am. Rep. 351.

⁵ *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446.

⁶ *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446.

⁷ *McNeil v. Armstrong*, 81 Fed. 943.

⁸ *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

⁹ *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

¹⁰ *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

In applying the principle that genuine dissatisfaction is sufficient, whether reasonable or not, if the contract provides for a subject-matter involving personal taste, a contract for personal services is generally regarded as a contract in which the personal element is material; and, accordingly, while it is necessary that dissatisfaction should be genuine,¹¹ it is not necessary that it should be reasonable.¹² Questions of this sort in contracts for personal services usually arise under provisions which reserve to the employer the right to terminate the contract if he is dissatisfied; and accordingly such questions are discussed in that connection.¹³

§ 2621. Matter not involving personal element—Theory of sufficiency of actual dissatisfaction. If the subject-matter of the contract does not involve personal taste or feeling, or any personal element, there is a conflict of authority on the question of whether a genuine but unreasonable dissatisfaction will prevent liability from existing under the contract. Some authorities hold that even in cases of this class a genuine dissatisfaction will prevent the party dissatisfied from being liable upon the contract, even if a reasonable man would have been satisfied.¹ Examples of contracts in which this principle has been applied are: a contract to make

¹¹ See § 2624.

¹² See § 2624.

¹³ See § 2624.

¹ **Connecticut.** *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153.

Illinois. *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263.

Iowa. *Haney-Campbell Co. v. Preston Creamery Association*, 119 Ia. 188, 93 N. W. 297; *Inman Manufacturing Co. v. American Cereal Co.*, 124 Ia. 737, 100 N. W. 860.

Kansas. *Hollingsworth v. Colthurst*, 78 Kan. 455, 18 L. R. A. (N.S.) 741, 96 Pac. 851.

Louisiana. *Moorman v. Plummer Lumber Co.*, 113 La. 429, 37 So. 17.

Maryland. *Goldberg v. Feldman*, 108 Md. 330, 70 Atl. 245.

Pennsylvania. *Adams, etc., Works v. Schnader*, 155 Pa. St. 304, 35 Am. St. Rep. 893, 26 Atl. 745.

Tennessee. *Peck-Williamson Heat-*

ing & Ventilating Co. v. McKnight, 140 Tenn. 563, 205 S. W. 419.

West Virginia. *Osborne v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591; *Barrett v. Coke Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

Wisconsin. *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278, 93 N. W. 1099.

"There is a conflict in the authorities as to the meaning of the term 'satisfactory,' so used in a contract. It is held, perhaps by the weight of authority, that, where such term appears in the contract, the party in whose favor it was reserved has the absolute right to determine the question, and to act accordingly—that is, either accepting or rejecting the work, provided his act is not merely capricious. Other authorities hold that such term is fully met where the work, as done, should be satisfactory to a rea-

brick "to the satisfaction" of the vendee's superintendent;² a contract by which A was to saw lumber for B at a specified rate, the contract to continue in force as long as satisfactory to each party;³ a contract to tow lumber,⁴ or to sew cotton bales.⁵ A contract for removing garbage, to be terminated when the city is dissatisfied with the performance thereof, may be terminated if the dissatisfaction is genuine.⁶ A contract to put in a heating apparatus to the purchaser's satisfaction, the contract providing that it should give entire satisfaction, and that if it proved "unsatisfactory after a thorough and reasonable trial, we will remove it at our own expense," is not performed unless such apparatus is satisfactory to the purchaser.⁷ A contract to construct a heating plant, to be paid for when "there has been sufficient cold weather to see that the plant is satisfactory and will do the work," is not performed unless such plant operates under such conditions in a manner satisfactory to the purchaser.⁸ In such cases it is not sufficient to show that the plant complies with the remaining requirements of the con-

sonable man. Without now deciding between these two views, it is sufficient to say that this particular term was not lightly used in the contract. It was made the subject of correspondence between the parties. Complainant was very loath to use it, saying it had had so much trouble with agreements in which this work appeared that it had ceased to admit such term into its contracts. Williamson insisted, and would sign no other; thereupon the complainant yielded. So we think the parties must have understood that Williamson was to have the absolute right to determine for himself whether the work as done effected a result satisfactory to himself. We think his determination was not capricious, because he would not have spent the additional sum which he did spend merely to satisfy a caprice." *Peck-Williamson Heating & Ventilating Co. v. McKnight*, 140 Tenn. 563, 205 S. W. 419.

² *Barrett v. Coal Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

³ *Moorman v. Plummer Lumber Co.*, 113 La. 429, 37 So. 17.

⁴ *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781.

⁵ *Allen v. Compress Co.*, 101 Ala. 574, 14 So. 362.

⁶ *Moriarity v. Board of Commissioners*, 89 N. J. L. 385, 98 Atl. 465 [affirmed, *Moriarity v. Board of Commissioners*, 90 N. J. L. 328, 100 Atl. 1070] (obiter, as contractor had twice broken provisions of contract, and had been fined therefor).

⁷ *Adams, etc., Works v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 803, 26 Atl. 745.

So of a contract to put in a plumbing and heating plant. *Fairmont Plumbing Co. v. Carr*, 54 W. Va. 272, 46 S. E. 458.

See also, *Peck-Williamson Heating & Ventilating Co. v. McKnight*, 140 Tenn. 563, 205 S. W. 419.

⁸ *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

For a similar provision, see *Peck-Williamson Heating & Ventilating Co. v. McKnight*, 140 Tenn. 563, 205 S. W. 419.

tract.⁹ Similar results have been reached under a contract to furnish a printing press,¹⁰ a separator,¹¹ a patent elevator,¹² a harvesting machine,¹³ a die,¹⁴ a binding machine,¹⁵ or an organ¹⁶ which is to operate to the satisfaction of the vendee. One who is to make a book-case to the satisfaction of another, can not recover without showing that such other was in fact satisfied. It is not enough to show that he ought to have been satisfied.¹⁷

A contract to sell realty and to furnish a "satisfactory title," means a title satisfactory to the vendee,¹⁸ and if he is dissatisfied in good faith, he may avoid the contract, even if the title is in fact marketable.¹⁹ A contract by which one party is to execute a bond to the satisfaction of the adversary party, requires actual satisfaction,²⁰ and if the adversary party, when acting in good faith, believes that the bond is not sufficient, his decision can not be reviewed.²¹ A contract to furnish beer "of satisfactory quality," means to the actual satisfaction of the purchaser,²² although it has been said that under such a contract the buyer may reject at will.²³

If a machine is sold to work in a "satisfactory" manner, this means that its operation must be satisfactory as the vendee operates it, even though a person of ordinary skill could operate it properly

⁹ *Manning v. School District*, 124 Wis. 84, 102 N. W. 350.

¹⁰ *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 1 L. R. A. 645; *Inman Manufacturing Co. v. American Cereal Co.*, 124 Ia. 737, 100 N. W. 860.

¹¹ *Haney-Campbell Co. v. Preston Creamery Association*, 119 Ia. 188, 93 N. W. 297.

¹² *Singerly v. Thayer*, 108 Pa. St. 291, 56 Am. Rep. 207.

¹³ *Walter A. Wood, etc., Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906.

¹⁴ *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278, 93 N. W. 1099.

¹⁵ *Plano Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841; *Osborne v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591.

¹⁶ *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583.

¹⁷ *McCarren v. McNulty*, 78 Mass. (7 Gray) 139.

¹⁸ *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153; *Hollingsworth v. Colthurst*, 78 Kan. 455, 18 L. R. A. (N.S.) 741, 96 Pac. 851.

See, however, § 2622, note 19.

¹⁹ *Liberman v. Beckwith*, 79 Conn. 317, 8 Am. & Eng. Ann. Cas. 271, 65 Atl. 153; *Stotts v. Miller*, 128 Ia. 633, 105 N. W. 127; *Hollingsworth v. Colthurst*, 78 Kan. 455, 18 L. R. A. (N.S.) 741, 96 Pac. 851; *Averett v. Lipscombe*, 76 Va. 404.

²⁰ *Goldberg v. Feldman*, 108 Md. 330, 70 Atl. 245.

²¹ *Goldberg v. Feldman*, 108 Md. 330, 70 Atl. 245.

²² *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263.

²³ *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263. (In this case the quantity also was left to the will of the buyer and the transaction was probably not a contract at all.)

and other persons in the vendee's business would be satisfied.²⁴ Thus a test of a heater for a residence is sufficient if made under the supervision of ordinary servants. The fact that a skilled engineer and a plumber can make it work in a satisfactory manner does not show performance.²⁵ If the machine operates reasonably well, but not to the satisfaction of the vendee, he may avoid the contract, but he can not keep the machine and recoup damages.²⁶

§ 2622. Theory of necessity of reasonable dissatisfaction. Other authorities hold that a provision in a contract not involving personal taste or feeling, or any personal element, to the effect that it is to be performed to the satisfaction of the adversary party, means only that performance must be such that the adversary party, if a reasonable man, would be satisfied therewith.¹ Accordingly, the fact that the adversary party is in fact not satisfied does not discharge his liability under this theory, if it is found that a reasonable man would have been satisfied with like performance. While this theory furnishes ample protection against unreasonable conduct on the part of the adversary party, it practically eliminates from the contract the provision that the contract is to be performed to the satisfaction of the adversary party, and it enables the party who has performed the contract to recover as though such words were not included therein.

Among contracts to which this principle applies are contracts to sink a well which will produce a satisfactory flow of water;² to

²⁴ Haney-Campbell Co. v. Creamery Association, 119 Ia. 188, 93 N. W. 297.

²⁵ Adams, etc., Co. v. Schnader, 155 Pa. St. 394, 35 Am. St. Rep. 893, 26 Atl. 745.

²⁶ Campbell Printing Press Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645.

¹ Alabama. Higgins Mfg. Co. v. Pearson, 146 Ala. 528, 40 So. 579.

Colorado. McCartney v. Badovinac, 62 Colo. 76, L. R. A. 1917A, 1146, 160 Pac. 190.

Illinois. Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248.

Iowa. Ellis v. Interstate Business Men's Accident Association, 183 Ia. 1279, L. R. A. 1918F, 414, 168 N. W. 212.

Massachusetts. Hawkins v. Graham, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312; Lockwood Mfg. Co. v. Regulator Co., 183 Mass. 25, 66 N. E. 420; C. W. Hunt Co. v. Boston Elevated Ry. Co., 199 Mass. 220, 85 N. E. 446; Cashman v. Proctor, 200 Mass. 272, 86 N. E. 284.

Michigan. Hutton v. Sherrard, 183 Mich. 356, L. R. A. 1915E, 976, 150 N. W. 135.

New York. Bowery National Bank v. Mayor, etc., 63 N. Y. 336; Thompson v. Postal Life Ins. Co., 226 N. Y. 363, 123 N. E. 750.

South Dakota. Richison v. Mead, 11 S. D. 639, 80 N. W. 131.

² Richison v. Mead, 11 S. D. 639, 80 N. W. 131.

put in a heating apparatus in "first-class working order," to be paid for on "satisfactory completion" when "such acknowledgment has been made by the owner or work demonstrated";³ and to alter a boiler, payment to be made when the owner is "satisfied the boilers as changed are a success."⁴ A contract to furnish wire doors and screens and to fit them in a house, to be paid for "on satisfactory completion of the work," is performed so that the contractor may recover if he has performed so that a reasonable man would be satisfied with such performance.⁵ In any event, the satisfaction which is provided for relates to the method in which the contractor has performed the work, and not to the original selections made by the property owner.⁶ A contract to finish wood-work "in the best workmanlike manner to the entire satisfaction of the owner," is performed by doing the work in a good and workmanlike manner.⁷ A similar result was reached under a contract for laying tiles on a roof according to certain plans and specifications to the satisfaction of the owner.⁸ A sold pumps to B, which were to work in a satisfactory manner. This was held to mean to the satisfaction of a reasonable person, and not necessarily the city engineer, though A knew that B was to deliver such pumps to the city under his contract with it, subject to the engineer's approval.⁹ Similar results have been reached under a contract to furnish an evaporator,¹⁰ or graduated milk-pans,¹¹ or a binding machine,¹² or hoisting towers and equipment therefor,¹³ to the satisfaction of the vendee. If a machine is sold under an agreement that it is to work satisfactorily and that if it does not do so the seller is to be notified and given an opportunity to send an expert to make it work satisfactorily, the purchaser must give the machine a fair test, must give the requisite notice, and if the seller's employe does not make it work satisfactorily, he must return the machine within a reasonable time.¹⁴

³ *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312.

⁴ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749.

⁵ *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579.

⁶ *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579.

⁷ *Dall v. Noble*, 116 N. Y. 230, 15 Am. St. Rep. 398, 5 L. R. A. 554, 22 N. E. 406.

⁸ *McNeil v. Armstrong*, 81 Fed. 943.

⁹ *Lockwood Mfg. Co. v. Regulator Co.*, 183 Mass. 25, 66 N. E. 420.

¹⁰ *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

¹¹ *Daggett v. Johnson*, 49 Vt. 945.

¹² *May v. Hoover*, 112 Ind. 455, 14 N. E. 472.

¹³ *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446.

¹⁴ *Auto-Fedan Hay Press Co. v. Ward*, 89 Kan. 218, 50 L. R. A. (N.S.) 783, 131 Pac. 595.

Under a contract to furnish a manufacturing plant "to the acceptance" of the adversary party, it is sufficient if a plant is furnished which would satisfy a reasonable man as a performance of the specifications therefor.¹⁵ The purchaser can not avoid the contract if the plant as furnished conforms to the specifications, although it is not sufficient to perform the functions which he decided it to perform.¹⁶ If the principal has reserved the power to approve of sales made by an agent, and if the agent has power to purchase such property himself, the principal can not refuse arbitrarily to approve a contract by which the agents agree to buy such property;¹⁷ and the vendor's refusal to investigate the sufficiency of the security which is offered, and to make inquiry of the vendee's banker to whom he is referred for information, amounts to an arbitrary refusal.¹⁸

A contract to furnish a good and satisfactory title to real estate is performed by furnishing a marketable title.¹⁹ Similar results have been reached under a contract to furnish a satisfactory lease.²⁰

A contract to do a piece of work to the "entire satisfaction" of the adversary party, has been held to be performed when done in a proper manner,²¹ as under a contract employing an actor.²² A contract to excavate for a railroad "according to stakes set by the engineer and to his satisfaction," requires excavation only to stakes then in place and does not give the engineer the right to change stakes until the cut is completed to his satisfaction.²³ So a contract to erect a wall, giving to the owner power to determine all questions as to performance, does not give him power to reject arbitrarily.²⁴ A contract for electric lighting to meet the approval of a certain electric light company and to be a first-class job, does not make such approval a condition precedent so as to oblige the contractor to obtain such inspection and approval.²⁵ A contract to

¹⁵ *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284.

¹⁶ *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284.

¹⁷ *Hutton v. Sherrard*, 183 Mich. 356, L. R. A. 1915E, 976, 150 N. W. 135.

¹⁸ *McCartney v. Badovinac*, 62 Colo. 76, L. R. A. 1917A, 1146, 160 Pac 190.

¹⁹ *Moot v. Investment Association*, 157 N. Y. 201, 45 L. R. A. 666, 52 N. E. 1.

See, however, § 2621, notes 18 and 19.

²⁰ *Mullally v. Greenwood*, 127 Mo. 138, 48 Am. St. Rep. 613, 20 S. W. 1001.

²¹ *Sloan v. Hayden*, 110 Mass. 141.

²² *Smith v. Robson*, 148 N. Y. 252, 42 N. E. 677.

²³ *Olson v. Ry.*, 22 Wash. 130, 60 Pa. 156.

²⁴ *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

²⁵ *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

sell hops, reserving to the vendees the right to terminate the contract if on examination they should determine that the hops to be packed would not produce the quality called for, does not give them the right to reject arbitrarily.²⁶ Such contract, therefore, has a consideration and is mutually binding.

A contract to furnish evidence to the satisfaction of one of the parties, is held to be performed if the evidence which is furnished is such as would satisfy a reasonable man.²⁷ A contract by which a detective is employed to ascertain the person by whom a certain crime was committed, and payment is to be made when such facts are established to the satisfaction of such person who employs such detective, is performed if the detective furnishes evidence which would satisfy a reasonable man acting in a reasonable manner.²⁸ Under a contract by which a forfeiture of an insurance policy is to be waived if the insured furnishes satisfactory evidence of his insurability, the insured performs, if his medical examination shows that his health is substantially perfect, even if the insurer is not in fact satisfied.²⁹ Under a contract of accident insurance, which provides that no recovery can be had for an accident caused by the discharge of firearms, unless the actual character of such discharge shall be proved by the testimony of at least one person other than the insured, who was an eyewitness of the event, or unless the board of directors are satisfied that the discharge was accidental, it is sufficient if evidence of the actual character of the discharge is offered which would satisfy reasonable men acting reasonably.³⁰ A provision for reinstating one whose policy has lapsed by failure to pay premiums or assessments, subject to the approval of the

²⁶ *Lilenthal v. Stearns*, 121 Fed. 197.

²⁷ *McCartney v. Badovinac*, 62 Colo. 76, L. R. A. 1917A, 1146, 160 Pac. 190; *Ellis v. Interstate Business Men's Accident Association*, 183 Ia. 1279, L. R. A. 1918F, 414, 168 N. W. 212; *Thompson v. Postal Life Ins. Co.*, 226 N. Y. 363, 123 N. E. 750.

²⁸ *McCartney v. Badovinac*, 62 Colo. 76, L. R. A. 1917A, 1146, 160 Pac. 190.

²⁹ *Thompson v. Postal Life Ins. Co.*, 226 N. Y. 363, 123 N. E. 750.

³⁰ *England. Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 782.

United States. Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 434.

Iowa. Ellis v. Interstate Business Men's Accident Association, 183 Ia. 1279, L. R. A. 1918F, 414, 168 N. W. 212.

Massachusetts. Noyes v. Commercial Travelers' Eastern Acci. Asso., 190 Mass. 171, 76 N. E. 665; *Traiser v. Commercial Travelers' Eastern Acci. Asso.*, 202 Mass. 292, 88 N. E. 901.

New York. Reynolds v. Equitable Acci. Asso., 59 Hun 13.

Tennessee. Accident Ins. Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723.

board of directors, requires reasonable action on the part of the board of directors,³¹ and it does not give them power to refuse to reinstate such member arbitrarily.³²

Under a contract between a public corporation and a paving contractor, which contains a provision that the council shall retain from the contract price money sufficient to pay unpaid claims for labor or material if sworn statements of such claims are filed with the council, and if the council is satisfied that such claims are just and unpaid, the council, if acting in good faith, may retain such amounts.³³

If a provision in a contract under which savings deposits are made, to the effect that in case of the loss or destruction of the savings bank book such deposits can not be withdrawn unless proof is made to the satisfaction of the trustees or the treasurer that such book has been lost or destroyed, is construed as giving to the trustees or the treasurer the final and uncontrolled determination of such question of fact, such provision is regarded as invalid.³⁴

§ 2623. Sufficiency of reasonable dissatisfaction. Whether the contract is one which involves personal taste or not, a provision for performance to the satisfaction of one of the parties is not performed if a reasonable man would not have been satisfied under the circumstances.¹ A contract for plastering "to the satisfaction of the owner," is not performed if it is so defective that the owner has reasonable cause for dissatisfaction.² Under a contract reserving to one party the right to terminate the contract if he is satisfied that the adversary party is delaying performance unnecessarily, his determination of such fact is final if not unreasonable.³

§ 2624. Dissatisfaction as ground for discharge of contract. It is occasionally provided that a contract is to take effect and that

³¹ *Hinchliffe v. Minnesota Commercial Men's Ass'n.*, — Minn. —, 171 N. W. 776.

³² *Hinchliffe v. Minnesota Commercial Men's Ass'n.*, — Minn. —, 171 N. W. 776.

³³ *Carlisle v. Spain*, 147 Mich. 158, 110 N. W. 532.

³⁴ *Webber v. Cambridgeport Savings Bank*, 186 Mass. 314, 71 N. E. 567.

¹ *Miller v. Atlantic City*, 74 N. J. L. 345, 68 Atl. 64; *Pormann v. Walsh*, 97

Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881.

It is said to be sufficient if the party acts "reasonably and in good faith under an honest sense of dissatisfaction." *Dubinsky v. Wells Brothers Co.*, 218 Mass. 232, 105 N. E. 1004.

² *Poorman v. Walsh*, 97 Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881.

³ *Miller v. Atlantic City*, 74 N. J. L. 345, 68 Atl. 64.

performance is to begin, but that one of the parties reserves the right to terminate such contract if he is dissatisfied with the performance of such contract. The same principles which apply to performance to the satisfaction of one of the parties, apply to conditions of this sort reserving the right to terminate the contract in case of dissatisfaction. On the one hand, genuine dissatisfaction is necessary in order to justify the termination of the contract under such a provision.¹ A provision allowing a contract to be canceled "for any good cause" on sixty days' notice by either party, means any cause assigned in good faith.² A provision in a mining contract that the owner may terminate it if satisfied that the system of mining was prejudicial to the mine, does not give him the right to terminate it arbitrarily.³ This principle applies to contracts in which the personal element is material,⁴ such as a contract of agency.⁵ Under a provision in a contract for the employment of an agent to the effect that the principal may terminate such contract if in his opinion the financial condition of the agent will make him unable to perform such contract, such election to terminate such contract must be exercised by the principal in good faith.⁶ Whether reasonable grounds for dissatisfaction must exist or whether a genuine dissatisfaction is sufficient, whether reasonable or not, is a question the solution of which depends upon the nature of the contract. If the contract is one which does not involve personal taste and the like, or personal services,⁷ such as a contract for the lease of realty which contains a provision authorizing the lessor to terminate such lease in case of dissatisfaction,⁸ the party who seeks to terminate such contract must show that he has reasonable grounds for dissatisfaction. If the contract is one which involves personal taste and feeling,⁹ such as a contract for the rendition of services of a personal nature, as long as they are "satisfactory" to

¹ *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814; *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530; *Brucker v. Manistee & G. R. Ry. Co.*, 166 Mich. 330, 130 N. W. 822; *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539; *Magee v. Scott Lumber Co.*, 78 Minn. 11, 80 N. W. 781.

² *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530.

³ *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814.

⁴ *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

⁵ *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

⁶ *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

⁷ *Barr v. Van Duyn*, 45 Ia. 228; *Clark v. Kelly (Ia.)*, 109 N. W. 292.

⁸ *Clark v. Kelly (Ia.)*, 109 N. W. 292.

⁹ *United States American Music Stores v. Kussel*, 232 Fed. 306, L. R. A. 1916F, 882.

the employer.¹⁰ such contract may be terminated at any time when the party to whom such power of terminating the contract is reserved is dissatisfied in good faith. In contracts of this sort, the existence of reasonable grounds for dissatisfaction is immaterial, and it can not be inquired into." Under a contract of agency, which by its terms may be terminated by the principal whenever he is dissatisfied with the results, the agent can not recover damages if the principal terminates such contract in good

Georgia. Mackenzie v. Minis, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

Iowa. Daniels v. Decatur County, 99 Ia. 440, 68 N. W. 718.

Michigan. Koehler v. Buhl, 94 Mich. 496; Sax v. R. R., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; Schmand v. Jandorf, 175 Mich. 88, 44 L. R. A. (N.S.) 680, 140 N. W. 996; Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N. W. 344.

Minnesota. Frary v. Rubber Co., 52 Minn. 264, 18 L. R. A. 644, 53 N. W. 1156.

New Jersey. Moriarty v. Board of Commissioners, 89 N. J. 385, 98 Atl. 465 [affirmed, Moriarty v. Board of Commissioners, 89 N. J. 385, 100 Atl. 1070].

Pennsylvania. Corgan v. George F. Lee Coal Co., 218 Pa. St. 386, 120 Am. St. Rep. 891, 67 Atl. 655.

Vermont. Rossiter v. Cooper, 23 Vt. 522.

Wisconsin. Evans v. Bennett, 7 Wis. 404.

¹⁰ **United States.** American Music Stores v. Kussel, 232 Fed. 306, L. R. A. 1916F, 882.

Georgia. Mackenzie v. Minis, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

Iowa. Daniels v. Decatur County, 99 Ia. 440, 68 N. W. 718.

Michigan. Koehler v. Buhl, 94 Mich. 496; Sax v. Detroit G. H. & M. R. R. Co., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; Schmand v. Jan-

dorf, 175 Mich. 88, 44 L. R. A. (N.S.) 680, 140 N. W. 996; Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N. W. 344.

Minnesota. Frary v. American Rubber Co., 52 Minn. 264, 18 L. R. A. 644, 53 N. W. 1156.

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¹¹ **United States.** American Music Stores v. Kussel, 232 Fed. 306, L. R. A. 1916F, 882.

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Michigan. Koehler v. Buhl, 94 Mich. 496; Sax v. R. R., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; Schmand v. Jandorf, 175 Mich. 88, 44 L. R. A. (N.S.) 680, 140 N. W. 996; Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N. W. 344.

Minnesota. Frary v. American Rubber Co., 52 Minn. 264, 18 L. R. A. 644, 53 N. W. 1156.

New Jersey. Moriarty v. Board of Commissioners, 89 N. J. 385, 98 Atl.

faith, whether upon reasonable grounds or not.¹² In case of actual dissatisfaction, whether justified or not, an employer may terminate a contract of employment as chef,¹³ gardener,¹⁴ furrier,¹⁵ candy maker,¹⁶ as mining foreman,¹⁷ or manager of a business.¹⁸ A county may discharge a superintendent of bridge work, who is employed as long as his work is satisfactory to the county commissioners, where they are dissatisfied with him for advising them to accept exorbitant bids for bridge material in which he was interested, even if such advice was not within the terms of his employment, where the superintendent and the board both treated it as part of his work.¹⁹

§ 2625. Approval of architect or engineer as condition precedent—Necessity. In the absence of a provision which either expressly or by necessary implication makes the approval of a third person, such as an architect, engineer, and the like, a condition precedent to recovery upon the contract, such approval will not be regarded as a condition precedent,¹ even though the contract provides for supervision by such architect, engineer, and the like. Clauses of this sort are not favored in construction,² and they are not extended beyond the words of the parties or the necessary infer-

465 [affirmed, *Moriarty v. Board of Commissioners*, 90 N. J. 328, 100 Atl. 1070].

Pennsylvania. *Corgan v. George F. Lee Coal Co.*, 218 Pa. St. 386, 120 Am. St. Rep. 891, 67 Atl. 655.

Vermont. *Rossiter v. Cooper*, 23 Vt. 522.

Wisconsin. *Evans v. Bennett*, 7 Wis. 404.

¹² *Garlock v. Motz Tire & Rubber Co.*, 192 Mich. 665, 159 N. W. 344.

¹³ *Bush v. Koll*, 2 Colo. App. 48.

¹⁴ *Mackenzie v. Minis*, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

¹⁵ *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157.

¹⁶ *Schmand v. Jandorf*, 175 Mich. 88, 44 L. R. A. (N.S.) 680, 140 N. W. 996.

¹⁷ *Corgan v. George F. Lee Coal Co.*, 218 Pa. St. 386, 120 Am. St. Rep. 891, 67 Atl. 655.

¹⁸ *American Music Stores v. Kussel*, 232 Fed. 306, L. R. A. 1916F, 882; *Frary v. Rubber Co.*, 52 Minn. 264, 18 L. R. A. 644, 53 N. W. 1156.

¹⁹ *Daniels v. Decatur County*, 99 Ia. 440, 68 N. W. 718.

¹ *Derby Desk Co. v. Connors Bra. Construction Co.*, 204 Mass. 461, 90 N. E. 543; *Welch v. Hubschmitt Building & Woodworking Co.*, 61 N. J. L. 57, 38 Atl. 824; *Hunn v. Pennsylvania Institution for Instruction of the Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812; *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484.

See also, *McDowell v. Hemming Mfg. Co.*, 91 N. J. L. 209, 102 Atl. 680.

² *Hunn v. Pennsylvania Institution*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812; *Baumgartner v. City of Renton*, 96 Wash. 588, 165 Pac. 484.

ences which must be drawn from the words which are used.³ It has been held that if the certificate does not specifically make the certificate of the architect a condition precedent to any recovery, but merely provides that payment shall be made upon such certificate, a contractor who has fully performed may recover on the common counts without producing such certificate or accounting for its absence.⁴ A contract which provides for manufacturing certain articles in accordance with the specifications, as laid down by a certain board, does not make the approval of such board a condition precedent to the right to recover on such contract if the articles conform to such specifications.⁵ If the property owner or the architect is by law required to obtain the approval of certain public officers to the plans according to which the building is to be constructed,⁶ and the contractor does not undertake to obtain such approval, such approval is not a condition precedent to the contractor's right to recover if he has performed the contract,⁷ even if the plans are not approved by the proper public officer.⁸

Like other contracts,⁹ such a contract must be construed as a whole;¹⁰ and a provision in one clause which makes the determination of the work by the engineer or architect final and conclusive, may be controlled by another clause which permits the property owner to interpose claim for defective work within a specified time.¹¹ At the same time an unequivocal provision for performance to the satisfaction of the architect, is not overcome by a subsequent equivocal provision.¹² A provision that materials which are delivered must be to the satisfaction of the architect, is not overcome by a subsequent provision for making payments in advance of delivery.¹³

§ 2626. Express provision for approval of architect or engineer as condition precedent—Validity. Examples of conditions precedent, the non-performance of which suspends the right of action

³ *Hunn v. Pennsylvania Institution*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁴ *Davis v. Badders*, 95 Ala. 348, 10 So. 422; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

⁵ *McDowell v. Hemming Mfg. Co.*, 91 N. J. L. 209, 102 Atl. 680.

⁶ *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863.

⁷ *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863.

⁸ *Ordway v. Newburyport*, 230 Mass. 306, 119 N. E. 863.

⁹ See § 2038.

¹⁰ *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484.

¹¹ *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484.

¹² *Bateman v. Mapel*, 145 Cal. 241, 78 Pac. 734.

¹³ *Bateman v. Mapel*, 145 Cal. 241, 78 Pac. 734.

until such conditions are performed, are often found in building and construction contracts. Under a provision that payment is to be made upon certificates to be given by a third person, such certificate is conclusive in the absence of fraud, bad faith, collusion, evident mistake or waiver.¹ A provision that an estimate of work is to be made by an engineer,² or by an architect,³ and that a cer-

¹ **Canada.** *The Queen v. Cimon*, 23 Can. S. C. 62.

United States. *Martinsburg & Potomac Ry. Co. v. March*, 114 U. S. 549, 29 L. ed. 255; *Lewis v. Ry.*, 49 Fed. 708; *Summers v. Ry.*, 49 Fed. 714; *Pauly, etc., Mfg. Co. v. Hemphill County*, 82 Fed. 698, 10 C. C. A. 595; *Mundy v. Ry.*, 67 Fed. 633; *Elliott v. Ry.*, 74 Fed. 707, 21 C. C. A. 3; *Newman v. United States*, 81 Fed. 122; *Casey v. Canton*, 253 Fed. 589; *Utah Construction Co. v. St. Louis Construction & Equipment Co.*, 254 Fed. 321.

Alabama. *Shriner v. Craft*, 166 Ala. 146, 28 L. R. A. (N.S.) 450, 51 So. 884.

Arkansas. *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702; *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620.

Colorado. *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174.

Connecticut. *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028.

Illinois. *Barbee v. Findlay*, 221 Ill. 251, 77 N. E. 590; *Andrew Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

Kansas. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

Maryland. *Filston Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228; *Pope v. King*, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Massachusetts. *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347.

Michigan. *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195; *Schneider v. Ann Arbor*, 195 Mich. 590, 162 N. W. 110.

Minnesota. *Robertson v. Grand Rapids*, 96 Minn. 69, 104 N. W. 715.

Mississippi. *Standard Const. Co. v. Brantley Granite Co.*, 90 Miss. 16, 43 So. 300.

Missouri. *Chapman v. Ry.*, 114 Mo. 542, 21 S. W. 858.

Nebraska. *Katz-Craig Contracting Co. v. Cozad*, 101 Neb. 189, 162 N. W. 490; *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

New York. *Brady v. New York*, 112 N. Y. 480, 2 L. R. A. 751, 20 N. E. 390.

Ohio. *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

Pennsylvania. *Gonder v. Ry.*, 171 Pa. St. 492, 33 Atl. 61.

Wisconsin. *McAlpine v. Academy*, 101 Wis. 468, 78 N. W. 173.

² **United States.** *Lewis v. Ry.*, 49 Fed. 708; *Summers v. Ry.*, 49 Fed. 714; *Mundy v. Ry.*, 67 Fed. 633; *Utah Construction Co. v. St. Louis Construction & Equipment Co.*, 254 Fed. 321; *Barlow v. United States*, 35 Ct. Cl. 514 [modified and affirmed, 184 U. S. 123, 46 L. ed. 463].

Illinois. *Andrew Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

Iowa. *Ross v. McArthur*, 85 Ia. 203, 52 N. W. 125.

Kansas. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

Missouri. *McGregor v. J. A. Ware Construction Co.*, 188 Mo. 611, 87 S. W. 981.

Virginia. *Johnston v. Bunn*, 108 Va. 490, 19 L. R. A. (N.S.) 1064, 62 S. E. 341.

³ **United States.** *Mitchell v. Dougherty*, 86 Fed. 859; *Toomey v. United States*, 49 Ct. Cl. 172.

Alabama. *Shriner v. Craft*, 166 Ala. 146, 28 L. R. A. (N.S.) 450, 51 So. 884.

tificate must be obtained from such engineer or architect that the work done is done in a proper manner, before the contractor can recover for such work, is generally upheld as a valid covenant.⁴ The engineer or architect must act fairly and impartially as between the parties;⁵ and his duties are analogous to those of an arbitrator.⁶

Whether authority can be given to the architect or engineer to pass upon questions involving his own default, is a question upon which there is a conflict of authority. It has been held that such power may be conferred upon him,⁷ but in other jurisdictions it is said that the arbitration clause does not apply to a dispute in which the architect himself is involved.⁸

§ 2627. Approval or certificate as express condition. Under a specific provision therefor, the obtaining of such certificate is a condition precedent to any recovery by the contractor upon his contract unless the obtaining of such certificate is excused or waived in some manner.¹ Under a contract to refer disputes arising out of a construction contract to a designated person, a refusal

Illinois. *Barbee v. Findlay*, 221 Ill. 251, 77 N. E. 590; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

Maryland. *Pope v. King*, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Massachusetts. *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Loftus v. Jorjorian*, 194 Mass. 165, 80 N. E. 235; *Hennebique Const. Co. v. Boston Cold Storage & Terminal Co.*, 230 Mass. 456, L. R. A. 1018F, 374, 110 N. E. 948.

Michigan. *Kelly v. Muskegon*, 110 Mich. 529, 68 N. W. 282; *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 116 N. W. 195.

Nebraska. *Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854.

Oregon. *Hoskins v. Powder Land & Irrigation Co.*, 90 Or. 217, 176 Pac. 124.

⁴ *Pope v. King*, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417; *Johnston v. Bunn*, 108 Va. 490, 10 L. R. A. (N.S.) 1064, 62 S. E. 341.

Contra, if the contract is for conclusive determination. *Fulton County*

v. Gibson, 158 Ind. 471, 63 N. E. 982. Or is for arbitration in advance upon the question whether the agreement has been violated. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

⁵ *Lantry Contracting Co. v. Atchison, Topeka & Santa Fe Ry.*, 102 Kan. 799, 172 Pac. 527.

⁶ *Lantry Contracting Co. v. Atchison, Topeka & Santa Fe Ry.*, 102 Kan. 799, 172 Pac. 527.

On the question of the duties of the arbitrator, see §§ 2525 and 2535 et seq.

⁷ *Firestone Tire & Rubber Co. v. Riverside Bridge Co.*, 247 Fed. 625.

⁸ *McCloskey v. Marks*, 263 Pa. St. 441, 106 Atl. 729.

On this subject in Scotch law see, *The Interpretation of Reference Clauses in Contracts*, by R. D. Melville, 16 *Juridical Review*, 297.

¹ *United States. Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N.S.) 774; *Casey v. Canton*, 253 Fed.

to submit such disputes precludes recovery by the contractor.² Thus under a building contract, a provision that the architect shall decide the value of alterations,³ or shall certify the progress of the

580; *Utah Construction Co. v. St. Louis Construction & Equipment Co.*, 254 Fed. 321.

Alabama. *First National Bank v. Fidelity & Deposit Co.*, 145 Ala. 335, 117 Am. St. Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415.

Arkansas. *Hot Springs, etc., Ry. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639; *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620.

California. *Copley v. Durand*, 153 Cal. 278, 95 Pac. 38.

Illinois. *Packard v. Van Schoick*, 58 Ill. 79; *Coey v. Lehman*, 79 Ill. 173; *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Barbee v. Findlay*, 221 Ill. 251, 77 N. E. 590; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

Kansas. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520 (obiter).

Maryland. *Filston Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228; *Pope v. King*, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Massachusetts. *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Loftus v. Jorjorian*, 194 Mass. 165, 80 N. E. 235; *Hennebique Construction Co. v. Boston Cold Storage & Terminal Co.*, 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948; *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

Michigan. *Hanley v. Walker*, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57; *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 116 N. W. 195.

Mississippi. *Standard Const. Co. v. Brantley Granite Co.*, 90 Miss. 16, 43 So. 300.

Montana. *McGlauntin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

New Jersey. *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269; *Sheyer v. Pinkerton Const. Co.* (N. J.), 59 Atl. 462.

New York. *Smith v. Briggs*, 3 Denio (N. Y.) 73; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Wangler v. Swift*, 90 N. Y. 38; *National Contracting Co. v. Hudson River Water Power Co.*, 102 N. Y. 209, 84 N. E. 965.

Ohio. *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

Pennsylvania. *O'Reilly v. Kernes*, 52 Pa. St. 214; *Hunn v. Pennsylvania Institution*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812; *McCloskey v. Marks*, 441 Pa. St. 263, 106 Atl. 729.

Texas. *Boettler v. Tendick*, 73 Tex. 488, 5 L. R. A. 270, 11 S. W. 497; *Scott v. Construction Co.* (Tex. Civ. App.), 55 S. W. 37.

Virginia. *Johnston v. Bunn*, 108 Va. 490, 19 L. R. A. (N.S.) 1064, 62 S. E. 341.

West Virginia. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436; *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815.

Wisconsin. *Wendt v. Vogel*, 87 Wis. 462, 58 N. W. 764; *Foster Lumber Co. v. Atkinson*, 94 Wis. 578, 60 N. W. 347; *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359, 79 N. W. 564; *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562.

² *Meyers v. Construction Co.*, 20 Or. 603, 27 Pac. 584; *Fulton v. Peters*, 137 Pa. St. 613, 20 Atl. 936.

³ *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583; *East Tennessee, etc., Ry. v. Mfg. Co.*, 95 Tenn. 538, 32 S. W. 635.

work done, on which certificate installments of the contract price are to be paid,⁴ or providing for his deciding other questions in dispute between the parties, makes such decision conclusive if it is made in good faith and not under evident mistake.⁵ The same principles apply to contracts for constructing waterworks.⁶ An approval by a state board,⁷ or by a highway inspector,⁸ may be made a condition precedent to recovery on the contract. So if a contract of sale to the United States provides for payment "upon producing duplicate specified certificates of the commanding officer," no recovery can be had unless such certificates are produced or a legal excuse, shown for not producing them.⁹

§ 2628. Questions as to which determination of architect or engineer final. The certificate of the architect may, by the terms of the contract, be made conclusive as to the performance in general;¹ as to the quality of materials furnished,² even where the

⁴ Ashland, etc., Co. v. Shores, 105 Wis. 122, 81 N. W. 136.

⁵ Gowen v. Pierson, 166 Pa. St. 258, 31 Atl. 83.

⁶ Covington v. Limerick (Ky.), 40 S. W. 254.

⁷ Winters v. Ramsey, 4 Ida. 303, 39 Pac. 193.

⁸ Jones v. Marlborough, 70 Conn. 583, 40 Atl. 460.

⁹ United States v. Robeson, 34 U. S. (9 Pet.) 319, 9 L. ed. 142.

¹ England. Tullis v. Jacson [1892], 3 Ch. 441.

Arkansas. Hot Springs Ry. Co. v. Maher, 48 Ark. 522, 3 S. W. 639; Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242.

Illinois. Stose v. Heissler, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161.

Massachusetts. White v. Abbott, 188 Mass. 99, 74 N. E. 305.

Michigan. Hanley v. Walker, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57.

Missouri. Williams v. The Chicago, Santa Fe & California Ry. Co., 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

New Jersey. Chism v. Schipper, 51

N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316.

New York. Wangler v. Smith, 90 N. Y. 38.

Pennsylvania. O'Reilly v. Kerns, 52 Pa. St. 214.

Texas. Boettler v. Tendick, 73 Tex. 488, 5 L. R. A. 270, 11 S. W. 497.

Wisconsin. Tetz v. Butterfield, 54 Wis. 242, 41 Am. Rep. 29, 11 N. W. 531.

² Arkansas. Brashears v. Garland School Dist., 133 Ark. 599, 202 S. W. 234.

California. Bateman v. Mapel, 145 Cal. 241, 78 Pac. 734.

Colorado. Sterling v. Hurd, 44 Colo. 436, 98 Pac. 174.

Oregon. Seaside v. Randles, — Or. —, 180 Pac. 319.

Pennsylvania. Payne v. Roberts, 214 Pa. St. 568, 64 Atl. 86.

Washington. Stimson Mill Co. v. Feigenson Engineering Co., 100 Wash. 172, 170 Pac. 573.

So as to classification of material which is excavated. McGregor v. J. A. Ware Construction Co., 188 Mo. 611, 87 S. W. 981.

contract does not make definite provision as to such quality;³ as to quantities;⁴ as to the allowance of extra time for performance;⁵ as to the compensation to be made for extra work;⁶ as to change in price due to alteration in plans,⁷ and as to the cost of completion where the owner completes the contract under a clause permitting him so to do in the event of default by the contractor.⁸

The contract may provide that the architect shall determine the meaning thereof.⁹ Under such a clause his decision that a stipulation for damages for each day's delay is a covenant for liquidated damages, and not for a penalty, is conclusive.¹⁰

By the express terms of the contract, the certificate may be conclusive as to all questions arising under the contract, including measurements, valuations, breach, payments, and the like.¹¹ If the contract makes the decision of the architect or engineer final and conclusive upon the parties as to all questions arising under such contract, the determination of the engineer is final and conclusive in the absence of fraud, bad faith, collusion, evident mistake, and the like.¹²

³ *Brashears v. Garland School Dist.*, 133 Ark. 509, 202 S. W. 234.

⁴ *National Contracting Co. v. Hudson River Water Power Co.*, 170 N. Y. 439, 63 N. E. 450; *Hoskins v. Powder Land & Irrigation Co.*, 90 Or 217, 176 Pac. 124.

⁵ *Firestone Tire & Rubber Co. v. Riverside Bridge Co.*, 247 Fed. 625, 160 C. C. A. 35; *Toomey Bros. v. United States*, 49 Ct. Cl. 172; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044; *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815.

⁶ *North American Ry. Construction Co. v. R. E. McMath Surveying Co.*, 116 Fed. 169; *Hennebique Const. Co. v. Boston Cold Storage & Terminal Co.*, 230 Mass. 456, 119 N. E. 948; *Guthat v. Gow*, 95 Mich. 527, 55 N. W. 442; *Sheyer v. Pinkerton Const. Co. (N. J.)*, 59 Atl. 462.

⁷ *Connors v. United States*, 130 Fed. 609; *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

⁸ *White v. Abbott*, 188 Mass. 99, 74 N. E. 305.

⁹ *United States. Merrill - Ruckgaber Co. v. United States*, 241 U. S. 387, 60 L. ed. 1058 [affirming judgment, *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553].

Illinois. Hennessey v. Metzger, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058.

Massachusetts. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347; *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

Virginia. Rosenberg v. Turner, — Va. —, 98 S. E. 763.

Wisconsin. Keachie v. Starkweather Drainage District, 168 Wis. 298, 170 N. W. 236.

¹⁰ *Hennessey v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058.

¹¹ *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

¹² *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 60 L. ed. 1058 [affirming judgment, *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553];

§ 2629. Who can determine performance as condition precedent.

The fact that the engineer selected by the parties is in the employment of one of the parties to the contract, and is therefore possibly biased in his judgment,¹ or that he is a stockholder,² or a former member of a board of directors,³ of the adversary party to the contract, does not make such provision unenforceable. The fact that the engineer, architect, and the like, is an employe of one of the parties, makes it necessary that he should exercise the utmost diligence and good faith in determining the questions which are submitted to him for determination.⁴

Since the power to determine questions between the adversary parties to a contract is personal,⁵ an architect or engineer can not delegate his authority to decide questions of fact,⁶ unless the parties to the building contract acquiesce in the selection of the person whom he designates,⁷ although he may base his findings on the report of his assistants.⁸ If one of the parties to the contract,⁹ such as the property owner,¹⁰ acquiesces in inspection by an employe of the engineers whose determination is to be final in accordance with the terms of the contract, such acquiescence waives the right of such party to demand a personal inspection by such engineers.

If the contract, either by express terms or by fair implication, shows that the engineer is not to make personal inspection of all the work, he may act through his agents or employes and may issue certificates based on their report.¹¹

Marsch v. Southern New England R. Corp., 230 Mass. 483, 120 N. E. 120; *Rosenberg v. Turner*, — Va. —, 98 S. E. 703; *Keachie v. Starkweather Drainage District*, 168 Wis. 298, 178 N. W. 236.

¹ *Eckersley v. Harbor Board* [1894], 2 Q. B. 667; *Ives v. Williams* [1894], 2 Ch. 478; *Shriner v. Craft*, 166 Ala. 146, 28 L. R. A. (N.S.) 450, 51 So. 884; *Ogden v. United States*, 60 Fed. 725; *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520; *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

² *Williams v. Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

³ *Chicago Athletic Association v. Mfg. Co.*, 77 Ill. App.

⁴ *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

⁵ See §§ 2250 et seq.

⁶ *Spencer v. Silk Co.*, 112 Fed. 638.

⁷ *Seretto v. Rockland, S. T. & O. H. Ry.*, 101 Me. 140, 63 Atl. 651; *Haskin-Wood Vulcanizing Co. v. Ship-Building Co.*, 94 Va. 439, 26 S. E. 878.

⁸ *Richmond College v. Scott-Nuckols Co.*, — Va. —, 98 S. E. 1.

⁹ *Richmond College v. Scott-Nuckols Co.*, — Va. —, 98 S. E. 1.

¹⁰ *Richmond College v. Scott-Nuckols Co.*, — Va. —, 98 S. E. 1.

¹¹ *Richmond College v. Scott-Nuckols Co.*, — Va. —, 98 S. E. 1.

If the architect or engineer designated in the contract as the person to determine questions of performance, is subsequently discharged by his employer, he has no longer power to decide such questions,¹² and the contractor is not obliged to obtain his certificate,¹³ but he may recover without a certificate,¹⁴ or he may obtain a certificate from the architect actually in charge of the work.¹⁵ If the engineer, whose certificate and final estimate should be a condition precedent to the right of the contractor to recover full compensation, does not delay unreasonably, the contractor has no power to employ another engineer to make such final estimate without the consent of the property owner;¹⁶ and accordingly he can not bring an action against the property owner based upon such estimate.¹⁷ After the architect or engineer has rendered a decision and communicated it, his employer can not revoke his authority so as to render such decision inoperative.¹⁸

If, by the terms of the contract, questions of performance are to be decided by the owner and the architect, a decision of such question by the architect alone is not binding upon the owner.¹⁹

§ 2630. On whom determination of performance is binding. On the one hand, in the absence of fraud or evident mistake, the certificate given by the architect or engineer is binding upon the contractor.¹ Thus the architect's decision that certain paving was not constructed in accordance with the contract,² is conclusive. After the engineer or architect has once decided the question, which

¹² *Wallis Iron Works v. Park Association*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140.

¹³ *Fitts v. Reinhart*, 102 Ia. 311, 71 N. W. 227; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

¹⁴ *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

¹⁵ *Griffith v. Happersberger*, 86 Cal. 606, 614, 26 Pac. 137, 487.

¹⁶ *Johnson v. Bunn*, 108 Va. 490, 62 S. E. 341.

¹⁷ *Johnson v. Bunn*, 108 Va. 490, 62 S. E. 341.

¹⁸ *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347.

¹⁹ *Welch v. Woodworking Co.*, 61 N.

J. L. 57, 38 Atl. 824; *Sicilian Asphalt Paving Co. v. Williamsport*, 186 Pa. St. 256, 40 Atl. 471; *Pormann v. Walsh*, 97 Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881.

¹ *United States. Bowe v. United States*, 42 Fed. 761.

Idaho. Thompson v. Bradbury, 5 Ida. 760, 51 Pac. 758; *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Ida. 5, 93 Pac. 789.

Illinois. Brownell Improvement Co. v. Critchfield, 197 Ill. 61, 64 N. E. 332. *New York. In re Freel*, 148 N. Y. 165, 42 N. E. 586.

Washington. Craig v. Geddis, 4 Wash. 390, 30 Pac. 396.

² *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61, 64 N. E. 332.

under the terms of the contract he was to decide, and has given his certificate passing upon such fact, he can not reconsider such question and give a certificate to the contrary effect;³ nor can his successor,⁴ nor another engineer in the owner's employ.⁵ An engineer can not, by approving stone to be quarried from a specified quarry, preclude his successor from rejecting the stone actually offered under such contract.⁶ After the certificate has once been delivered to take effect, the subsequent fate of the instrument is immaterial. Hence, if the contractor redelivered the certificate to the architect, such certificate is still binding upon the owner.⁷

The certificate of the architect or engineer, or acceptance by him of work done, is usually made binding upon the owner, and in the absence of fraud or evident mistake, the owner is concluded thereby as to all questions which such certificate purports to pass upon, if the party giving the certificate was made by the terms of the contract the proper person to pass upon such question.⁸ The fact that the architect signed the contract as agent of the owner, does not prevent the operation of a provision which in effect makes

³ *Gulf, etc., Ry. v. Ricker* (Tex.), 17 S. W. 382.

⁴ *Murray v. Regina*, 26 Can. S. C. 203.

⁵ *Chicago, etc., Ry. v. Price*, 138 U. S. 185, 34 L. ed. 917.

⁶ *United States v. Barlow*, 184 U. S. 123, 46 L. ed. 463 [modifying, 35 Ct. Cl. 514].

⁷ *Arnold v. Bournique*, 144 Ill. 132, 36 Am. St. Rep. 419, 20 L. R. A. 493, 33 N. E. 530.

⁸ *United States. Martinsburg, etc., Ry. v. March*, 114 U. S. 549, 29 L. ed. 255; *Sheffield, etc., Ry. v. Gordon*, 151 U. S. 285, 38 L. ed. 164; *Chicago, Santa Fe & California Ry. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917.

Alabama. Shriner v. Craft, 166 Ala. 146, 28 L. R. A. (N.S.) 450, 51 So. 884.

Arkansas. Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242.

California. Tally v. Parsons, 131 Cal. 516, 63 Pac. 833.

Connecticut. O'Keefe v. Church, 50 Conn. 551, 22 Atl. 325.

Dakota. McGuire v. Rapid City, 6 Dak. 346, 5 L. R. A. 752, 43 N. W. 346.

Florida. Wilcox v. Stephenson, 30 Fla. 377, 11 So. 659.

Idaho. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Ida. 5, 93 Pac. 789.

Illinois. Korf v. Lull, 70 Ill. 420 [s. c., 84 Ill. 225]; *International Cement Co. v. Blifeld*, 173 Ill. 179, 50 N. E. 716.

Massachusetts. Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

Michigan. Schuler v. Eckert, 90 Mich. 165, 51 N. W. 198; *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

Minnesota. Robertson v. Grand Rapids, 96 Minn. 69, 104 N. W. 715.

Missouri. Nofsinger v. Ring, 71 Mo. 149, 36 Am. Rep. 456; *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23, 57 S. W. 746.

Nebraska. Katz - Craig Contracting Co. v. Cozad, 101 Neb. 189, 162 N. W. 490; *Howard County v. Peshaw*, — Neb. —, 172 N. W. 55.

New Jersey. Sisters of Charity v. Smith (N. J. Eq.), 46 Atl. 598.

the certificate of the architect binding on the owner,⁹ especially if the owner has approved such contract.¹⁰ A clause which makes the certificate of the engineer or architect binding upon the contractor, is construed as making it binding upon the owner.¹¹ As far as this involves the effect of the architect's directions given to the contractor during the performance of the contract, it is undoubtedly correct, since, if such directions were not conclusive upon the owner, the contractor might comply with the directions of the architect literally, and he might then be unable to recover from the owner.¹² However, a provision to the effect that buildings were to be constructed in accordance with plans and specifications, and to the satisfaction of a specified architect, to be testified by his certificate, has been held not to make such certificate conclusive upon the property owner.¹³ The certificate of the architect or engi-

Pennsylvania. *Kennedy v. Poor*, 151 Pa. St. 472, 25 Atl. 119; *Bowman v. Stewart*, 165 Pa. St. 394, 30 Atl. 988.

Texas. *Boettler v. Tendick*, 73 Tex. 488, 5 L. R. A. 270, 11 S. W. 497.

Washington. *Hughes v. Brävinder*, 9 Wash. 595, 38 Pac. 209.

"It is difficult to see what effect should be given the acceptance of work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms." *Sheffield, etc., Co. v. Gordon*, 151 U. S. 285, 292, 38 L. ed. 164.

⁹ *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

¹⁰ *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

¹¹ *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Andrew Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35; *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

¹² *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

¹³ *Mercantile Trust Co. v. Hensey*, 205 U. S. 208, 51 L. ed. 811.

"We do not think this certificate was conclusive, and it did not, therefore, bar the maintenance of this action. The language of the contract, upon which the claim is based, is set out in the foregoing statement, and while it provides that the work shall be completed agreeably to the drawings and specifications made by M. D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, it omits any provision that the certificate shall be final and conclusive between the parties. In other words, the contract provides that before the builder can claim payment at all he must obtain the certificate of the architect; but after such certificate has been given, there is no provision which bars the plaintiff from showing a violation of the contract in material parts, by which he has sustained damage. A contract which provides for the work on a building to be performed

neer is accordingly admissible in evidence as tending to show performance.¹⁴

Conversely, if a certificate of failure of performance is to be given by the architect to enable the owner to terminate the contract and to complete the work himself, the omission to give such certificate prevents the owner from acting under such clause of the contract,¹⁵ and his subsequent certificate of the cost of such completion is not conclusive and is not even admissible as evidence.¹⁶

By specific provision, however, the certificate of an engineer may be conclusive upon the contractor, but not upon the adversary party.¹⁷

The determination of an architect or engineer agreed upon by the parties to the contract, is not binding upon third persons who have contracts with either the owner or contractor,¹⁸ unless the contract with such third person makes performance of his contract subject to the approval of such engineer.¹⁹ A subcontractor whose contract does not contain a provision making the decision of the engineer or architect of the property owner conclusive, is not bound by a certificate of such engineer given to the principal contractor and fixing the amount which the principal contractor lost by reason of the subcontractor's failure to perform in time.²⁰ If the contract between the principal contractor and the subcontractor gives power to the architect to fix the amount of damages due to the failure of the subcontractor to perform, the architect may include

in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications. *Glacius v. Black*, 50 N. Y. 145; *Fontano v. Robbins*, 22 App. D. C. 253." *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811.

¹⁴ *O'Loughlin v. Poli*, 82 Conn. 427, 74 Atl. 763; *McMillen v. School District*, — Mich. —, 167 N. W. 48.

¹⁵ *Champlain Construction Co. v. O'Brien*, 104 Fed. 930; *O'Keefe v. Church*, 59 Conn. 551, 22 Atl. 325; *In-*

ternational Cement Co. v. Blifeld, 173 Ill. 179, 50 N. E. 716; *Charlton v. Scoville*, 144 N. Y. 691, 39 N. E. 304.

¹⁶ *Charlton v. Scoville*, 144 N. Y. 691, 39 N. E. 394.

¹⁷ *O'Brien v. New York*, 139 N. Y. 543, 35 N. E. 323.

¹⁸ *Wallace v. Oregon Engineering & Construction Co.*, 90 Or. 31, 174 Pac. 156; *Barclay v. Deckerhoof*, 171 Pa. St. 378, 33 Atl. 71; *Modern Steel Structural Co. v. English Const. Co.*, 129 Wis. 31, 108 N. W. 70.

¹⁹ *White v. Abbott*, 188 Mass. 99, 74 N. E. 305; *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027.

²⁰ *Modern Steel Structural Co. v. English Const. Co.*, 129 Wis. 31, 108 N. W. 70.

the compensation made to the contractor for supervising the performance of the work after the default of the subcontractor.²¹ If the contract between the principal contractor and the property owner provides that all disputes shall be settled by the engineer, such provision does not give to the engineer power to pass on the validity of a contract between the principal contractor and a subcontractor.²²

§ 2631. Power of architect or engineer. The power of the architect or engineer to bind the employer, depends upon the power conferred upon him by such employer, either in the building contract with the contractor, or in the contract of employment of such architect or engineer.¹ Outside of such authority, the architect or engineer has not, by virtue of his position, general power to pass upon questions of fact and thereby to conclude his employer,² or to modify terms in the contract already entered into.³ In the absence of a specific grant of authority, the architect has no power to change plans,⁴ or to waive a provision for liquidated damages,⁵ although performance of the contract must be made to his satisfaction. If the architect or engineer demands material of a more expensive kind than that stipulated for by the contract, and arbitrarily refuses the use of material which conforms to the contract, it has been held that the contractor may comply with such demands and may recover the difference in the cost of such material from the owner.⁶

²¹ *White v. Abbott*, 188 Mass. 99, 74 N. E. 305.

²² *Wallace v. Oregon Engineering & Construction Co.*, 90 Or. 31, 174 Pac. 156.

¹ *Guthrie v. Carpenter*, 162 Ind. 417, 70 N. E. 486; *Seaside v. Randles*, — Or. —, 180 Pac. 319; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543.

² *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811 [affirming, *Mercantile Trust Co. v. Hensey*, 27 D. C. App. 210]; *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983.

³ *Arkansas. Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242.

District of Columbia. Fontano v. Robbins, 22 D. C. App. 253.

Massachusetts. McIntosh v. Hastings, 156 Mass. 344, 31 N. E. 298; *Leverone v. Arancio*, 170 Mass. 439, 61 N. E. 45.

West Virginia. Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 61 S. E. 815.

Wisconsin. Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543.

⁴ *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543.

He may change the plans if so authorized by his principal. *Guthrie v. Carpenter*, 162 Ind. 417, 70 N. E. 486.

⁵ *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815.

⁶ *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. 640.

The adversary party is not precluded by the action of the architect any further than he has agreed in advance. Thus a provision requiring payment under the contract to be upon certificate, but making no provision for extras, does not prevent the contractor from recovering for extras.¹ Under a provision in a contract requiring a certain specified make of article or its equivalent, the architect has no power to refuse arbitrarily to permit the contractor to use any other material than such designated make.²

A provision which makes the architect or the engineer the judge of the performance of the contract, assumes that he will act in accordance with his personal knowledge, expert and otherwise;³ and accordingly it is not necessary that he should give notice or hearing before he decides one of the questions submitted to him.⁴

§ 2632. Form of certificate. A written certificate is not a condition precedent unless express provision is made therefor.¹ A provision that work is to be done to the satisfaction of a superintendent,² does not require such satisfaction to be expressed in the form of a written certificate unless so stated. Under a provision in a contract for payment when the building is "completed and accepted by the architect," a written certificate of his approval, though valuable, is not indispensable.³ On the other hand, if a written certificate is provided for by the contract, the oral approval of the architect is insufficient if the owner has not waived the production of the written certificate.⁴

The form of the certificate is immaterial,⁵ unless the contract makes some express provision with reference thereto. As such contracts are ordinarily drawn, the certificate must be in writing and signed by the architect or engineer.⁶ If the architect is to give a

¹ Jacob v. Weisser, 207 Pa. St. 484, 56 Atl. 1065.

² Camp v. Neufelder, 49 Wash. 426, 95 Pac. 640.

³ Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

⁴ Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

See on this subject §§ 2536 et seq., with reference to the duty of arbitrators to give notice and hearing.

⁵ Gubbins v. Lautenschlager, 74 Fed. 160; Devlan v. Wells, 65 N. J. L. 213, 47 Atl. 467.

² Gubbins v. Lautenschlager, 74 Fed. 160.

³ Devlan v. Wells, 65 N. J. L. 213, 47 Atl. 467.

⁴ Lamprell v. Billericay Union, 3 Exch. 283.

⁵ Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550; Eastham v. Western Const. Co., 36 Wash. 7, 77 Pac. 1051.

⁶ Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 450, L. R. A. 1915F, 374, 119 N. E. 948.

certificate of dissatisfaction with the work as done to enable the owner to terminate the employment of the contractor, such certificate can not be given by a confidential letter written by the architect to the owner and not communicated to the contractor.⁷

§ 2633. Contents of certificate. A certificate which recites performance of the contract in substance is sufficient;¹ and it need not follow the language of the contract which specifies the facts which must appear in such certificate.² Under a contract which requires that payment should be made upon written certificate, an indorsement of "O. K." on the bills is sufficient.³

It is ordinarily contemplated by the contract, which provides for preliminary certificates and estimates, that the value fixed thereby is to be approximate and not actual or final.⁴ The final certificate of the architect, on the other hand, must be complete⁵ and unconditional.⁶ The final certificate must fix the amount due so that both parties to the contract can learn such fact from such certificate.⁷ The certificate must show the decision of the architect upon the matters which are submitted to him by the contract for final determination.⁸ A certificate which shows that the architect or engineer leaves the final amount to be adjusted by the parties themselves, is insufficient.⁹ A certificate which states that the delays in performance were due partly to one cause and partly to another, is too indefinite.¹⁰ A letter written by the architect or engineer to the contractor, which purports to be an acceptance of the building on condition that certain items are "satisfactorily

⁷ Wilson v. Borden, 68 N. J. L. 627, 54 Atl. 815.

¹ Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550; Eastham v. Western Const. Co., 36 Wash. 7, 77 Pac. 1051.

² Eastham v. Western Const. Co., 36 Wash. 7, 77 Pac. 1051.

³ Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550.

⁴ P. M. Hennessy Construction Co. v. Hart, 141 Minn. 449, 170 N. W. 597.

⁵ Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948

⁶ Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948.

⁷ Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 N. E. 468; Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948.

⁸ Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 N. E. 468; Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948.

⁹ Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 N. E. 468.

¹⁰ Hinkley v. United States, 49 Ct. Cl. 148.

attended to at once," and which does not specify the amount which is due, is not a final certificate for payment within the meaning of the contract.¹¹

The certificate given by the architect is not a performance of a condition precedent, unless it shows on its face his determination in the contractor's favor of all the facts made by the contract conditions precedent, and the enforcement of liability by the contractor.¹² Thus a certificate that a certain amount of railroad track is "laid, that trains have been run over the same, and that it is in a suitable condition for traffic," does not entitle the contractor to payment where he was to be paid when such amount of track was "fully completed and equipped" in "suitable condition for running trains thereon," and providing that the certificate of the engineer should be conclusive.¹³ On the other hand, a finding by the architect, that a certain amount should be retained until it is determined whose fault it is that certain work has not been done, is not conclusive that it was the fault of the contractor, and does not therefore prevent him from recovering such amount if he can show that the fault was not his.¹⁴

§ 2634. Effect of certificate or approval. If the contract provides in express language that the certificate is not conclusive, and that it does not relieve the contractor from his liability to make good all defects, such certificate is of course not conclusive.¹ A provision in a contract which gives to the architect power to reject materials,² or to determine the amounts to be allowed for alterations,³ does not make his certificate conclusive so as to relieve the contractor from his express covenant to perform in accordance with the plans and specifications. If the contract provides that the certificate of the architect shall not relieve the contractor from his duty to perform in a good and workmanlike manner, the cer-

¹¹ *Hennebique Construction Co. v. Boston Cold Storage & Terminal Co.*, 230 Mass. 456, L. R. A. 1918F, 374, 119 N. E. 948.

¹² *Mockler v. St. Vincent's Institution*, 87 Mo. App. 473.

¹³ *Kansas City, etc., Ry. v. Perkins*, 88 Tex. 66 [sub nomine, *Perkins v. Locke*, 29 S. W. 1048]

¹⁴ *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631, 25 Atl. 747. And see *Rob-*

inson v. Baird, 165 Pa. St. 505, 30 Atl. 1010.

¹ *Robins v. Goddard*, [1905] 1 K. B. 294; *Young v. Stein*, 152 Mich. 310, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

² *Seaside v. Randles*, — Or. —, 180 Pac. 319.

³ *Hennebique Const. Co. v. Boston Cold Storage & Terminal Co.*, 230 Mass. 456, 119 N. E. 948.

tificate is, of course, not conclusive as to such performance.⁴ A provision to the effect that the decision of the engineer is to be final as to the meaning of the plans and specifications, does not confer power upon the engineer to modify plain and unequivocal provisions of the contract,⁵ and his estimate or certificate which is given as a result of such unauthorized modification is not conclusive.⁶

A certificate of an architect or engineer will not be regarded as conclusive unless the plain and unequivocal language of the contract requires that such effect should be given to it.⁷

Whether a provision which gives to the architect the power to determine whether the contract has been performed or not, requires him to pass upon the work as it is performed, or whether he may reserve his decision until the contract is completed, is a question upon which there is a conflict of authority. In some jurisdictions it is said that the architect or engineer must decide the sufficiency of performance as the contract is being performed,⁸ and that his failure to object to defective work while it is being constructed prevents him from raising such question thereafter.⁹ In other jurisdictions it is said that the architect or engineer has no power to accept the work while it is being performed, so as to bind the owner unless the contract clearly gives him such power,¹⁰ and his failure to object to defective work as it is done does not prevent his principal from objecting thereto.¹¹ If certificates are given while the work is progressing, such certificates are final as to all matters which were within the knowledge of the architect when such cer-

⁴ *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

⁵ *Dyer v. Middle Kittitas Irrigation District*, 40 Wash. 238, 82 Pac. 301.

⁶ *Dyer v. Middle Kittitas Irrigation District*, 40 Wash. 238, 82 Pac. 301.

⁷ *England. Robins v. Goddard*, [1905] 1 K. B. 204.

United States. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 L. ed. 811; *Central Trust Co. v. Louisville, etc., St. L. & T. R. R. Co.*, 70 Fed. 282.

Massachusetts. Hennebique Const. Co. v. Boston Cold Storage & Terminal Co., 230 Mass. 456, 119 N. E. 948.

Michigan. Young v. Stein, 152 Mich.

310, 125 Am. St. Rep. 412, 17 L. R. A. (N.S.) 231, 116 N. W. 195.

Oregon. Seaside v. Randles, — Or. —, 180 Pac. 319.

Washington. Dyer v. Middle Kittitas Irrigation District, 40 Wash. 238, 82 Pac. 301.

⁸ *Kunze v. Jones*, 200 Mich. 453, 166 N. W. 904; *Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co.*, 82 N. J. Eq. 246, 87 Atl. 235.

⁹ *Kunze v. Jones*, 200 Mich. 453, 166 N. W. 904.

¹⁰ *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174.

¹¹ *Baumgartner v. Renton*, 96 Wash. 588, 165 Pac. 484.

tificate was given,¹² such as apparent defects. Such certificates are not conclusive as to defects which were not apparent when they were given, but which become apparent subsequently,¹³ especially if the contractor has promised to repair such defects.¹⁴ A mistake made by the engineer in issuing instalment certificates, may be corrected by him at the final estimate.¹⁵

It may be provided specifically in the contract that a certificate given while work is in progress does not exempt the contractor from liability to replace work which is subsequently discovered to have been performed improperly.¹⁶ Under such a provision, a certificate which is given during the progress of the work does not prevent the owner from setting up a subsequent claim on account of defective material.¹⁷ If a contract provides that the certificate of an architect shall not be binding upon the property owner until the final acceptance of the building, final acceptance is impossible if the contractor abandons it before it is completed.¹⁸

§ 2635. Approval of attorney as condition precedent. It is occasionally provided in contracts, unless the approval of the attorney of one of the parties in favor of the validity of the transaction is obtained, the transaction shall be void.¹ Provisions of this sort are found in contracts for the purchase of land,² in contracts for making advances on the security of land,³ and in contracts for the

¹² *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822.

¹³ *Copley v. Durand*, 153 Cal. 278, 16 L. R. A. (N.S.) 791, 95 Pac. 38.

¹⁴ *Copley v. Durand*, 153 Cal. 278, 16 L. R. A. (N.S.) 791, 95 Pac. 38.

¹⁵ *O'Brien v. New York*, 139 N. Y. 543; 35 N. E. 323.

¹⁶ *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112.

¹⁷ *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112.

¹⁸ *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112.

¹ *England. Williams v. Edwards*, 2 Sim. 78.

United States. Michigan Stone & Supply Co. v. Harris, 81 Fed. 928.

California. Church v. Shanklin, 95 Cal. 626, 17 L. R. A. 207, 30 Pac. 789.

Massachusetts. Gilson v. Cambridge Savings Bank, 180 Mass. 444, 62 N. E. 728; *Glidden v. Massachusetts Hospital Life Ins. Co.*, 187 Mass. 538, 73 N. E. 538.

North Carolina. Webb v. School District, 143 N. Car. 299, 55 S. E. 719.

² *Williams v. Edwards*, 2 Sim. 78; *Church v. Shanklin*, 95 Cal. 626, 17 L. R. A. 207, 30 Pac. 789.

As to the merger of such provision in the deed, see, *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850 [sub nomine, *Loftus v. Read*, 31 L. R. A. (N.S.) 457].

³ *Gilson v. Cambridge Savings Bank*, 180 Mass. 444, 62 N. E. 728; *Glidden v. Massachusetts Hospital Life Ins. Co.*, 187 Mass. 538, 73 N. E. 538.

purchase of bonds.⁴ Full effect is given to such provisions, and it is generally held that if the attorney is acting in good faith his decision is final.⁵ It has, however, been held that a contract to

⁴Michigan Stone & Supply Co. v. Harris, 81 Fed. 928; Webb v. School District, 143 N. Car. 209, 55 S. E. 719.

⁵England. Williams v. Edwards, 2 Sim. 78.

United States. Michigan Stone & Supply Co. v. Harris, 81 Fed. 928.

California. Church v. Shanklin, 95 Cal. 626, 17 L. R. A. 207, 30 Pac. 789.

Massachusetts. Glidden v. Massachusetts Hospital Life Ins. Co., 187 Mass. 538, 73 N. E. 538.

North Carolina. Webb v. School District, 143 N. Car. 209, 55 S. E. 719.

"The subject-matter of this contract was the negotiable bonds to be issued for street improvements to be made under a contract between the city and the plaintiff in error. They had not been issued when this agreement was entered into. It was a most reasonable and prudent thing for proposing purchasers to stipulate for some security against the invalidity of such bonds before being required to receive and pay for them. . . . The plain meaning of this contract was: (1) That plaintiffs in error were to furnish certified copies of the proceedings under which these bonds were issued. (2) Defendants in error were to fairly and honestly submit this record, when furnished, to the judgment of the counsel selected by them. (3) The counsel thus selected must not capriciously and arbitrarily reject the bonds, but on the record, honestly and fairly give his judgment, as to their legality. . . . The buyers employed counsel, a gentleman particularly skilled in the matter of the validity of municipal bonds, and submitted this evidence to him and procured his opinion. . . . The question of the validity of the bonds was to be settled by the opinion of a third person, whose

judgment was to be a legal opinion based upon the law and facts touching these bonds. Neither party would be concluded by an opinion rendered arbitrarily and without the honest intent of deciding fairly and rationally. The contract seems to come fairly within the principle applicable to contracts under which settlements between parties are made dependent upon the certificate of some third person. The rule in such cases as that, in the absence of fraud, or such gross misconduct as would necessarily imply bad faith, or the failure to exercise an honest judgment, the action of such third person should conclude the parties." Michigan Stone & Supply Co. v. Harris, 81 Fed. 928 [quoted in Webb v. School District, 143 N. Car. 209, 55 S. E. 719].

"The application signed by the plaintiff in this case contained this language: 'That the title to the above mentioned real estate is to be examined and the papers prepared by one of the solicitors of the bank; and that such title will not be considered satisfactory, if the estate is held subject to any conditions or restrictions. The expense of examining the title, whether finally accepted or rejected, is to be borne by the undersigned, etc.' Here is a plain implication that the title must be satisfactory to the solicitor of the bank, and that it may be accepted or rejected by him, according to his opinion in regard to its validity. We think the reasonable interpretation of this language, in the connection in which it is used, is that the title must be such as the solicitor of the bank, acting in good faith in the exercise of his judgment, deems good. By way of special explanation it is said that it will not be considered satisfactory if the estate is held subject

furnish a "first-class" title, to be passed upon by vendee's attorney, is performed by furnishing a good marketable title without regard to the actual satisfaction of the attorney.⁸

§ 2636. Other illustrations of approval by third person. A contract for the transportation of a passenger may provide that he shall establish his identity to the satisfaction of some specified agent of the carrier.¹ Full effect is given to such provision, and a passenger in such case establishes his identity to the satisfaction of such agent if the latter acts honestly and in good faith.² It will not be presumed, however, that the parties agree to make the agent of the carrier the judge of the facts unless the contract clearly provides therefor.³ A provision in a ticket which requires the passenger to sign his name or otherwise to identify himself on demand, does not make the agent of the carrier the judge of his identity.⁴

A contract of insurance, especially in a mutual benefit society, may provide, if the insured has ceased to be a member, as by reason of non-payment of dues, that he may be reinstated by furnishing the certificate of a physician, stating that he is in good health.⁵

to any conditions or restrictions. In view of the purpose of the application and the relations of the parties, it would not be reasonable to suppose that the bank was to accept the title and make the loan, if, in the opinion of its solicitor, there were such defects or uncertainties in it as would expose the holder to a risk of loss from an outside claimant. In this case the record shows an outstanding tax title whose validity could not be determined without resorting to oral testimony. Furthermore, the release of a mortgage incumbrance was by a deed which purported to be executed by an attorney of the mortgagee, while there was nothing to show that any power of attorney had been acknowledged and recorded as required by the Pub. Sts., c. 120, § 14. Gen. Sts., c. 89, § 20. We consider the solicitor's report that the title was not satisfactory for the reasons shown by the record, a sufficient justification of the defendant's refusal to make the loan." *Gilson v. Cambridge Savings Bank*, 180 Mass. 444, 62 N. E. 728.

⁸ *Vought v. Williams*, 120 N. Y. 253,

17 Am. St. Rep. 634, 8 L. R. A. 591, 24 N. E. 195 (obiter, as the title was not, in fact, marketable).

¹ *Bethea v. Northeastern Ry.*, 26 S. Car. 91, 1 S. E. 372.

² *Bethea v. Northeastern Ry.*, 26 S. Car. 91, 1 S. E. 372.

³ *Marlow v. Southern Pacific Co.*, 151 Cal. 383, 121 Am. St. Rep. 127, 90 Pac. 928 [distinguishing, *Southern Ry. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166, 30 S. E. 732, and *Central Georgia Ry. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874].

⁴ *Marlow v. Southern Pacific Co.*, 151 Cal. 383, 121 Am. St. Rep. 127, 90 Pac. 928 [distinguishing, *Southern Ry. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166, 30 S. E. 732, and *Central Georgia Ry. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874].

⁵ *Lyon v. Supreme Assembly*, 153 Mass. 83, 26 N. E. 236; *Societa Unione Fratellanza Italiana v. Leyden*, 225 Mass. 540, L. R. A. 1917C, 256, 114 N. E. 738; *Jackson v. Northwestern Mutual Relief Association*, 78 Wis. 463, 47 N. W. 733.

Full effect is given to such provisions.⁶ A certificate by a physician, to the effect that the member is still sick with a specified ailment, but is improving, is not a performance of such condition.⁷ Under a provision which requires the insured to furnish a satisfactory certificate of health, the insurance company can not refuse reinstatement on the ground that the company does not consider it sufficient, if in fact it is sufficient.⁸

A contract by which a railway employs a surgeon, may provide that his fees are to be fixed ultimately by the chief surgeon and other designated officials.⁹

Contracts of sale occasionally contain provisions by which questions as to quality,¹⁰ or quantity,¹¹ are to be submitted to the determination of a third person. If such determination is exercised in good faith, it is final and conclusive,¹² at least if it is free from evident and gross mistake. Under a contract by which A is to raise a certain quantity of peas and is to deliver them to B for canning, a provision that B's superintendent shall be the sole judge as to the proper condition of the crop for canning, is valid and his

⁶ *Lyon v. Supreme Assembly*, 153 Mass. 83, 26 N. E. 236; *Societa Unione Fratellanza Italiana v. Leyden*, 225 Mass. 540, L. R. A. 1917C, 256, 114 N. E. 738; *Jackson v. Northwestern Mutual Relief Association*, 78 Wis. 463, 47 N. W. 733.

⁷ *Societa Unione Fratellanza Italiana v. Leyden*, 225 Mass. 540, L. R. A. 1917C, 256, 114 N. E. 738.

⁸ *Jackson v. Northwestern Mutual Relief Association*, 78 Wis. 463, 47 N. W. 733.

⁹ *Union Pacific Ry. Co. v. Anderson*, 11 Colo. 293, 18 Pac. 24.

¹⁰ *Colorado. Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546.

Michigan. Robinson v. Detroit, Lansing & Northern Ry. Co., 84 Mich. 658, 48 N. W. 205.

Oklahoma. Citizens' Independent Mill & Elevator Co. v. Perkins, 52 Okla. 242, 152 Pac. 443.

South Carolina. Brooke v. Laurens Milling Co., 78 S. Car. 200, 125 Am. St. Rep. 780, 58 S. E. 806.

Washington. Tacoma & Eastern

Lumber Co. v. Field, 100 Wash. 79, 170 Pac. 360.

¹¹ *Bullock v. Consumers' Lumber Co.*, (Cal.), 31 Pac. 367; *Nadeau v. Pingree*, 92 Me. 196, 42 Atl. 353; *Boyle v. Munser-Sanntry, etc., Co.*, 77 Minn. 206, 79 N. W. 659.

¹² *California. Bullock v. Consumers' Lumber Co.* (Cal.), 31 Pac. 367.

Colorado. Empson Packing Co. v. Clawson, 43 Colo. 188, 95 Pac. 546.

Maine. Nadeau v. Pingree, 92 Me. 196, 42 Atl. 353.

Michigan. Robinson v. Detroit, Lansing & Northern Ry. Co., 84 Mich. 658, 48 N. W. 205.

Minnesota. Boyle v. Musser-Sanntry, etc., Co., 77 Minn. 206, 79 N. W. 659.

Oklahoma. Citizens' Independent Mill & Elevator Co. v. Perkins, 52 Okla. 242, 152 Pac. 443.

South Carolina. Brooke v. Laurens Milling Co., 78 S. Car. 200, 125 Am. St. Rep. 780, 58 S. E. 806.

Washington. Tacoma & Eastern Lumber Co. v. Field, 100 Wash. 79, 170 Pac. 360.

judgment, if fairly exercised and free from gross mistake, is conclusive.¹³ Under a contract referring questions as to the measurement of logs delivered under such contract to a third person, his decision is conclusive in the absence of fraud or evident mistake.¹⁴ A provision in a contract with the United States, may confer upon the quartermaster the power to ascertain and to determine the distance for which property is transported.¹⁵ Under such a clause the determination of the quartermaster is final in the absence of fraud or gross mistake; and the fact that the quartermaster fixes the distance according to direction in an air line instead of direction along the route by which the property was in fact transported, is not sufficient to show bad faith on his part.¹⁶

¹³ *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546.

¹⁴ *Bullock v. Lumber Co.* (Cal.), 31 Pac. 367; *Nadeau v. Pingree*, 92 Me. 196, 42 Atl. 353; *Boyle v. Musser-Sauntry, etc., Co.*, 77 Minn. 206, 79 N. W. 659.

¹⁵ *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106.

¹⁶ *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106.

"The contract which is the foundation of this action provides that transportation shall be paid 'in all cases according to the distance from the place of departure to that of delivery.' But no specific rule is prescribed for the ascertainment of distances. The contract is silent as to whether they shall be estimated by an air line, or by the route usually traveled by contractors in conveying government stores, or by the road over which troops ordinarily marched when going from one post or station to another. The parties, however, concurred in designating a particular person—the chief quartermaster of the district of New Mexico—with power not to simply ascertain, but to fix, the distances which should govern in the settlement of the contractor's accounts for transportation. The written order of General Easton to the depot quartermaster at Fort Leavenworth was an exertion of that power. He dis-

charged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the chief quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action can not, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would give its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the

If the judgment of such third person is not exercised in good faith, it is not conclusive as between the parties.¹⁷ Where the scaler agreed upon by the parties to measure logs acts solely under the direction of an agent of the vendee, his determination as to quantity is not binding.¹⁸

VI

CONDITION IN POWER OF ONE PARTY

§ 2637. Condition in power of one party. In many cases the act which is selected as a condition is one which one of the parties has the power to perform or not at his option.¹ If his performance or failure to perform such act, as the case may be, gives to the other party, by the terms of the contract, the right to treat such contract as discharged, if he wishes to, or to treat it as in full force and effect if he elects to waive the breach, such act is a condition, although its performance or non-performance rests with one of the parties to the contract. If, by the terms of the contract, the performance or non-performance of the so-called condition, as the case may be, operates to discharge the party who had the power to perform such act or not to perform it, and if he is not bound to perform any other or further acts by the terms of the contract, it is apparently improper to call such an agreement a contract at all, since performance on the part of the party who has power to perform or to break such condition is thus purely optional.² Such act may be a condition, although it rests in the power of one of the parties to perform; but the transaction can not be a simple contract, since the element of consideration is absent. If not under seal, it is not a contract at all. A condition, the performance of

government, resulting in vexatious and expensive and, to the contractor, often times, ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government.

The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument." *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1108.

¹⁷ *Tacoma & Eastern Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

¹⁸ *Magee v. Smith*, 101 Wis. 511, 78 N. W. 167.

¹ *Capital Fertilizer Co. v. Ashcraft-Wilkinson Co.*, — Ala. —, 79 So. 484. See §§ 2638 et seq.

² See §§ 564 et seq., 572 et seq. and 575 et seq.

which is within the power of one of the parties to the contract, is known at civil law as a protestative condition.³

§ 2638. Amount of compensation in discretion of one party.

Analogous to the cases in which performance must be made to the satisfaction of one party,¹ are the contracts, such as contracts of employment in which the amount of wages is left to the decision of the employer. In such cases the employer, if acting in good faith, is the sole judge,² and his decision is conclusive in the absence of fraud or bad faith, even if he fixes the compensation below what the court would hold to be a reasonable amount.³ Under a contract to render services as attorney for such a fee as the client "is able to pay and thinks reasonable," the client's decision is conclusive.⁴ A provision for paying the physician of a railroad company, "subject to the approval" of certain officers of the railroad, makes their approval a condition precedent to recovery.⁵ A contract to increase the salary of an employe if at any time the amount of increased business or the character of the employe's work fairly justifies a change of mind on the part of the employer as to the amount to be paid, makes the employer the sole judge as to such facts.⁶

Under a contract which leaves the amount of compensation to the employe, it is said that he can not make an unreasonable charge;⁷ but this result is reached by construing the promise as one to "pay any sum charged, if it was reasonable."⁸

§ 2639. Option to one party to discharge. A contract may contain an express provision that one or either party may terminate such contract at his option. Full effect is given to such provisions, and the exercise of such option operates as a discharge of the contract.¹ Until such option is exercised the contract is binding upon

³ *Anse La Butte Oil & Mineral Co. v. Babb*, 122 La. 415, 47 So. 754.

¹ See §§ 2618 et seq.

² *Taylor v. Brewer*, 1 Maule & S. 290.

³ *Butler v. Winona Mill Co.*, 28 Minn. 205, 41 Am. Rep. 277, 9 N. W. 697.
Contra, *Bryant v. Flight*, 2 H. & H. 84.

⁴ *Howe v. Kenyon*, 4 Wash. 677, 30 Pac. 1058.

⁵ *Union Pacific Ry. v. Anderson*, 11 Colo. 293, 18 Pac. 24.

⁶ *Blaine v. Knapp*, 140 Mo. 241, 41 S. W. 787.

⁷ *Van Arman v. Byington*, 38 Ill. 443.

⁸ *Van Arman v. Byington*, 38 Ill. 443.

¹ *England*. *Parker v. Ibbetson*, 4 C. B. (N.S.) 346 (option to terminate due to trade custom).

United States. *Louisiana, etc., Ry. v. Board of Levee District*, 87 Fed. 594, 31 C. C. A. 121; *Capital Fertilizer Co. v. Ashcraft-Wilkinson Co.*, — Ala. —, 79 So. 484.

both parties,² if the remaining provisions of the contract are such that a sufficient consideration exists.³ If a reasonable time is required for exercising such option,⁴ such as a period of thirty days,⁵ sufficient consideration exists. If such option can not be exercised until after the lapse of a reasonable period of time,⁶ such as an option to be exercised by giving six months' notice after the expiration of eighteen months,⁷ sufficient consideration exists. If such option may be exercised arbitrarily at any time, the contract is without consideration,⁸ and the adversary party may end the contract at will.⁹

The exercise of such an option is not a breach of the contract,¹⁰ unless the contract shows that upon the exercise of such option, compensation for injury arising therefrom is to be made.¹¹ If a contract provides in effect for termination at the will of either party, by mutual agreement for compensation if possible, and if not, for compensation to be determined by arbitrators, the failure

Illinois. Thayer v. Allison, 109 Ill. 180.

Indiana. Over v. Byram Foundry Co., 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302.

Kansas. Emerson-Brantingham Co. v. Lyons, 102 Kan. 733, 172 Pac. 513.

Michigan. Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N. W. 539.

Nebraska. Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383.

New Jersey. Fritz v. Pennsylvania Fire Ins. Co., 85 N. J. L. 171, 50 L. R. A. (N.S.) 35, 88 Atl. 1065 (obiter).

New York. McCullough's Lead Co. v. Strong, 56 N. Y. 660.

North Carolina. Booth v. Ratcliffe, 107 N. Car. 6, 12 S. E. 112.

Oregon. Foster v. Henderson, 29 Or. 210, 45 Pac. 899.

Wisconsin. Pierce v. Signor, 131 Wis. 621, 111 N. W. 699.

² **United States.** Kenny v. Knight, 119 Fed. 475.

Alabama. McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 138 Am. St. Rep. 66, 51 So. 767.

Illinois. Fred W. Wolf Co. v. Mon-

arch Refrigerating Co., 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

New Jersey. Fritz v. Pennsylvania Fire Ins. Co., 85 N. J. L. 171, 50 L. R. A. (N.S.) 35, 88 Atl. 1065.

Washington. Brooks v. Trustee Co., 76 Wash. 589, 50 L. R. A. (N.S.) 594, 136 Pac. 1152.

³ See §§ 572 et seq.

⁴ **A. Leschen & Sons Rope Co. v. Patterson,** 130 La. 557, 58 So. 336; **Mayo v. Philadelphia Textile Machinery Co.,** 105 Va. 486, 53 S. E. 967.

⁵ **A. Leschen & Sons Rope Co. v. Patterson,** 130 La. 557, 58 So. 336.

⁶ **Mayo v. Philadelphia Textile Machinery Co.,** 105 Va. 486, 53 S. E. 967.

⁷ **Mayo v. Philadelphia Textile Machinery Co.,** 105 Va. 486, 53 S. E. 967.

⁸ See § 572.

⁹ **Brown v. Wilson,** 58 Okla. 392, L. R. A. 1917B, 1184, 160 Pac. 94; **Eclipse Oil Co. v. South Penn Oil Co.,** 47 W. Va. 84, 34 S. E. 923.

¹⁰ **Over v. Byram Foundry Co.,** 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; **Emerson-Brantingham Co. v. Lyons,** 102 Kan. 733, 172 Pac. 513.

¹¹ **Harlow v. Oregonian Pub. Co.,** 45 Or. 520, 78 Pac. 737.

to make compensation in either way upon the exercise of such option gives rise to a cause of action for damages.¹²

Where the option to terminate the contract at will exists, a question presented for decision is what amounts to the exercise of such option. The right to avoid a purchase of stock is not exercised by acting as a stockholder giving a proxy and offering the stock for sale. Such acts amount to affirmance, not rescission.¹³ An option to avoid a contract within a year from the date of the making thereof is not exercised by a written request for an extension of such time to enable the party making the request to determine, whether it would be possible for him to go on with the contract.¹⁴ An option to terminate a contract employing a teacher by giving one week's notice, may be exercised by refusal to employ such teacher before the school opens, and the teacher is then entitled to but one week's salary.¹⁵ If, by the terms of the contract, the option to terminate it is to be exercised upon return of the property received under the contract, such provisions must be performed at least substantially in order that such option may be exercised.¹⁶ If a cow and calf are sold under a contract which provides that they are regarded as one animal and which permits the purchaser to terminate such contract by returning them in case the cow does not prove to be a breeder, such option can be exercised only by returning both cow and calf.¹⁷ If the purchaser reserves the option to avoid the contract by returning the property within a specified time, his failure to return such property within such time prevents him from exercising such option.¹⁸ If he continues to use such property after the time specified, the fact that he gave notice before the termination of such period that he would exercise such option, does not operate as a termination of the contract.¹⁹

An option to rescind a contract for breach and recover money paid thereunder may be exercised before the date of the maturity

¹² Harlow v. Oregonian Pub. Co., 45 Or. 520, 78 Pac. 737.

¹³ Jessop v. Ivory, 158 Pa. St. 71, 27 Atl. 840.

¹⁴ Ford v. Dyer, 148 Mo. 528, 49 S. W. 1091.

¹⁵ Derry v. Board of Education, 102 Mich. 631, 61 N. W. 61.

¹⁶ White v. Miller, 132 Ia. 144, 8 L. R. A. (N.S.) 727, 109 N. W. 465 (provision for return in case of breach of

warranty); Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

¹⁷ White v. Miller, 132 Ia. 144, 8 L. R. A. (N.S.) 727, 109 N. W. 465.

¹⁸ Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

¹⁹ Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

of the last payment.²⁰ If an insurance policy provides for cancellation on five days' notice, such notice may be given by writing; but notice sent by registered letter, which purported to be from a different insurance company and which the insured did not in fact open, is not sufficient.²¹

If the time within which the option to end the contract must be exercised, is specified, such option must be exercised within the time thus specified.²² If the time within which the option to end the contract must be exercised, is not specified, such option must be exercised in a reasonable time.²³ If A sold bonds to B under a contract by which B was given an option to return such bonds and withdraw her original investment with interest at six per cent. "at any time," it is held that such option must be exercised within a reasonable time; and that a delay of six years after such transaction is not a reasonable delay.²⁴

§ 2640. Contract of indefinite duration—Implied option to discharge at will. If the express terms of the contract do not fix the time for its duration, if the subject-matter and the surrounding circumstances do not indicate an intention to enter into a permanent obligation or one of indefinite duration, and if the contract is one which from its nature might be terminated at any time, or might be performed indefinitely, it is generally held that either party to the contract may terminate it at his option.¹

²⁰ Lord v. Board of Trade, 163 Ill. 45, 45 N. E. 205.

²¹ Fritz v. Pennsylvania Fire Insurance Co., 85 N. J. L. 171, 50 L. R. A. (N.S.) 35, 88 Atl. 1065.

²² Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 401, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

²³ Brooks v. Trustee Co., 76 Wash. 589, 50 L. R. A. (N.S.) 594, 136 Pac. 1152.

²⁴ Capital Fertilizer Co. v. Ashcraft-Wilkinson Co., — Ala. —, 79 So. 484; Brooks v. Trustee Co., 76 Wash. 589, 50 L. R. A. (N.S.) 594, 136 Pac. 1152.

¹ United States. Willcox & G. Sewing Mach. Co. v. Ewing, 141 U. S. 627, 35 L. ed. 882; Chattanooga, etc. Ry. v. Ry., 44 Fed. 456; Mercantile Trust Co. v. Columbus, S. & H. R. Co., 90 Fed.

148; Western, etc., Co. v. Steel Co., 116 Fed. 176; Warden v. Hinds, 163 Fed. 201, 25 L. R. A. (N.S.) 520.

Alabama. Lambie v. Sloss Iron & Steel Co., 118 Ala. 427, 24 So. 108.

Illinois. Bates Mach. Co. v. Bates, 192 Ill. 138, 61 N. E. 518.

Louisiana. Long v. Kee, 42 La. Ann. 899, 8 So. 610.

Massachusetts. Marble v. Standard Oil Co., 160 Mass. 553, 48 N. E. 783.

Michigan. Savage v. Surgical Association, 59 Mich. 400, 26 N. W. 652.

Oregon. Christensen v. Pacific Coast Borax Co., 26 Or. 302, 38 Pac. 127.

Pennsylvania. Philadelphia & R. R. Co. v. River Front R. Co., 168 Pa. St. 337, 31 Atl. 1098; Kenderline Hydro-Carbon Fuel Co. v. Plumb, 182 Pa. St. 463, 38 Atl. 480.

Accordingly, contracts for the rendition of personal services,² such as a contract of employment as land agent,³ or a contract to repair and construct buildings as directed by the adversary party, no particular buildings being designated,⁴ may be discharged at any time at the option of either party as to the part of such contract which remains executory. A agreed with B to manage B's plantation and stock farm, and as compensation A was to have the products of the farm and one half of the increase of the stock. No time for the termination of such contract was fixed. A was allowed to terminate the contract at any time, upon giving due notice and taking possession at the beginning of some designated year.⁵ On the same principle, a contract to furnish commodities,⁶ such as a contract by retail dealers to buy oil of a wholesale dealer exclusively, without limitation as to time,⁷ or a contract to manufacture articles for a corporation for an indefinite time in the future,⁸ may each be discharged at any time at the option of either party as to the part thereof which remains executory.

§ 2641. Option not exercisable at will. In cases in which the parties do not contemplate a permanent obligation, the nature of the subject-matter and the surrounding circumstances may show that it was not intended that either party should have the right to discharge such contract at his option.¹ A, an employer, took an employe who was seriously injured, to a hospital, and left him

Washington. Hewson v. Peterman Mfg. Co., 76 Wash. 600, 51 L. R. A. (N.S.) 398, 136 Pac. 1158.

Wisconsin. Irish v. Dean, 39 Wis. 562.

²Howard v. East Tenn., Va. & Ga. Ry. Co., 91 Ala. 268, 8 So. 868; Bates Machinery Co. v. Bates, 192 Ill. 138, 61 N. E. 518; Quin v. Bay State Distilling Co., 171 Mass. 283, 50 N. E. 637; Staroske v. Pulitzer Publishing Co., 235 Mo. 67, 138 S. W. 36.

A contract for an indefinite period to act as secretary and treasurer may be terminated at the will of the employer. Hewson v. Peterman Mfg. Co., 76 Wash. 600, 51 L. R. A. (N.S.) 398, 136 Pac. 1158.

³Howard v. Ry., 91 Ala. 268, 8 So. 868.

See also, Coffin v. Landis, 46 Pa. St. 426.

⁴Quin v. Distilling Co., 171 Mass. 283, 50 N. E. 637.

⁵Long v. Kee, 42 La. Ann. 899, 8 So. 610.

⁶Marble v. Standard Oil Co., 169 Mass. 553, 48 N. E. 783; Echols v. New Orleans, Jackson & Great Northern Ry., 52 Miss. 610; Turtle Creek v. Pennsylvania Water Co., 243 Pa. St. 401, 90 Atl. 194; Bellevue v. Ohio Valley Water Co., 245 Pa. St. 114, 91 Atl. 236; Irish v. Dean, 39 Wis. 562.

⁷Marble v. Standard Oil Co., 169 Mass. 553, 48 N. E. 783.

⁸Kenderdine Hydro-Carbon Fuel Co. v. Plumb, 182 Pa. St. 463, 38 Atl. 480.

¹Mississippi River Logging Co. v. Robson, 60 Fed. 773, 16 C. C. A. 400

there, promising to pay for his care. No provision was made as to the length of time which he was to remain. It was held that this implied an agreement on A's part to pay for such care until at least such time as he could be moved without great danger to his health. Accordingly, where A gave such notice before such time, and it was not shown that the employe had means of his own to pay for such care, such notice does not discharge A's liability to the hospital.² A contract to drive logs, for the termination of which no time is designated, may appear from the surrounding circumstances to be intended to last until all the timber has been cut off the land of the owner thereof. Such contract can not be terminated by notice before the timber is exhausted.³

A question upon which there has been a serious conflict of authority as to the right of either party to terminate the contract at his option, arises in cases in which a railway company has agreed to construct a switch so as to furnish service to certain property, in consideration of which the owner of such property agrees to make use of it in a certain specified manner, so as to furnish goods or property for transportation by such railway. It has been held, on the one hand, that such a contract is permanent at least as long as such land is used in the manner provided for by the contract.⁴ In other jurisdictions, however, and by the greater weight of numerical authority, it has been held that such a contract may be terminated by either party if reasonable notice is given.⁵

Another question upon which a similar conflict of authority has arisen, is found in cases in which the state or a public corporation

[same case, 43 Fed 364]; *St. Barnabas Hospital v. Minneapolis International Electric Co.*, 68 Minn. 254, 40 L. R. A. 388, 70 N. W. 1126; *Stonega Coke & Coal Co. v. Louisville & N. R. Co.*, 106 Va. 223, 9 L. R. A. (N.S.) 1184, 55 S. E. 551.

² *St. Barnabas Hospital v. Electric Co.*, 68 Minn. 254, 40 L. R. A. 388, 70 N. W. 1126.

³ *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400, s. c., 43 Fed. 364.

⁴ *McKell v. Chesapeake & O. Ry. Co.*, 175 Fed. 321 (mine).

⁵ *Jones v. Newport News & Mississippi Valley Co.*, 65 Fed. 736 (switch); *Baldwin v. Kansas City M. & B. Ry.*,

111 Ala. 515, 20 So. 340 (sand-pit); *Barney v. Indiana Ry. Co.*, 157 Ind. 228, 61 N. E. 194 (race-track); *Stonega Coal & Coke Co. v. Louisville & Nashville Ry.*, 106 Va. 223, 9 L. R. A. (N.S.) 1184, 55 S. E. 551 (coal-mine).

A contract by which a mine owner agrees to construct a switch and a railway company agrees to operate cars over it without any provision as to time, is held to be subject to termination by the railway company whenever it wishes to do so, as long as reasonable notice is given of such intention. *Stonega Coke & Coal Co. v. Louisville & N. R. Co.*, 106 Va. 223, 9 L. R. A. (N.S.) 1184, 55 S. E. 551.

has granted a franchise to a public utility, such as a street railway company, without specifying the length of time for which such franchise is to last. A question of this sort is contemplated by the general rule that ambiguous or uncertain contracts which involve the public interest are so construed as to protect the public interest.⁶ In accordance with this principle it has been held by the great weight of numerical authority among the states of the Union that a franchise of this sort was not perpetual and that it could be ended in a reasonable time in view of all the facts and circumstances of the case.⁷ In a few states, however, the fact that the public utility frequently expends large sums of money in the performance of such contracts, has induced the courts to ignore the well-settled rule that construction must always favor the public interest in case of doubt; and it has been held that such franchise was to be regarded as perpetual.⁸ This last view has been adopted by the supreme court of the United States;⁹ and since cases of this sort ordinarily present the question of the impairment of the obliga-

⁶ See § 2052.

⁷ *Alabama. Birmingham & P. Mines Street R. Co. v. Birmingham Street R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

Illinois. Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99; *People v. Chicago Teleph. Co.*, 220 Ill. 238, 77 N. E. 245; *People v. Central U. Teleph. Co.*, 232 Ill. 260, 83 N. E. 829; *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266; *People v. Economy Light & P. Co.*, 241 Ill. 290, 89 N. E. 760; *People v. Commercial Teleph. & Teleg. Co.*, 277 Ill. 265, L. R. A. 1917D, 704, 115 N. E. 379.

Iowa. State v. Des Moines City R. Co., 159 Ia. 259, 140 N. W. 437.

Maryland. Westminster Water Co. v. Westminster, 98 Md. 551, 64 L. R. A. 630, 103 Am. St. Rep. 424, 56 Atl. 990.

Michigan. Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43, 82 N. W. 821.

North Carolina. State v. Atlantic & N. C. R. Co., 141 N. Car. 736, 53 S. E. 290.

Ohio. Little Miami R. Co. v. Greene County, 31 O. S. 338; *Lake Shore & M.*

S. R. Co. v. Elyria, 69 O. S. 414, 69 N. E. 738; *East Ohio Gas Co. v. Akron*, 81 O. S. 33, 26 L. R. A. (N.S.) 92, 90 N. E. 40.

Oregon. Joseph v. Joseph Waterworks Co., 57 Or. 586, 111 Pac. 864 [rehearing denied, 57 Or. 592, 112 Pac. 1083].

Texas. Houston v. Houston City Street R. Co., 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 127.

⁸ *Dayton v. South Covington & C. Street R. Co.*, 177 Ky. 202, L. R. A. 1918B, 476, 197 S. W. 670; *Nebraska Teleph. Co. v. Fremont*, 72 Neb. 25, 99 N. W. 811; *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. 1048.

⁹ *Louisville v. Cumberland Teleph. & Teleg. Co.*, 224 U. S. 649, 56 L. ed. 934; *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 57 L. ed. 633, 44 L. R. A. (N.S.) 405; *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 57 L. ed. 1389; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. ed. 1410; *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, 62 L. ed. 481, L. R. A. 1918E, 865.

tion of contracts, and since the supreme court of the United States in such cases decides whether a contract existed or not,¹⁰ these decisions of the supreme court of the United States will force the state courts to modify their views so as to conform to those of the supreme court of the United States under penalty of reversal.

§ 2642. Permanent obligation contemplated. The nature of the subject-matter and the surrounding circumstances may, however, show that the parties intend such contract to be a permanent obligation, or at least they intend that it shall last for a longer period than that at which one of the parties has attempted to terminate.¹ In such cases it is frequently said that the contract is permanent;² but such statement is ordinarily, in part at least, obiter, since the question which is involved is usually whether such contract is not to extend beyond the time at which one of the parties has attempted to terminate it. A contract by which a water company agrees to furnish water in consideration of an easement for its pipes across the land of another, has been said to be permanent,³ so that it can not be terminated after a reasonable time and upon reasonable notice.⁴ In this case, however, the question involved was whether the assignee of the water company could terminate such contract after twenty-five years, while retaining its right to place its pipes across the land of the adversary party; and it was held that while such rights were indefinite and unlimited as to time, they were not necessarily perpetual; that the water company could change its line of pipes and could avoid liability under the original contract; but that while it enjoyed such easement, it must pay therefor in the manner fixed by the original contract.⁵ A contract between a rail-

¹⁰ See ch. XCV.

¹ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 450, 36 L. ed. 776; *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400 [same case, 43 Fed. 364]; *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed. 849, 68 L. R. A. 968; *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917E, 680, 159 Pac. 865; *St. Barnabas Hospital v. Minneapolis International Electric Co.*, 68 Minn. 254, 40 L. R. A. 388, 70 N. W. 1126; *Globe Ins. Co. v. Wayne*, 75 O. S. 451, 80 N. E. 13.

² *Franklin Telegraph Co. v. Harrison*, 145 U. S. 450, 36 L. ed. 776; *Western*

Union Telegraph Co. v. Pennsylvania Co., 129 Fed. 849, 68 L. R. A. 968; *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917E, 680, 159 Pac. 865; *Globe Ins. Co. v. Wayne*, 75 O. S. 451, 80 N. E. 13.

³ *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917E, 680, 159 Pac. 865.

⁴ *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917 E, 680, 159 Pac. 865.

⁵ *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917 E. 680, 159 Pac. 865.

way company and a telegraph company, by which the telegraph company acquires a license to erect poles on the land of the railway company, and both railway company and telegraph company are to be entitled to string wires along such poles, is said to be permanent.⁶ A contract by which A, a telegraph company, gives to B, a license to string wires on A's poles, which wires are to become A's property after ten years, and A is then to lease to B at a certain sum per annum, has been held to be a permanent contract if in performance thereof B has expended a large sum of money in stringing such wires and has given up a valuable contract with a rival telegraph company for similar services.⁷ A contract between the owners of adjoining buildings for the construction and operation of an elevator for the service of both buildings, has been said to be permanent.⁸ Such a contract by its express provision was to operate "so long as the buildings shall remain," and the question in the case was as to the right of a purchaser of one of the buildings to refuse to continue paying for the expense of operating the elevator after a change in the business conditions had made it unprofitable to employ an elevator in such building.⁹

§ 2643. Notice of exercise of option to terminate. A reasonable notice of the exercise of such option must be given when the absence thereof will inflict injury upon the adversary party which the parties to the original contract did not contemplate, and can not be understood to have intended. Thus before exercise of a right to terminate a contract of indefinite duration for one railway's using a freight depot and the tracks of another railway company,¹ or for the management of a road jointly constructed by the two railway companies,² reasonable notice must be given. If the parties to a contract for the management of a road jointly owned by both railroad companies, can not agree upon regulations for the operation of such road, the court may make temporary orders to enable both parties to use the road, pending final judgment in a suit for specific performance and injunction.³ The notice

⁶ *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed. 849, 68 L. R. A. 968.

⁷ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

⁸ *Globe Ins. Co. v. Wayne*, 75 O. S. 451, 80 N. E. 13.

⁹ *Globe Ins. Co. v. Wayne*, 75 O. S. 451, 80 N. E. 13.

¹ *Chattanooga, etc., Ry. v. Ry.*, 44 Fed. 456.

² *Philadelphia, etc., Ry. v. River Front R. R. Co.*, 168 Pa. St. 357, 31 Atl. 1098.

³ *Philadelphia, etc., Ry. v. River Front R. R. Co.*, 168 Pa. St. 357, 31 Atl. 1098.

by which it is sought to exercise such option must show in clear and unequivocal language that the party who gives such notice intends not to be bound by such contract after the time specified therein.⁴

VII

WHO CAN TAKE ADVANTAGE OF BREACH OF CONDITION

§ 2644. Who may take advantage of breach of condition—Self-executing conditions. Whether breach of condition may be taken advantage of by one or both of the parties to the contract, depends upon the intention of the parties in inserting such condition, as inferred from the language which is used, together with the surrounding circumstances in many cases. The provision which stipulates for the condition may be so worded that the condition is self-executing, and that the breach of the condition automatically operates to terminate the contract in whole or in part, without regard to any further act of either party, and without regard to the wishes of either or both of the parties except as far as such wishes were embodied in the original contract. In cases of this sort, full effect is given to the intention of the parties and upon the happening of the event, the rights of the parties under the contract terminate in whole or in part in accordance with the provisions of the contract.¹ In contracts of fire insurance, conditions are sometimes so inserted that upon the happening of the specified event, the rights of the party under the contract terminate

⁴ *Lewis v. Worrell*, 185 Mass. 572, 71 N. E. 73.

¹ *England*. *Reeves v. Butcher* [1891], 2 Q. B. 509; *Hemp v. Garland*, 4 Q. B. 519.

United States. *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741.

Kansas. *First National Bank v. Peck*, 8 Kan. 660; *Snyder v. Miller*, 71 Kan. 410, 114 Am. St. Rep. 489, 69 L. R. A. 250, 80 Pac. 970.

Kentucky. *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966.

Massachusetts. *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655.

Minnesota. *Coppoletti v. Citizens' Ins. Co.*, 123 Minn. 325, 143 N. W. 787

Mississippi. *Central Trust Co. v. Meridian Light & Railway Co.*, 106 Miss. 431, 51 L. R. A. (N.S.) 151, 63 So. 575.

New Mexico. *Buss v. Kemp Lumber Co.*, 23 N. M. 567, 170 Pac. 54.

Ohio. *Ohio Farmers' Ins. Co. v. Wilson*, 70 O. S. 354, 71 N. E. 715.

Oregon. *Hinkson v. Kansas City Life Ins. Co.*, — Or. —, 183 Pac. 24.

Pennsylvania. *Bemis v. Harbor Creek Mutual Fire Ins. Co.*, 200 Pa. St. 340, 49 Atl. 769.

South Dakota. *Green v. Frick*, 25 S. D. 342, 126 N. W. 579.

Texas. *Harrison Mach. Works v. Reigor*, 64 Tex. 89; *San Antonio Real*

without any further act on the part of the insurer.² A condition in a policy of fire insurance against additional insurance, may be so worded as to operate automatically to end the policy in case of breach.³ In contracts for the payment of money, it is sometimes provided that default in the payment of an instalment or in the payment of interest or in the payment of taxes upon the security for the payment of such debt, will make the entire debt due and payable at once; and if such condition is so worded as to be self-executing and to operate automatically, such debt becomes due at once, and accordingly the Statute of Limitations begins to run at once, without regard to the actual wishes of the creditor.⁴ Conditions in a life insurance policy are usually so worded that upon breach thereof the contract terminates automatically without any further act on the part of the insurer.⁵

Estate Building & Loan Association v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

Wisconsin. *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267, 54 N. W. 18.

²**Massachusetts.** *Woolford v. Phenix Ins. Co.*, 190 Mass. 233, 76 N. E. 722; *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655.

Michigan. *A. M. Todd Co. v. Farmers' Mutual Fire Ins. Co.*, 137 Mich. 188, 100 N. W. 442.

Minnesota. *Lake Superior & Cold Storage Co. v. Concordia Fire Ins. Co.*, 95 Minn. 492, 104 N. W. 560; *Coppolletti v. Citizens' Ins. Co.*, 123 Minn. 325, 143 N. W. 787.

Ohio. *Ohio Farmers' Ins. Co. v. Wilson*, 70 O. S. 354, 71 N. E. 715.

Pennsylvania. *Bemis v. Harbor Creek Mutual Fire Ins. Co.*, 200 Pa. St. 340, 40 Atl. 769.

Wisconsin. *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267, 54 N. W. 18.

³**Woolford v. Phenix Ins. Co.**, 190 Mass. 233, 76 N. E. 722; *A. M. Todd Co. v. Farmers' Mutual Fire Ins. Co.*, 137 Mich. 188, 100 N. W. 442; *Lake Su-*

perior Produce & Cold Storage Co. v. Concordia Fire Ins. Co., 95 Minn. 492, 104 N. W. 560.

⁴**England.** *Reeves v. Butcher* [1891], 2 Q. B. 509; *Hemp v. Garland*, 4 Q. B. 519.

United States. *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741.

Kansas. *First National Bank v. Peck*, 8 Kan. 680; *Snyder v. Miller*, 71 Kan. 410, 114 Am. St. Rep. 489, 69 L. R. A. 250, 80 Pac. 970.

Kentucky. *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966.

Mississippi. *Central Trust Co. v. Meridian Light & Railway Co.*, 106 Miss. 431, 51 L. R. A. (N.S.) 151, 63 So. 575.

New Mexico. *Buss v. Kemp Lumber Co.*, 23 N. M. 567, 170 Pac. 54.

South Dakota. *Green v. Frick*, 25 S. D. 342, 126 N. W. 679.

Texas. *Harrison Mach. Works v. Reigor*, 64 Tex. 89; *San Antonio Real Estate Building & Loan Association v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

Wisconsin. *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209.

⁵**Hinkson v. Kansas City Life Ins. Co.**, — Or. —, 183 Pac. 24.

§ 2645. Conditions for benefit of one party. In the great majority of cases, however, a condition is not made self-executing, but it is inserted for the benefit of one of the parties thereto; and the provision for such condition is so worded that its legal effect is to give to the party for whose benefit the condition is reserved, the right to take advantage of such condition if he sees fit, or to waive the breach of the condition, on the other hand, if he prefers.¹ Provisions for accelerating the maturity of contracts for the payment of money in case of certain specified defaults, are frequently so worded that the creditor has the election in case of such default either to declare the debt due at once, or to waive such default and to treat the debt as due in accordance with the terms of the original contract.² Under a contract for the sale of land, which provides that in the event of certain specified defaults, the vendor may declare such contract void, the default of the purchaser does not of itself terminate the contract automatically, and such contract is not terminated unless the vendor elects so to do upon the happening of such specified breach.³ A condition in a policy of fire insurance against additional insurance may be so worded as to make the policy void in case of breach only if the insurer so elects.⁴

If a condition is inserted in a contract for the benefit of one of the parties, the adversary party can not take advantage of a breach thereof.⁵ A provision in a contract for the payment of money for the acceleration of maturity in case of certain specified defaults, is ordinarily so worded that it is evidently inserted for the benefit

¹ **Florida.** *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, L. R. A. 1916B, 1189, 68 So. 647.

Iowa. *Westervelt v. Huiskamp*, 101 Ia. 196, 70 N. W. 125.

Montana. *Saville v. Aetna Ins. Co.*, 8 Mont. 419, 3 L. R. A. 542, 20 Pac. 646.

Oklahoma. *Lavery v. Mid-Continent Oil Development Co.*, — Okla. —, L. R. A. 1917D, 231, 162 Pac. 737.

Oregon. *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796, 7 L. R. A. (N.S.) 791, 83 Pac. 536.

Wisconsin. *Zwickey v. Haney*, 63 Wis. 464, 23 N. W. 577.

² *Zwickey v. Haney*, 63 Wis. 464, 23 N. W. 577.

³ *Higinbotham v. Frock*, 48 Or. 129,

120 Am. St. Rep. 796, 7 L. R. A. (N.S.) 791, 83 Pac. 536.

⁴ *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, L. R. A. 1916B, 1189, 68 So. 647; *Saville v. Aetna Ins. Co.*, 8 Mont. 419, 3 L. R. A. 542, 20 Pac. 646.

⁵ **Arkansas.** *Orr v. State*, 56 Ark. 107, 19 S. W. 319.

California. *Diepenbrock v. Luiz*, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743 (see concurring opinion).

Colorado. *First National Bank v. Park*, 37 Colo. 303, 86 Pac. 106.

Florida. *Shouse v. Doane*, 39 Fla. 95, 21 So. 807.

Iowa. *Westervelt v. Huiskamp*, 101 Ia. 196, 70 N. W. 125; *Lasher v. Ins Co.*, 115 Ia. 231, 88 N. W. 375.

of the creditor alone. In such case the debtor can not take advantage of breach of such condition;⁶ and the period of limitations does not begin to run until the creditor has elected to take advantage of such breach and to treat the maturity of such instrument as accelerated in accordance with the provisions of the contract.⁷ A provision in a contract for building vessels, by which, in the event of default by the contractor, the owner may complete the work himself, is inserted for the benefit of the owner, and he alone can take advantage thereof.⁸ A provision inserted for the benefit of the owner that, if emergency demands, the engineer in charge "may make alterations in any part of the work," can not be invoked by the contractor to require such alterations to be made

Kansas. *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044; *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65.

Massachusetts. *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219.

Minnesota. *Robbins v. Morgan*, 56 Minn. 304, 57 N. W. 799.

Mississippi. *Central Trust Co. v. Meridian Light & Railway Co. (Miss.)*, 64 So. 216.

Nebraska. *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207.

New Jersey. *Vickers v. Commercial Co.*, 66 N. J. L. 9, 48 Atl. 606; *Ramsey v. Perth Amboy Shipbuilding & Engineering Co.*, 72 N. J. Eq. 165, 65 Atl. 461.

North Carolina. *Standard Dry Kiln Co. v. Ellington*, 172 N. Car. 481, 90 S. E. 564.

North Dakota. *McCarty v. Goodman*, — N. D. —, 167 N. W. 503.

Washington. *Weinberg v. Naher*, 51 Wash. 591, 22 L. R. A. (N.S.) 959, 99 Pac. 736 (obiter).

⁷ **Colorado.** *First National Bank v. Park*, 37 Colo. 303, 86 Pac. 106.

Kansas. *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044; *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65.

Mississippi. *Central Trust Co. v. Meridian Light & Railway Co. (Miss.)*, 64 So. 216.

Nebraska. *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207.

North Carolina. *Standard Dry Kiln Co. v. Ellington*, 172 N. Car. 481, 90 S. E. 564.

North Dakota. *McCarty v. Goodman*, — N. D. —, 167 N. W. 503.

Washington. *Weinberg v. Naher*, 51 Wash. 591, 22 L. R. A. (N.S.) 959, 99 Pac. 736 (obiter).

⁷ **Colorado.** *First National Bank v. Park*, 37 Colo. 303, 86 Pac. 106.

Kansas. *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65.

Mississippi. *Central Trust Co. v. Meridian Light & Railway Co. (Miss.)*, 64 So. 216.

Nebraska. *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207.

North Carolina. *Standard Dry Kiln Co. v. Ellington*, 172 N. Car. 481, 90 S. E. 564.

North Dakota. *McCarty v. Goodman*, — N. D. —, 167 N. W. 503.

Washington. *Weinberg v. Naher*, 51 Wash. 591, 22 L. R. A. (N.S.) 959, 99 Pac. 736 (obiter).

⁸ *Ramsey v. Perth Amboy Shipbuilding & Engineering Co.*, 72 N. J. Eq. 165, 65 Atl. 461 [affirmed, *Ramsey v. Perth Amboy Shipbuilding & Engineering Co.*, 73 N. J. Eq. 742, 70 Atl. 1101].

for his benefit.⁹ A provision for discharge for non-performance inserted in a land contract for the benefit of the vendor, and to be exercised at his option, can not be taken advantage of by the vendee.¹⁰ A provision inserted for the benefit of the vendor, that default by the vendee in paying the purchase money note at maturity shall make the contract void, can not be taken advantage of by the vendee.¹¹ Default in payment of interest on school lands purchased by the defaulting vendee does not discharge him from liability for the purchase price if the state wishes to treat the contract as in effect, though a statutory provision makes such default work a forfeiture.¹² A condition in a contract, whereby A agrees to drill an oil well on B's land, to the effect that A's failure to commence such well and to complete it in accordance with the terms of the contract, is intended for B's benefit, and A can not terminate such contract by his own default.¹³ A condition in a lease, which provides for its termination in case the property is sold by the lessor, is probably for the benefit of the lessor; and in any event if the lessee remains in possession, he is liable for rent after such sale in accordance with the provisions of the lease.¹⁴

One who elects to take advantage of a breach which he may enforce or waive at his option, must be able to show that he himself was ready and willing to perform the covenants on his part to be performed, except as far as his performance was prevented by such breach of condition.¹⁵ A contractor who has reserved the right to stop work in case of the failure of the owner to pay the instalments then due under the contract, can not take advantage of such

⁹ *National Contracting Co. v. Commonwealth*, 183 Mass. 89, 66 N. E. 639. ("May" does not here mean "shall.")

¹⁰ *California*. *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629. *Illinois*. *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330.

Kansas. *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098.

Kentucky. *Barbour v. Brookie*, 26 Ky. (3 J. J. Mar.) 511.

Maine. *Niles v. Phinney*, 90 Me. 122, 37 Atl. 880.

Massachusetts. *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347.

Rhode Island. *Anderson v. Nelson*, — R. I. —, 101 Atl. 136.

¹¹ *Westervelt v. Huiskamp*, 101 Ia. 196, 70 N. W. 125.

¹² *Orr v. State*, 56 Ark. 107, 19 S. W. 319.

¹³ *Lavery v. Mid-Continent Oil Development Co.*, — Okla. —, L. R. A. 1917D, 231, 162 Pac. 737.

¹⁴ *Diepenbrock v. Luiz*, 159 Cal. 716, L. R. A. 1915C, 234, 115 Pac. 743 (see concurring opinion).

¹⁵ *Schillinger Bros. Co. v. Bosch-Ryan Grain Co.* (Ia.), 116 N. W. 132; *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796, 7 L. R. A. (N.S.) 791, 83 Pac. 536.

breach of condition on the part of the owner if he himself has not performed the terms of the contract and has not furnished bond as required by such contract.¹⁶

§ 2646. Condition for benefit of either party. The provision for a condition may be so worded that it is evident that the condition is inserted for the benefit of both parties; and in such case either party may take advantage of such breach.¹ The option to terminate a contract may be intended for the benefit of the vendee or lessee. A provision, "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance, while such completion is delayed," gives the option to the lessee either to keep the lease alive by making such payments, or to terminate it by refusing to make them.²

§ 2647. Construction as to right of party to take advantage of breach. In construing the language by which provision is made for conditions, the courts are unwilling to construe such conditions as self-executing if possible.¹ The dislike of the courts for forfeitures² has frequently led the courts to construe a word, such as "void," as really equivalent to "voidable at the election of the party for whose benefit such provision is inserted."³ It has been said that a provision to the effect that an insurance policy is to be void if the insured is not the unconditional and sole owner, is not to be taken literally and that "void" means only voidable.⁴ Accordingly, it is said that the insurance company, upon learning of the defect in title, must, if it wishes to avoid the policy, notify the insured of such determination on its part in a reasonable time and tender the unearned premium which it has received.⁵ A provision in a contract of sale, to the effect that certain stipulated defaults shall

¹⁶ *Schillinger Bros. Co. v. Bosch-Ryan Grain Co.* (Ia.), 116 N. W. 132.

¹ *Bradford v. Limpus*, 10 Ia. 35.

² *Van Etten v. Kelly*, 66 O. S. 605, 64 N. E. 560.

See to the same effect, where no provision is made for minimum royalties, *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

¹ *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177.

² See § 2054.

³ *Beecher v. Vt. Mutual Fire Ins. Co.*, 90 Vt. 347, 98 Atl. 917.

⁴ *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 8 L. R. A. (N.S.) 708, 74 N. E. 964.

⁵ *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 8 L. R. A. (N.S.) 708, 74 N. E. 964.

render the contract "void and of no effect," is held to be inserted for the protection of the party who is not in default. Accordingly, such default terminates the rights of the party in default, but not the rights of the adversary party.⁶ The courts are especially averse to construing a condition as intended for the benefit of the party who has the power to perform such condition or not.⁷ A provision for employing one as long as a specified contract "remains in force," is held to mean as long as such contract by its terms would be in force in case of performance, and not to refer to the discharge of such contract prematurely by breach.⁸ A provision in a contract for operating an oil and gas well, to the effect that failure to commence such well and to complete it in accordance with the terms of the contract, should operate as a forfeiture, has been held to be a provision which is inserted for the benefit of the lessor;⁹ and accordingly a breach of such condition gives to the lessor the right to terminate the lease, but it does not give such right to the lessee.¹⁰

VIII

PERFORMANCE AND BREACH

§ 2648. Performance and breach of condition. A substantial performance of the conditions for which provision is made in a contract according to the terms thereof, is necessary.¹ A substantial performance of such conditions in accordance with the terms of the policy is sufficient, and literal performance is not nec-

⁶ *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177.

⁷ *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219; *Lavery v. Mid-Continent Oil Development Co.*, — Okla. —, L. R. A. 1917D, 231, 162 Pac. 737.

⁸ *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219.

⁹ *Lavery v. Mid-Continent Oil Development Co.* — Okla. —, L. R. A. 1917D, 231, 162 Pac. 737.

¹⁰ *Lavery v. Mid-Continent Oil Development Co.* — Okla. —, L. R. A. 1917D, 231, 162 Pac. 737.

¹ *Colorado. Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624; *Rollens v. Denver Club*, 43 Colo. 345, 96 Pac. 188; *National Mutual Fire Ins. Co. v. Dun-*

can, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mutual Fire Ins. Co.*, 20 L. R. A. (N.S.) 340]; *Union Health and Accident Co. v. Anderson*, — Colo. —, 180 Pac. 81.

Kansas. Jaques v. Order of United Commercial Travelers, 104 Kan. 612, 180 Pac. 200.

Massachusetts. Holt v. Silver, 169 Mass. 435, 48 N. E. 837.

Nebraska. Taylor v. Illinois Commercial Men's Association, 84 Neb. 799, 24 L. R. A. (N.S.) 1174, 122 N. W. 41.

Oregon. United Brokers' Co. v. Southern Pacific Co., 86 Or. 607, 169 Pac. 114.

Pennsylvania. Lebanon County v. Franklin Fire Ins. Co., 237 Pa. St. 360, 44 L. R. A. (N.S.) 148, 85 Atl. 419.

essary,² at least at modern law. In this respect, conditions resemble covenants,³ although the language by which provision is made for conditions is likely to be far more detailed than the language in which covenants are expressed; and accordingly there may be far less scope for the doctrine of substantial performance in conditions than in covenants.

If a true statement of the value of a building is made a condition precedent to the validity of a policy of fire insurance, a substantial compliance with such condition is sufficient.⁴ A condition in a policy of fire insurance, which avoids the policy if mechanical work upon the premises in making alterations or repairs is done, is not broken by the presence of mechanics in making repairs which are necessary to preserve the property.⁵ A provision in a contract

²Colorado. *Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624; *National Mut. Fire Ins. Co.*, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mut. Fire Ins. Co.*, 20 L. R. A. (N.S.) 340]; *Union Health & Accident Co. v. Anderson*, — Colo. —, 180 Pac. 81.

Georgia. *Maribel v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 51 Am. St. Rep. 102, 30 L. R. A. 835, 23 S. E. 463.

Kansas. *Jaques v. Order of United Commercial Travelers*, 104 Kan. 612, 180 Pac. 200.

Louisiana. *Pouns v. Citizens' Fire Ins. Co.*, 144 La. 497, 80 So. 672.

Maine. *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 66 Atl. 714.

Nebraska. *Taylor v. Illinois Commercial Men's Asso.*, 84 Neb. 799, 24 L. R. A. (N.S.) 1174, 122 N. W. 41.

Oregon. *United Brokers' Co. v. Southern Pac. Co.*, 86 Or. 607, 169 Pac. 114.

Pennsylvania. *Lebanon County v. Franklin F. Ins. Co.*, 237 Pa. St. 360, 44 L. R. A. (N.S.) 148, 85 Atl. 419.

West Virginia. *Pauley v. Sun Insurance Office*, 79 W. Va. 187, L. R. A. 1918E, 473, 90 S. E. 552.

"The decisions in other states undoubtedly disclose many different forms of expressions if not a variety of opinions, in relation to the proper rule

to be applied in adjusting the rights of parties where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the other party. By the strict rules of the common law in such a case, full performance was undoubtedly required as a condition precedent to the right of recovery, but in most jurisdictions the rigor of this common law rule has been relaxed, even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and relief is granted to the plaintiff by applying the equitable doctrine of substantial performance." *Skowhegan Water Co. v. Skowhegan Village Corp.*, 102 Me. 323, 66 Atl. 714.

³See ch. LXXXIV.

⁴*National Mutual Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634 (obiter) [sub nomine, *Duncan v. National Mutual Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

⁵*Lebanon County v. Franklin Fire Ins. Co.*, 237 Pa. St. 360, 44 L. R. A. (N.S.) 148, 85 Atl. 419.

for the transportation of goods which requires notice of a claim for damages, is complied with if such notice is given as conforms substantially to the requirements of the contract.⁶ Under a contract by which A, who had sold bank stock to B, agreed to refund to B the proportionate share of the loss which B might sustain if the bank failed to recover money which had been misappropriated by an officer and which contained a provision that such loss should be regarded as having been forfeited if such amount should not have been recovered by the end of the year, was performed substantially if such amount was recovered after the year;⁷ and such purchaser could not maintain an action upon such contract against the seller if it was shown that such amount had been recovered after the expiration of such period.⁸ A condition against a change of occupation is broken only by a substantial and material change.⁹ Provisions requiring notice need to be complied with only substantially. Thus A and B made a contract with X, requiring A and B to give certain notice to X. A subsequently sold his interest to X. A notice from B alone was held sufficient.¹⁰

At the same time, as in the case of covenants,¹¹ substantial performance means a substantial performance of the terms of the contract, and not the substitution of something of equal value without the consent of the parties.¹² If a contract is conditioned upon the completion of a certain railway to a certain point within a certain time, such condition is broken if such railway is not completed,¹³ even although another railway has been constructed which will be even more advantageous to the promisor than the railway for which he stipulated.¹⁴

§ 2649. Effect of breach of condition. If the condition is one which the law will recognize and enforce,¹ full effect is given to the

⁶ *United Brokers' Co. v. Southern Pac. Co.*, 86 Or. 607, 169 Pac. 114.

⁷ *Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624.

⁸ *Robinson v. Pierce*, 34 Colo. 500, 83 Pac. 624.

⁹ *Union Health & Accident Co. v. Anderson*, — Colo. —, 180 Pac. 81; *Jaques v. Order of United Commercial Travelers*, 104 Kan. 612, 180 Pac. 200; *Taylor v. Illinois Commercial Men's*

Association, 84 Neb. 799, 24 L. R. A. (N.S.) 1174, 122 N. W. 41.

¹⁰ *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837.

¹¹ See ch. LXXXIV.

¹² *Union Saw Mill Co. v. Lake Lumber Co.*, 120 La. 106, 44 So. 1000.

¹³ *Union Saw Mill Co. v. Lake Lumber Co.*, 120 La. 106, 44 So. 1000.

¹⁴ *Union Saw Mill Co. v. Lake Lumber Co.*, 120 La. 106, 44 So. 1000.

¹ See §§ 719 et seq.

provisions of the contract which provide for such condition, and breach of condition operates as a discharge of the contract in whole or in part, according to its terms.²

Whether the breach of condition terminates the rights of the parties finally and absolutely, or whether it merely suspends such rights as long as such specified state of affairs exists, depends upon the intention of the parties as expressed in the words of the contract. By the terms of the contract, the breach of the condition may destroy the right of one of the parties under the contract absolutely and finally, either in whole or in part. If the contract is so worded as to have this effect, the happening of the event terminates the rights of one or both of the parties under the contract,³ and the fact that such state of affairs ceases to exist does not revive the contract and confers no rights upon the parties there-

² **Canada.** *Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co.*, 33 Can. S. C. 94.

United States. *Baltimore & Ohio Railroad Co. v. Leach*, 249 U. S. 217, — L. ed. — [reversing, 173 Ky. 452, and citing, *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U. S. 592, 61 L. ed. 685].

Kansas. *Burns v. Alliance Co-operative Ins. Co.*, 103 Kan. 803, 176 Pac. 985.

Maryland. *Linthicum Heights Co. v. Firemen's Ins. Co.*, — Md. —, 106 Atl. 165.

Nebraska. *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43, 51 L. R. A. (N.S.) 261, 144 N. W. 1044.

New Jersey. *Wildwood Board v. Bright*, 91 N. J. L. 579, 103 Atl. 422.

New York. *Clark v. West*, 193 N. Y. 349, 86 N. E. 1.

Ohio. *Germania F. Ins. Co. v. Werner*, 76 O. S. 543, 12 L. R. A. (N.S.) 456, 81 N. E. 980.

Oregon. *Hinkson v. Kansas City Life Ins. Co.*, — Or. —, 183 Pac. 24.

Tennessee. *American Steam Laundry Co. v. Hamburg-Bremen F. Ins. Co.*, 121 Tenn. 13, 21 L. R. A. (N.S.) 442, 113 S. W. 394.

West Virginia. *Bronson v. New York*

F. Ins. Co., 64 W. Va. 494, 19 L. R. A. (N.S.) 643, 63 S. E. 283.

If a building or construction contract contains a provision to the effect that upon the happening of a certain event the owner may end the contract and may take possession of such material as is necessary to perform the contract, and that he may under such circumstances complete the performance of the contract himself, the owner acquires title to such material when he takes possession thereof under such provision. *Wildwood Board v. Bright*, — N. J. —, 103 Atl. 422.

³ **Canada.** *Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co.*, 33 Can. S. C. 94.

Kansas. *German Ins. Co. v. Russell*, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345.

Maine. *Dolliver v. Granite State Fire Ins. Co.*, 111 Me. 275, 89 Atl. 8.

Maryland. *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

Nebraska. *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 936, 78 N. W. 936.

New Hampshire. *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556.

under.⁴ If a policy of fire insurance provides that it shall be void in case of vacancy and if the courts construe the word "void" literally, such policy does not revive when the building becomes occupied.⁵ If, by the terms of a policy of fire insurance, it is void from the beginning because of the existence of prior insurance, a renewal of such policy is without legal effect, although in the meantime such prior insurance has ceased to be in effect.⁶ If, by the terms of the contract of fire insurance, it becomes void if an inventory is not taken within a specified time, it does not revive on the taking of such inventory at a later time.⁷

In cases of this sort, the contract can take effect again only by the mutual agreement of the parties thereto, whether such agreement is expressed formally or informally.⁸ This, however, is probably to be regarded rather as a new contract than as a waiver of the right of each party to take advantage of such breach of condition.

In many cases the provisions of the contract which prescribe the condition are so worded that the rights of the parties are merely suspended during a given state of affairs, and accordingly the rights of the parties revive when such state of facts ceases to exist.⁹ A policy of fire insurance may contain a provision against vacan-

Washington. Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 59 Wash. 501, 110 Pac. 38.

⁴ **Canada.** Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co., 33 Can. S. C. 94.

Kansas. German Ins. Co. v. Russell, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345.

Maine. Dolliver v. Granite State Fire Ins. Co., 111 Me. 275, 89 Atl. 8.

Maryland. Reynolds v. German-American Ins. Co., 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

Nebraska. Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep. 936, 78 N. W. 936.

New Hampshire. Moore v. Phoenix Ins. Co., 62 N. H. 240, 13 Am. St. Rep. 556.

⁵ **German Ins. Co. v. Russell**, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345;

Dolliver v. Granite State Fire Ins. Co., 111 Me. 275, 50 L. R. A. (N.S.) 1106, 89 Atl. 8.

⁶ **Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co.**, 33 Can. S. C. 94.

⁷ **Reynolds v. German-American Ins. Co.**, 107 Md. 110, 15 L. R. A. (N.S.) 345, 68 Atl. 262.

⁸ **Home Fire Ins. Co. v. Kuhlman**, 58 Neb. 488, 76 Am. St. Rep. 936, 78 N. W. 936.

⁹ **Kentucky.** Phoenix Ins. Co. v. Lawrence, 45 Ky. (4 Met.) 9, 81 Am. Dec. 521.

Maine. Lane v. Maine Mutual Fire Ins. Co., 12 Me. 44.

Maryland. U. S. Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224.

Massachusetts. Worthington v. Bearse, 94 Mass. (12 All.) 382; **Hinckley v. Germania Fire Insurance Co.**, 140 Mass. 38.

contract.⁴ If, on the other hand, the condition is a condition subsequent, the burden of proof is upon the party who alleges the breach of such condition and who is resisting the enforcement of the contract. Unless such party is able to establish the facts which amount to such breach by a preponderance of the evidence, his defense is insufficient.⁵ Under a condition in a policy of fire insurance by which such policy is to terminate if the ownership of the insured shall become other than sole and unconditional, the burden of proving breach of such condition rests upon the insurer.⁶ If a lessee of a mine seeks to avoid his covenant to pay royalties by pleading a condition subsequent which discharged him from such obligation in case of unavoidable casualty, the burden of proving an unavoidable casualty rests upon such lessee;⁷ and it is not sufficient if he alleges or proves inability to secure railway cars unless he also shows due diligence on his part in attempting to secure them.⁸ Under a building contract by which the contractor agrees to construct a building within a certain time unless certain events happen, it is said, however, that the burden of proof rests upon the property owner, and that if he merely shows failure to perform in such time without also showing that such events did not happen, he can not recover.⁹

§ 2651. Duty to make restitution on breach of condition. Whether one who has received benefits under a real or supposed contract is obliged to make restitution to the adversary party when such contract is discharged by breach of condition, depends, in the

⁴ *Waterman-Waterbury Co. v. School Dist.* No. 2, 182 Mich. 498, L. R. A. 1915B, 626, 148 N. W. 673.

⁵ *Iowa.* *Adams v. Atlas Mutual Ins. Co.*, 135 Ia. 299, 112 N. W. 651.

Kentucky. *Bennett v. Howard*, 175 Ky. 797, L. R. A. 1917E, 1075, 195 S. W. 117.

Massachusetts. *Gray v. Gardner*, 17 Mass. 188; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879.

Minnesota. *Taylor v. Security Mutual Fire Ins. Co.*, 88 Minn. 231, 92 N. W. 952.

Ohio. *Moody v. Amazon Ins. Co.*, 52 O. S. 12, 38 N. E. 1011.

West Virginia. *Houseman v. Home*

Ins. Co., 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048.

Wisconsin. *Clute v. Clintonville Mutual Fire Ins. Co.*, 144 Wis. 638, 32 L. R. A. (N.S.) 240, 129 N. W. 661.

⁶ *Rochester German Ins. Co. v. Monumental Sav. Asso.*, 107 Va. 701, 60 S. E. 93; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Houseman v. Home Ins. Co.*, 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048.

⁷ *Bennett v. Howard*, 175 Ky. 797, L. R. A. 1917E, 1075, 195 S. W. 117.

⁸ *Bennett v. Howard*, 175 Ky. 797, L. R. A. 1917E, 1075, 195 S. W. 117.

⁹ *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052.

absence of specific statutory provision or of specific provisions in the contract requiring restitution or providing against restitution, as the case may be, on the question whether such condition was in the nature of a condition precedent so that the contract in question never took effect, or whether it is in the nature of a condition subsequent so that rights took effect and the party who seeks restitution had in fact, for a greater or less period of time, received benefits under such contract. If the condition is in the nature of a condition precedent, so that no rights ever attached under such contract, the party who received benefits under such contract must make restitution to the adversary party,¹ at least in the absence of fraud or bad faith on the part of the party who seeks restitution. On the other hand, if the condition is in the nature of a condition subsequent, and rights have arisen under the contract prior to the breach, so that the party who seeks restitution has received benefits of some sort under such contract, it is generally held that no right to restitution exists,² in the absence of statutory provisions requiring such restitution, and in the absence of provisions in the contract on such subject. If a policy of life insurance contains a condition against liability arising out of death from certain specified causes, the insurer is not bound to return the premiums if the insured dies from one of such specified causes.³

Contracts, especially contracts of insurance, frequently contain provisions for the restitution of benefits in case the contract should become void for breach of certain specified conditions. Under provisions of this sort, the question which usually arises is whether the restoration of the benefits is a condition precedent to the right to take advantage of the breach of condition. If the policy of

¹ *Fisher v. Metropolitan Life Ins. Co.*, 162 Mass. 236, 38 N. E. 503; *Connecticut Mutual Life Ins. Co. v. Pyle*, 44 O. S. 19, 58 Am. Rep. 781, 4 N. E. 465; *Metropolitan Life Ins. Co. v. Felix*, 73 O. S. 46, 75 N. E. 941; *Grabinski v. United States Annuity & Life Ins. Co.*, 33 S. D. 300, 145 N. W. 553.

² *Illinois*, *Dickerson v. Northwestern Mutual Life Ins. Co.*, 200 Ill. 270, 65 N. E. 694.

Indiana, *Red Men's Fraternal Accident Asso. v. Rippey*, 181 Ind. 434, 50 L. R. A. (N.S.) 1006, 103 N. E. 345, 104 N. E. 641.

Massachusetts, *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655.

Michigan, *Warren v. Federal Ins. Co.*, 198 Mich. 342, 164 N. W. 449.

Nebraska, *Meyers v. German Fire Ins. Co.*, 101 Neb. 855, 166 N. W. 247.

North Carolina, *Teeter v. Harner Military School*, 165 N. Car. 564, 51 L. R. A. (N.S.) 975, 81 S. E. 767.

³ *Red Men's Fraternal Accident Asso. v. Rippey*, 181 Ind. 434, 50 L. R. A. (N.S.) 1006, 103 N. E. 345, 104 N. E. 641.

insurance provides for the return of the premium, in case the policy becomes void, "on surrender of this policy," it has been held in some jurisdictions that the return of the premium is not a condition precedent to the termination of the policy and that the payment of such premiums is not necessary until the policy has been surrendered.⁴ In other jurisdictions it has been held that the use of such language does not indicate an intention to permit the cancellation of the insurance policy until the premium is repaid to the insured; and accordingly it is held that such restitution of the premium is a condition precedent to the cancellation of the policy.⁵ If a parent sends his son to a private school with knowledge of the provisions contained in the catalogue to the effect that pupils whose conduct is hurtful to the scholarship of his associates will be expelled, and with knowledge of the fact that tuition is payable in advance, such parent is liable for the unpaid portion of the tuition, even though the pupil has been expelled for cause.⁶

IX

EXCUSES AND WAIVER

§ 2652. Excuses and waiver—General nature. In many cases the courts succeed in avoiding the effect of breach of condition in accordance with the terms of the contract, by holding that the party who has broken such condition is excused from performance

⁴ **United States.** *El Paso Reduction Co. v. Hartford F. Ins. Co.*, 121 Fed. 937; *Schwarzschild & S. Co. v. Phoenix Ins. Co.*, 124 Fed. 52.

California. *Mangrum v. Law Union & Rock Ins. Co.*, 172 Cal. 497, L. R. A. 1916F, 440, 157 Pac. 239.

Iowa. *Parsons v. Northwestern Nat. Ins. Co.*, 133 Ia. 532, 110 N. W. 907.

Michigan. *Webb v. Granite State F. Ins. Co.*, 164 Mich. 139, 120 N. W. 19.

Nebraska. *Schmidt v. Williamsburg City Fire Ins. Co.*, 95 Neb. 43, 51 L. R. A. (N.S.) 261, 144 N. W. 1044.

New Jersey. *Davidson v. German Ins. Co.*, 74 N. J. L. 487, 12 Am. & Eng. Ann. Cas. 1065, 13 L. R. A. (N.S.) 884, 65 Atl. 996.

Ohio. *Phoenix Mut. F. Ins. Co. v. Brecheisen*, 50 O. S. 542, 35 N. E. 53.

South Carolina. *Norris v. Hartford F. Ins. Co.*, 66 S. Car. 450, 74 Am. St. Rep. 765, 33 S. E. 566.

Wisconsin. *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 735.

⁵ *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516 (express provision for refunding unearned premium if the insurance company should elect to cancel the policy); *Continental Ins. Co. v. Daniel*, (Ky.), 78 S. W. 866, 25 Ky. L. Rep. 1501; *Tisdell v. New Hampshire F. Ins. Co.*, 155 N. Y. 163, 40 L. R. A. 765, 49 N. E. 664; *Taylor v. Insurance Co.*, 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354.

⁶ *Teeter v. Horner Military School*, 165 N. Car. 564, 51 L. R. A. (N.S.) 975, 81 S. E. 707.

or that breach of such condition has been waived. To a large extent these terms have been used interchangeably. As far as they can be distinguished, "waiver" is used where the right to take advantage of the breach of condition is intentionally renounced by the adversary party,¹ and "excuse" is used of cases in which effect is denied to the breach of condition, either because of extrinsic facts, or because of conduct of the adversary party which does not show any intention on his part of renouncing his right to take advantage of such breach, but which the law, nevertheless, regards as preventing him from taking advantage thereof.² In many of the cases in which the doctrine of excuse is involved, the circumstances which lead up to the breach are such that the court can say properly that the breach was not one which was fairly contemplated by the parties when they entered into the original contract. Many forms of this kind of excuse have already been given in discussing the application and effect of various provisions for conditions.³ In some of the cases in which an excuse for breach is offered, no element of waiver that is of intention on the part of the party for whose benefit such condition was reserved to renounce the benefit of such condition, exists. The refusal of an insured to submit to an examination as to the amount and causes of the loss, is excused by the fact that when such examination was demanded his attorney was temporarily absent, and he refused to submit to such examination in the absence of his attorney.⁴ An injunction by which an insurance society is restrained from suspending a member for failure to pay his dues until the determination of litigation involving the power of such insurance order to increase its assessments, does not prevent his failure to pay his dues from operating as a breach of condition if it is finally adjudged that the insurance order had power to increase such assessments.⁵ Many of the excuses of this type arise in building and construction contracts, and these will be discussed in the following sections.⁶ The excuses for breach of conditions in contracts of insurance are usually classed under the general heading of waiver,⁷ although in thus classing them the term is frequently carried far beyond its original meaning as it is made to

¹ See § 2656.

² See §§ 2653 et seq.

³ See §§ 2594 et seq.

⁴ *Gordon v. St. Paul Fire & Marine Insurance Co.*, 197 Mich. 226, L. R. A. 1918E, 402, 163 N. W. 956.

⁵ *Evans v. Supreme Council*, 223 N. Y. 497, 1 A. L. R. 163, 120 N. E. 93.

⁶ See §§ 2653 et seq.

⁷ See §§ 2663 et seq.

cover the consequences of estoppel, and to prevent the insurance company from taking advantage of breaches of condition of which in all probability it was intended to take advantage wherever possible.⁸

§ 2653. Excuses for not obtaining approval or for not treating approval as finality—Fraudulent and arbitrary action. The contractor may, in some cases, excuse his failure to obtain the certificate of the architect. If he can show that the certificate was refused by the architect fraudulently, and in bad faith, he may recover without such certificate.¹ There is some authority for saying that by the express provision of the contract, the certificate of

⁸ See §§ 2599 et seq.

¹ **United States.** *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917; *Marks v. Ry.*, 76 Fed. 941, 22 C. C. A. 630; *Shippey v. United States*, 49 Ct. Cl. 151.

Arkansas. *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242.

California. *Copley v. Durand*, 153 Cal. 278, 95 Pac. 38.

Idaho. *Spaulding v. Navigation Co.*, 5 Ida. 528, 51 Pac. 408; *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Ida. 5, 93 Pac. 789 [1908].

Illinois. *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709.

Indiana. *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156.

Kansas. *Edwards v. Hartshorn*, 72 Kan. 49, 1 L. R. A. (N.S.) 1050, 82 Pac. 520; *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527. •

Kentucky. *Illinois Central R. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

Louisiana. *Dugue v. Levy*, 114 La. 21, 37 So. 995.

Massachusetts. *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

Missouri. *Williams v. Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

Nebraska. *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

New Jersey. *Chism v. Schipper*, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316; *Bradner v. Roffell*, 57 N. J. L. 32, 29 Atl. 317.

New York. *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442.

Oregon. *Seaside v. Randles*, — Or. —, 180 Pac. 319.

Pennsylvania. *Thaler v. Wilhelm Greissner Construction Co.*, 229 Pa. St. 512, 33 L. R. A. (N.S.) 345, 79 Atl. 147.

Vermont. *Fay v. Moore*, 261 Pa. St. 437, 104 Atl. 686; *Herrick v. Belknap*, 27 Vt. 673.

Virginia. *Norfolk & W. R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

Washington. *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936.

West Virginia. *Vaughan Const. Co. v. Virginian Ry. Co.*, 82 W. Va. 658, 97 S. E. 278.

Wisconsin. *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

the engineer or architect may be made conclusive as to his own good faith;² but in view of the fact that a covenant which assumes to waive in advance a possible defense, such as fraud,³ is invalid except as far as a reasonable time for investigation is given, and such provision, accordingly, operates as a short period of limitations,⁴ the correctness of this view may be doubted.

If the contractor can show that the certificate is withheld fraudulently, it is not necessary to show that the owner was a party to the fraud.⁵ If the property owner is a party to the fraud, and if the certificate is withheld by collusion between the property owner and his architect or engineer, the right of the contractor to recover without the certificate is even more clear.⁶

On the other hand, if the owner can show that the architect gave the certificate when it should not have been given, and that he acted fraudulently and in bad faith, he is not bound by the issuing of such certificate.⁷

If the contractor can show that the architect withheld his certificate arbitrarily, without in fact passing upon the question in dispute in a fair and honest manner, he may recover, notwithstanding the absence of such certificate.⁸ If the certificate is withheld arbitrarily or capriciously, the contractor may recover without

² *Tullis v. Jacson* [1892], 3 Ch. 441.

³ See § 727.

⁴ See § 727.

⁵ *Chiem v. Schipper*, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316.

⁶ *Fay v. Moore*, 261 Pa. St. 437, 104 Atl. 686.

⁷ *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Tetz v. Butterfield*, 54 Wis. 242, 41 Am. Rep. 29, 11 N. W. 531.

⁸ *United States. Crane Elevator Co. v. Clark*, 80 Fed. 705; *Utah Construction Co. v. St. Louis Construction & Equipment Co.*, 254 Fed. 321; *Shippey v. United States*, 49 Ct. Cl. 151.

California. Copley v. Durand, 153 Cal. 278, 95 Pac. 38.

Idaho. Nelson Bennett Co. v. Twin Falls Land & Water Co., 14 Ida. 5, 93 Pac. 789.

Illinois. McDonald v. Patterson, 186 Ill. 381, 57 N. E. 1027.

Massachusetts. Hebert v. Dewey, 101 Mass. 403, 77 N. E. 822.

Nebraska. Howard County v. Pesha, — Neb. —, 172 N. W. 55.

Pennsylvania. Pittsburgh Terra-Cotta Co. v. Sharp, 190 Pa. St. 256, 42 Atl. 685; *Thaler v. Wilhelm Greisser Construction Co.*, 220 Pa. St. 512, 33 L. R. A. (N.S.) 345, 79 Atl. 147.

Virginia. Richmond College v. Scott-Nuckols Co., — Va. —, 98 S. E. 1.

Washington. Dyer v. Kittitas County, 25 Wash. 80, 64 Pac. 1009; *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936.

Wisconsin. Bently v. Davidson, 74 Wis. 420, 43 N. W. 139; *Keachie v. Starkweather Drainage District*, 168 Wis. 298, 170 N. W. 236.

showing actual fraud.⁹ On the other hand, such conduct has been said to amount to fraud in law, although not actual fraud.¹⁰ Whatever explanation the courts may give for their result, they agree, however, that if the contractor shows that the certificate is withheld arbitrarily and unreasonably, he may recover without making any further showing of fraud or collusion.¹¹ Whether the contractor may recover where he has performed his contract substantially,¹² but not literally, and where the engineer or architect has refused to give a certificate because such performance fell short of the performance agreed upon by the contract, is a question upon which there is a conflict of authority. If there were no provision in the contract requiring the certificate of the architect or engineer as a condition precedent, the contractor in such cases could recover from the property owner; and the amount of his recovery would be the contract price less the cost of completing the contract.¹³ The architect can not withhold the certificate because the subcontractors and materialmen have not been paid where the chief contractor agrees that they may be paid out of the funds in the hands of the owner, which are ample for that purpose.¹⁴

If the architect withholds the certificate unreasonably, recovery can be had without it.¹⁵ If the engineer or architect is in fact satisfied with the work of the contractor, and if the certificate is

⁹ Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N.S.) 791, 95 Pac. 38; Richmond College v. Scott-Nuckols Co., — Va. —, 98 S. E. 1.

¹⁰ Howard County v. Pesha, — Neb. —, 172 N. W. 53.

¹¹ United States. Crane Elevator Co. v. Clark, 80 Fed. 705.

Illinois. McDonald v. Patterson, 188 Ill. 381, 57 N. E. 1027.

Indiana. Bird v. St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

Pennsylvania. Coon v. Citizens' Water Co., 152 Pa. St. 644, 25 Atl. 505; Pittsburgh Terra-Cotta Co. v. Sharp, 190 Pa. St. 256, 42 Atl. 685.

Washington. Dyer v. Kittitas County, 25 Wash. 80, 64 Pac. 1009.

Wisconsin. Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139.

¹² See § 2654 for right of engineer to withhold certificate in case of performance which is substantial but not literal. See ch. LXXX for substantial performance.

¹³ See ch. LXXX.

¹⁴ Mahoney v. Church, 47 La. Ann. 1064, 17 So. 484.

¹⁵ **California.** Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N.S.) 791, 95 Pac. 38.

Indiana. Bird v. Church, 154 Ind. 138, 56 N. E. 129.

Kansas. Edwards v. Hartshorn, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

Pennsylvania. Coon v. Water Co., 152 Pa. St. 644, 25 Atl. 505.

Wisconsin. Keachie v. Starkweather Drainage District, 168 Wis. 298, 170 N. W. 236.

refused in order to compel the contractor to reconstruct work which was injured by others without his fault, the contractor may recover without such certificate.¹⁶ Such conduct amounts either to fraud or to evident mistake.¹⁷

The architect must act upon his own judgment in order to make his refusal to issue a certificate conclusive upon the contractor.¹⁸ Thus if he acts solely upon the statements of his subordinates,¹⁹ or delegates to another the power to decide questions of performance,²⁰ or states objections made by his employer without exercising his own judgment as to the correctness of the objections made,²¹ or withholds the certificate solely on the order of the owner,²² he has not exercised his own judgment as required by the contract, and his refusal to issue a certificate is not conclusive. If the engineer refuses to grant a certificate because of his want of information upon the subject, the contractor may recover without such certificate.²³ So if the contract contains a clause providing that if in the judgment of two designated architects the contractor delays completion an unreasonable length of time, the owner may, on three days' notice, complete the contract, both architects designated must exercise independent judgment, and an order to stop work is invalid if one of the architects, in declaring the delay unreasonable, relies entirely upon what the other architect tells him.²⁴ If the architect or engineer employs an assistant who is evidently biased and prejudiced against the contractor to make the measurements, estimates and classifications required by the contract, the contractor may recover in the absence of such certificate upon showing that he has performed the contract.²⁵

As long as the architect has not wrongfully refused to give a certificate of completion, the fact that the contractor fears such wrongful refusal does not excuse him from omitting to apply for

¹⁶ *Copley v. Durand*, 153 Cal. 278, 16 L. R. A. (N.S.) 791, 95 Pac. 38.

¹⁷ *Crane Elevator Co. v. Clark*, 80 Fed. 705.

¹⁸ So must a scaler selected by both parties. *Bresnahan v. Ross*, 103 Mich. 483, 61 N. W. 793.

¹⁹ *Van Hook v. Burns*, 10 Wash. 22, 38 Pac. 763.

²⁰ *Monahan v. Fitzgerald*, 164 Ill. 525, 45 N. E. 1013.

²¹ *Crane Elevator Co. v. Clark*, 80 Fed. 705.

²² *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Marsch v. Southern New England R. Corp.*, 230 Mass. 483, 120 N. E. 120.

²³ *Shippey v. United States*, 49 Ct. Cl. 151.

²⁴ *Benson v. Miller*, 56 Minn. 410, 57 N. W. 943.

²⁵ *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Ida. 5, 93 Pac. 789.

such certificate.²⁶ If the architect or engineer has announced his determination in advance, and if it is evident that he has made up his mind without waiting for objections on the part of the contractor as provided for by the contract, such conduct on the part of the architect or engineer makes it unnecessary for the contractor to present written objections within a specified time as required by the contract.²⁷

The act of the owner, whereby he prevents the contractor from completing his contract,²⁸ or makes it impossible for him to obtain the certificate, as where a contractor who puts in fire sprinklers is to get a certificate of approval from a board of fire underwriters, and the board refuses such certificate for the sole reason that the water supply furnished by the owner was insufficient,²⁹ or the wrongful refusal of the architect who is to issue such certificate to make an examination of the premises,³⁰ or the wrongful refusal of an arbitrator to act,³¹ are acts which excuse compliance with such conditions precedent.

The property owner who, by the terms of the contract, is concluded by the certificate of the architect or engineer, may, conversely, attack the action of the architect or engineer on the ground of fraud or bad faith.³² If, by the terms of the contract, notice of a defect was to be given by the engineer of the public corporation as a condition precedent to the right of action of the corporation to recover on the contract, the public corporation may show as an excuse for failure to give such notice that the contractor had bribed the engineer from giving it.³³

Whether the architect has acted in good faith or not is a question of fact, to be determined by the tribunal trying the fact.³⁴ Good faith and honest dealing on the part of the architect or engi-

²⁶ *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023.

²⁷ *Lantry Contracting Co. v. Atchison, Topeka & Santa Fe Ry.*, 102 Kan. 799, 172 Pac. 527. (In this case the engineer had prepared estimates in the alternative—one to be furnished if the contractor intended to sue the property owner, and the other to be furnished in case the contractor agreed not to sue the property owner.)

²⁸ *St. Louis, etc., Ry. v. Kerr*, 153 Ill. 182, 38 N. E. 638; *Justice v. Elwert*, 28 Or. 460, 43 Pac. 649.

²⁹ *New York, etc., Co. v. Andrews*, 173 N. Y. 25, 65 N. E. 776.

³⁰ *McDonald v. Patterson*, 186 Ill. 381, 57 N. E. 1027; *Moran v. Schmitt*, 109 Mich. 282, 67 N. W. 323.

³¹ *Potter v. Holmes*, 72 Minn. 153, 75 N. W. 591.

³² *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659, 152 C. C. A. 493.

³³ *Hutchinson v. Kansas Bitulithic Co.*, 239 Fed. 659.

³⁴ *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620; *Schneider v. Ann Arbor*, 185 Mich. 599, 162 N. W. 110; *Fay*

neer will be presumed, and the party who attacks his conduct in giving or refusing a certificate has the burden of showing bad faith, unreasonable conduct, and the like.³⁵ The fact that the contractor has complied with the demands made by the architect or engineer when the certificate is first asked for and refused, is not conclusive as a matter of law that the architect or engineer is acting in bad faith,³⁶ since other defects which were not apparent at the time of the first investigation may have been discovered subsequently.³⁷

§ 2654. Refusal of certificate for substantial performance, short of exact performance. In some jurisdictions it seems to be held that in case of substantial performance under a contract which provides for the certificate of the architect or engineer, the architect or engineer should issue a certificate of performance wherever the contract has been performed substantially, and that in such certificate deduction should be made for the necessary cost of completing the contract. Accordingly, the contractor is allowed to recover without the certificate of the architect or engineer in case such certificate is refused until the contract is performed literally or exactly.¹ Under this theory, recovery can be had on a contract for constructing a bridge, which has cost more than six thousand dollars, which has been performed except certain work which would cost thirty dollars, and which, on account of climatic conditions, it is impossible to perform until the next season.² In other jurisdictions, however, effect seems to be given to the provision which requires the certificate of an architect or engineer as a condition precedent to recovery. It is felt that the judgment of the architect or engineer is final if he is acting in good faith;³ and accordingly the contractor can not recover, even in case of substantial perform-

v. Moore, 261 Pa. St. 437, 104 Atl. 680; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142.

³⁵ Bush v. Jones, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N.S.) 774; Schneider v. Ann Arbor, 195 Mich. 599, 162 N. W. 110.

³⁶ Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822.

³⁷ Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822.

¹ Bush v. Jones, 144 Fed. 942, 6 L. R. A. (N.S.) 774; Central Union

Stock Yards Co. v. Uvalde Asphalt Paving Co., 82 N. J. Eq. 246, 87 Atl. 235 (possibly a case of complete performance); Nolan v. Whitney, 88 N. Y. 648; Crouch v. Gutmann, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; Washington Bridge Co. v. Land and River Improvement Co., 12 Wash. 272, 40 Pac. 982.

² Washington Bridge Co. v. Improvement Co., 12 Wash. 272, 40 Pac. 982.

³ Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822.

ance,⁴ without showing that the refusal is fraudulent or unreasonable.⁵ In these jurisdictions it is held that it is not fraudulent or unreasonable for the architect or engineer to refuse his certificate until the contract has been performed literally.⁶

§ 2655. Mistake on part of architect or engineer. Since the provision in a contract which requires the certificate of the architect or engineer as a condition precedent is intended to leave the determination of the matter specified in the contract to the judgment of the architect or engineer, such provision can not be ignored and the contractor can not recover without producing such certificate, merely by showing a difference in judgment between the architect and the contractor, or even by showing that the judgment of the architect or engineer does not coincide with the judgment of the court or the jury.¹

The action of the architect in granting or in refusing a certificate will not be conclusive, however, if it is shown that he acted through mistake of the requisite degree.² What degree of mistake is requisite to produce this result, is a question upon which the courts have not agreed, at least in their outward form of statement. In some jurisdictions it is said that the action of the architect or engineer will not be final in case of gross mistake,³ which

⁴ *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

⁵ *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

⁶ *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

¹ *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65; *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *Tacoma & Eastern Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

² *United States v. United States v. Walsh*, 115 Fed. 697.

Arkansas. Carlile v. Corrigan, 83 Ark. 136, 103 S. W. 620; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242.

Kansas. Edwards v. Hartshorn, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

New Jersey. Bond v. Newark, 19 N. J. Eq. 376.

New York. Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449.

Tennessee. McEwen v. Nashville, (Tenn. Ch. App.), 36 S. W. 968.

Virginia. Norfolk, etc., Ry. v. Mills, 91 Va. 613, 22 S. E. 556.

Washington. Tacoma & Eastern Lumber Co. v. Field, 100 Wash. 79, 170 Pac. 360.

West Virginia. Vaughan Const. Co. v. Virginia Ry. Co., 82 W. Va. 658, 97 S. E. 278.

³ *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

is so gross as to imply bad faith,⁴ or as to amount to constructive fraud,⁵ or as to establish gross negligence on his part.⁶ In other jurisdictions it is said that the action of the architect or engineer will not be conclusive if the certificate is given under a clear mistake of fact,⁷ or in clear violation of an express provision of the contract.⁸ The action of the architect or engineer is not conclusive if it is taken under a clear misconstruction of the provisions of the contract.⁹ The act of the architect or engineer in granting or refusing a certificate because of a misconstruction of the classification of material made in the contract,¹⁰ or because through mistake he regards certain samples and photographs as a part of the contract,¹¹ or because through misconstruction of the contract he regards the contractor as responsible for a successful result, and not merely for com-

⁴ *Carlile v. Corrigan*, 83 Ark. 136, 103 S. W. 620; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520; *Vaughan Const. Co. v. Virginian Ry. Co.*, 82 W. Va. 658, 97 S. E. 278.

Gross mistake, amounting to bad faith, prevents the decision of the engineer from being final. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

⁵ *Tacoma & Eastern Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

⁶ *Seaside v. Randles*, — Or. —, 180 Pac. 319.

⁷ *United States v. United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419.

Illinois. *Barbee v. Findlay*, 221 Ill. 251, 77 N. E. 590 (obiter); *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Kansas. *Edwards v. Hartshorn*, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

Kentucky. *Illinois Central R. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

New Jersey. *Bond v. Newark*, 19 N. J. Eq. 376.

New York. *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449.

Tennessee. *McEwen v. Nashville* (Tenn. Ch. App.), 36 S. W. 968.

Virginia. *Norfolk, etc., Ry. v. Mills*, 91 Va. 613, 22 S. E. 556.

⁸ *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65; *Norfolk, etc., Ry. v. Mills*, 91 Va. 613, 22, S. E. 556.

⁹ *Illinois*. *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Indiana. *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65.

Missouri. *Williams v. Chicago, S. F. & C. Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

New York. *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661.

Wisconsin. *Shine v. Hagemeister Realty Co.*, — Wis. —, 172 N. W. 750.

¹⁰ *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65; *Williams v. Chicago, Santa Fe & California Ry. Co.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

¹¹ *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

pliance with plans and specifications,¹² is not conclusive as between the parties to the contract. If the engineer or contractor misinterprets the contract as giving him power to pass upon questions upon which he was not given power to pass, his action in refusing a certificate in the exercise of power thus erroneously assumed is not final.¹³ If the contract authorizes the architect to issue certificates for "work done and materials furnished upon the premises," the architect has no power to refuse a certificate on the ground that the contractor's delay caused injury to other work.¹⁴ A certificate that a building contract has been performed fully, does not bind the owner if a heating apparatus provided for by the contract has not been furnished.¹⁵

Equity will give relief if the architect has been guilty of fraud or manifest error.¹⁶ If mistake exists, fraud need not also exist to entitle the party to relief.¹⁷

§ 2656. Waiver of breach of condition—General nature. The operation of the general rules which govern the validity and effect of conditions is frequently modified by the desire of the courts to apply principles of waiver and to find that the party for whose benefit the condition was reserved has renounced it. The use of the term "waiver" has been severely criticized.¹ It has been pointed out with perfect correctness that a great many of the general principles of waiver can be arranged under the headings of new contract, election and estoppel. The fact is, however, that the term "waiver" is used rather to indicate a result which arises from certain acts or omissions, rather than to indicate the acts or omissions which give rise to such result. In the old law the primary idea of "waive" was to throw away. It was, for example, used when a thief threw away goods in his flight. He was said to waive such goods, and the goods were said to be waifs.² This idea has always persisted in our law, and the term waiver is still used of the voluntary renunciation of a right which the party entitled thereto might have asserted if it had not been for such renuncia-

¹² *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661.

¹³ *Shine v. Hagemeister Realty Co.*, — Wis. —, 172 N. W. 750.

¹⁴ *Shine v. Hagemeister Realty Co.*, — Wis. —, 172 N. W. 750.

¹⁵ *Mallard v. Moody*, 105 Ga. 400, 31 S. E. 45.

¹⁶ *O'Brien v. Construction Co.*, 107 Fed. 338; *State v. Cuyahoga County*, 12 Ohio C. D. 328, 21 Ohio C. C. 780.

¹⁷ *Norfolk, etc., Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

¹ See *Waiver Distributed*, by John S. Ewart.

² 1 Black. Com. 297.

tion.³ Because of the fact that a right may be renounced by means of a new contract, it has sometimes been said that waiver is equivalent to a new contract as distinguished from estoppel.⁴ Since waiver is one of the consequences of estoppel, it has been said, on the other hand, that waiver is equivalent to estoppel.⁵ Since the effect of waiver is to prevent the party in whose favor a condition is inserted from taking advantage of breach thereof,⁶ waiver has been said to be equivalent to performance.⁷ While, for the purposes of the particular case the party who has broken the condition may be as well off if he can show that the condition is waived as he is if he can show that the condition is performed, the two ideas are essentially different. Under an allegation of performance of conditions, waiver of conditions can not be shown, in most jurisdictions, to overcome the effect of a breach thereof.⁸ Some jurisdictions, however, treat waiver as so nearly equivalent to performance that waiver may be shown in evidence under a plea of performance.⁹

³ *United States. United Firemen's Ins. Co. v. Thomas*, 82 Fed. 406, 47 L. R. A. 450.

Colorado. National Mutual Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634 [sub nomine, *Duncan v. National Mutual Fire Ins. Co.*, 20 L. R. A. (N.S.) 340].

Iowa. Norton v. Catholic Order of Foresters, 138 Ia. 464, 24 L. R. A. (N.S.) 1030, 114 N. W. 893.

Maine. Holt v. New England Tel. & Tel. Co., 110 Me. 10, 85 Atl. 159.

Oklahoma. American Cent. Ins. Co. v. Sinclair, — Okla. —, 180 Pac. 60; *Ross v. Sanderson*, — Okla. —, L. R. A. 1917C, 879, 162 Pac. 709.

South Carolina. Griffith v. Newell, 69 S. Car. 300, 48 S. E. 259.

Wisconsin. Frazier v. Aetna Life Ins. Co., 114 Wis. 510, 90 N. W. 476; *Voss v. Northwestern National Life Ins. Co.*, 137 Wis. 492, 118 N. W. 212.

⁴ *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, 44 N. E. 698.

⁵ *Phoenix Ins. Co. v. Grove*, 215 Ill. 299, 25 L. R. A. (N.S.) 1, 74 N. E. 141,

"The doctrine of waiver, as applied to such a case as this, is that of estoppel in pais. There is no substantial distinction between the two, and the terms are used interchangeably, a waiver being only another name for an estoppel." *Phoenix Ins. Co. v. Grove*, 215 Ill. 299, 25 L. R. A. (N.S.) 1, 74 N. E. 141.

⁶ See § 2666.

⁷ *Barton v. Gray*, 57 Mich. 622.

⁸ *McCoy v. Iowa State Ins. Co.*, 107 Ia. 80, 77 N. W. 529; *Goodhue v. Hartford Fire Ins. Co.*, 175 Mass. 187, 55 N. E. 1039; *Wolff v. German-American Ins. Co.*, — Okla. —, 159 Pac. 480; *State Mut. Ins. Co. v. Green*, — Okla. —, 166 Pac. 105; *Bruce v. Phoenix Ins. Co.*, 24 Or. 486, 34 Pac. 16.

⁹ *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Zielke v. London Assurance Corporation*, 64 Wis. 442; *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69.

"The learned counsel of the appellant contends that such evidence being introduced to prove a waiver of any proofs of loss, and an estoppel of the

Waiver is therefore a consequence of certain acts or omissions. It is the abandonment or renunciation of a right, and since this abandonment or renunciation may be made in a number of ways, the use of the term waiver indicates the result which is reached, but does not indicate the means by which the result is reached.

It is frequently said that a new contract operates as a waiver of rights under the original contract. The new contract has already been discussed,¹⁰ and for that reason waiver which is the result of a new contract will not be treated in this connection. It is sufficient to point out that in cases in which it is claimed that waiver arises by reason of a new contract, the party who makes such claim must be able to show the existence of a new contract, including a sufficient consideration, in most jurisdictions.¹¹

In cases of election, one of the parties has a choice between two rights, but the law denies to him the right to take both. If he takes one as a finality, this operates as a renunciation of his alternative right to take the other which he once possessed. The giving

company to claim the same or to insist upon the performance of such condition, such waiver and estoppel should have been pleaded. We do not understand that such evidence tended merely to prove a complete waiver of any proofs of loss, but rather to prove the making of the proofs of loss required by the policy, in such manner and form as required by the company at the time, as a compliance with the condition of the policy in that respect, and if it showed any waiver it was as to the mere form of the written proofs and their authentication. The long list of the articles destroyed, and showing the value of each, contained all the substance of such a list authenticated and made in the form required by the policy, and the personal examination of the plaintiff on oath was provided for by the policy, and was required by the company in addition to the proofs furnished by such list. The question is not so much of a waiver of this condition of the policy as of a substantial compliance with such condition to the satisfaction of the company. But if

this is not the true theory of the legal effect of such evidence, the plaintiff could not anticipate that the defendant would deny the allegation of the complaint that due proofs of loss were furnished. In either view the waiver or estoppel was not required to be pleaded by the plaintiff." *Zielke v. London Assurance Corporation*, 64 Wis. 442.

¹⁰ See §§ 2457 et seq.

¹¹ See § 2461.

For the theory that consideration is not necessary in such cases, see § 2465.

Cases of this sort are not really causes of waiver, but new contract, unless the courts are ready to say that certain forms of simple contract do not need consideration. If the result of treating the rights under the former contract as waived is correct, it should be justified in some other way, as by explaining the cases on the theory of election or estoppel, or by recognizing the existence of a type of waiver which does not arise in any of these ways. See § 2664.

up of such alternative right is very frequently called a waiver. While this use of the term has been criticized severely,¹² the fact remains that before the election was made, the party had his choice between two inconsistent rights, and after the final election is made, his choice of one right prevents him from asserting the other right, even if he wishes to surrender the right which he has elected and to assert the right which he had not elected. Some term is necessary to indicate the finality of his renunciation of the right which he does not elect, as well as the finality of his election of the right which he elects. In spite of the objection which is made to the use of the term waiver in this connection, it seems to be a useful term, and one which has the authority of the courts. The practical trouble in its use, as in the use of other terms, which indicate results and consequences, is that the courts occasionally use the term waiver in this connection without pointing out clearly the inconsistent rights between which the party could elect, and the acts which are relied upon to show his election of one and his waiver of the other.

The term waiver is frequently used to indicate the result of estoppel. A party may have a right to which he is originally entitled and which he may assert; but by his words or acts he may have induced the adversary party so to act in reliance thereon that the adversary party will be prejudiced seriously if such original right can be asserted. Accordingly, the original right is lost and this loss of such right is frequently called waiver. A serious objection to the use of waiver in this connection is that the party against whom the estoppel operates frequently has no intention of estopping himself by his words or his acts from asserting his original right. The estoppel is imposed by law for the purpose of justice without any regard to the actual intention of the party who is estopped and frequently in defiance of his intention as the only available means of preventing him from securing some unfair advantage by a reliance upon technical legal rights. For these reasons the use of waiver in connection with estoppel seems less desirable than its use in connection with election. It is true, however, that even in election the party who makes the election may not know that he is bound to choose between his rights and his final renunciation of one of such rights, but his election of the other is frequently due to the application of rules of law without

¹² Waiver Distributed, by John S. Ewart, 7.

any regard to his actual intention. At the same time the nature of the case is such that in the greater number of cases of election the party to whom such right of election is given by law must know that he can not claim both rights at once. In the law of contracts especially, he must know that if he claims under the contract, he can not at the same time claim against it.

After all the cases in which rights arising under a contract are discharged by waiver, which can possibly be explained by the theory of the new contract or election or estoppel are thus explained, there nevertheless remain a large number of cases in which we must either say that the law has given effect to the voluntary and intentional renunciation of a right, or else we make use of severe and heroic means of bringing such case under the general class of the new contract or of election. In many of the cases the theory of the new contract can be invoked only if we are ready to enforce contracts without consideration. In many of the cases, the theory of election can be invoked only if we are ready to say that the party may elect between claiming his right or his defense and giving it up; and since election means a choice between two inconsistent rights, it seems like a perversion of terms to use it as indicating a choice between the assertion and the renunciation of a right. Many of the cases in which the doctrine of waiver is invoked by the courts can be explained on the theory of estoppel only if we are ready to base estoppel upon the promises for the future as well as representation of existing or past facts. Estoppel ordinarily imports an erroneous statement as to facts either present or past. If future promises, in reliance upon which the adversary party has acted, are to be treated as enforceable on the theory of estoppel, consideration in the technical sense is unnecessary wherever any action has been taken in reliance upon such promise, and accordingly the rule that the consideration must be that which is contemplated by the agreement of the parties,¹³ can never apply to render the contract unenforceable, since the doctrine of estoppel will make the promise enforceable in such cases.¹⁴

§ 2657. Elements of waiver—Knowledge of facts. Since waiver is the voluntary renunciation of a right, the knowledge of the existence of such right is an essential element of waiver;¹ and it is

¹³ See §§ 522 et seq.

¹⁴ For illustrations of waiver which is neither new contract, election, nor estoppel, see § 2644.

¹ United States. *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420; *Bennecke v. Connecticut Mutual Life Ins. Co.*, 105 U. S. 355, 26 L. ed. 990.

frequently said that unless such knowledge is shown to exist, the doctrine of waiver has no application. Accordingly, the failure of the insurer to make immediate objection to breach of condition, does not operate as waiver if the insurer does not know of such breach until after loss, and if he does not encourage or permit the insured to incur liability or to alter his position after the insurer has knowledge of such breach.² The fact that the agent of an insurance company has been in the habit of giving personal credit to the insured for renewal premiums, does not operate as a waiver of a condition requiring prompt payment of such premiums if the insurance company does not know of such custom on the part of the agent.³

At the same time, in many jurisdictions at least, this general statement is not to be taken literally. If one of the parties is charged with knowledge of certain rights, or if he could have learned of such rights by the use of ordinary diligence, he is to be treated in law as if he possessed such knowledge, except possibly as against persons who know that he does not in fact possess such knowledge; and accordingly, except as against such persons, conduct on his part which would amount to waiver if he possessed such knowledge, operates as a waiver, although he does not possess such knowledge.⁴

Alabama. *Security Ins. Co. v. Laird*, 182 Ala. 121, 62 So. 182.

California. *Los Angeles Gas & Electric Corp. v. Amalgamated Oil Co.*, 168 Cal. 140, 142 Pac. 46; *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

Illinois. *Nyman v. Manufacturers' & Merchants' Life Association*, 262 Ill. 300, 104 N. E. 653.

Maine. *Jewell v. Jewell*, 84 Me. 304, 18 L. R. A. 473, 24 Atl. 858.

Massachusetts. *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128.

Michigan. *Clare County Savings Bank v. Featherly*, 173 Mich. 292, 139 N. W. 61; *Jacobs v. Queen Ins. Co.*, 183 Mich. 512, 150 N. W. 147.

North Carolina. *Gardner v. North State Mutual Life Ins. Co.*, 163 N. Car. 367, 48 L. R. A. (N.S.) 714, 79 S. E. 806.

Ohio. *Union Mutual Life Ins. Co. v. McMillen*, 24 O. S. 67.

Utah. *Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co.*, 42 Utah 263, 45 L. R. A. (N.S.) 122, 130 Pac. 63.

Wisconsin. *Fraser v. Aetna Life Ins. Co.*, 114 Wis. 510, 90 N. W. 476.

² *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 119 Am. St. Rep. 246, 10 L. R. A. (N.S.) 876, 89 Pac. 130; *Rundell v. Anchor Fire Ins. Co.*, 128 Ia. 575, 25 L. R. A. (N.S.) 20, 105 N. W. 112 (obiter); *Aetna Ins. Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162, 45 So. 835; *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23.

³ *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

⁴ See on this question, though not involving breach of condition, *Pence*

§ 2658. Communication of intent to waive. As in the case of the offer which upon acceptance will amount to a contract,¹ the uncommunicated intention of one party to waive rights has no legal consequence, and in order to amount to waiver such intention must be communicated to the adversary party. The means by which such intention is communicated is ordinarily immaterial. The party may communicate his intention by express words.² If the authorized agent of an insurance company, when notified of a vacancy, informs the insured that his policy remains in full force, such notice operates as a waiver of a condition against vacancy.³ Far more frequently the intention to waive is communicated by the acts and conduct of the party who waives the right.⁴ The practical question which arises in cases of this sort is generally the nature of the acts or conduct by which such intention is shown, and of the extent to which, on the one hand, a mere declaration of an intent to waive is sufficient, or, on the other hand, of the necessity of action in reliance upon such declaration which would result in prejudice to the parties so acting if waiver were held not to exist.⁵

§ 2659. Waiver by acts—Condition precedent. A condition precedent to the taking effect of a contract is said to be waived by the conduct of the party for whose benefit such condition is inserted in treating such contract as in effect, in spite of the breach of such condition.¹ If the original contract is in writing, it is difficult to explain this result on the theory of a modification by

v. Langdon, 99 U. S. 578, 25 L. ed. 420;
Pabst Brewing Co. v. Milwaukee, 126
Wis. 110, 105 N. W. 563.

¹ See §§ 110 et seq.

² Home Fire Insurance Co. v. Wilson,
118 Ark. 442, L. R. A. 1918E, 409, 176
S. W. 688.

³ Home Fire Ins. Co. v. Wilson, 118
Ark. 442, L. R. A. 1918E, 409, 176 S. W.
688.

⁴ Warren v. Franklin Fire Ins. Co.,
161 Ia. 440, L. R. A. 1918E, 477, 143 N.
W. 554; Harris v. North American Ins.
Co., 190 Mass. 361, 4 L. R. A. (N.S.)
1137, 77 N. E. 493; Pacific Mutual Life
Insurance Co. v. McDowell, 42 Okla. 300,
L. R. A. 1918E, 391, 141 Pac. 273.

⁵ See §§ 2659 et seq.

¹ Arkansas. Home Ins. Co. v. North
Little Rock Ice & E. Co., 86 Ark. 538,
23 L. R. A. (N.S.) 1201, 111 S. W. 994.

California. California Raisin Grow-
ers' Association v. Abbott, 160 Cal. 601,
117 Pac. 767.

Illinois. Security Trust Co. v. Tar-
pey, 182 Ill. 52, 54 N. E. 1041.

Indiana. Glens Falls Ins. Co. v.
Michael, 167 Ind. 659, 8 L. R. A. (N.S.)
708, 79 N. E. 905.

Massachusetts. Harris v. North
American Ins. Co., 190 Mass. 361, 4 L.
R. A. (N.S.) 1137, 77 N. E. 493.

New York. Stover v. Flack, 30 N.
Y. 64; McClelland v. Mutual Life Ins.

the agreement of the parties, since the parol evidence rule would prevent the modification of the written contract by prior or contemporaneous oral negotiations.²

§ 2660. Waiver by acts misleading adversary or showing election to retain benefits. Conduct on the part of the party for whose benefit the condition is inserted, which induces the adversary party to believe that such condition will not be insisted upon or that its performance will be unavailing while there is still time for the adversary party to perform, is ordinarily said to amount to a waiver of such condition.¹

A breach of a condition is said to be waived by the act of the party for whose benefit such condition was reserved in continuing to accept benefits under the contract,² as by accepting premiums

Co., 217 N. Y. 336, 111 N. E. 1062; Hudson v. Glens Falls Ins. Co., 218 N. Y. 133, L. R. A. 1917A, 482, 112 N. E. 728.

North Carolina. Grier v. New York Mutual Life Ins. Co., 132 N. Car. 542, 44 S. E. 28.

Virginia. Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463.

Wisconsin. Dowling v. Lancashire Ins. Co., 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738.

² See §§ 2137 et seq.

¹ **Arkansas.** Wells v. Townsend & Freeman Co., 134 Ark. 560, 204 S. W. 417.

Kentucky. Inter-Southern Life Ins. Co. v. Duff, 184 Ky. 227, 211 S. W. 738.

Michigan. Slider v. Pere Marquette R. Co., 194 Mich. 581, 161 N. W. 961.

Mississippi. Illinois Central R. Co. v. Wm. Atkinson & McDonald Co., 113 Miss. 678, 74 So. 616; Illinois Central R. Co. v. Bauer, 114 Miss. 516, 75 So. 376, Berstein v. Yazoo & M. V. R. Co., 116 Miss. 382, 77 So. 146.

Missouri. Young v. Hartford Life Ins. Co. — Mo. —, 211 S. W. 1.

North Carolina. Reynolds v. Adams Express Co., 172 N. Car. 487, 90 S. E. 510.

North Dakota. Shark v. Great

Northern Ry. Co., 37 N. D. 342, 164 N. W. 39.

Oklahoma. Pacific Mutual Life Ins. Co. v. McDowell, 42 Okla. 300, L. R. A. 1918E, 391, 141 Pac. 273.

Virginia. Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463.

West Virginia. Sheppard v. Peabody Ins. Co. 21 W. Va. 368; Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; Peninsular Land Transpor. & Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595, 35 S. E. 998; Medley v. German-Alliance Ins. Co., 55 W. Va. 342, 2 Am. & Eng. Ann. Cas. 99, 47 S. E. 101; Houseman v. Home Ins. Co., 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048; Pauley v. Sun Ins. Office, 79 W. Va. 187, L. R. A. 1918E, 473, 90 S. E. 552.

Wisconsin. Lorenz v. Hart-Parr Co., 146 Wis. 261, 50 L. R. A. (N.S.) 796, 431 N. W. 446.

² **Ancient Order v. Davidson**, — Ark. —, L. R. A. 1917C, 914, 191 S. W. 961; **Upton v. Travelers' Insurance Co.**, — Cal. —, 2 A. L. R., 1597, 178 Pac. 651; **McClure v. Mutual F. Ins. Co.**, 242 Pa. St. 59, 48 L. R. A. (N.S.) 1221, 88 Atl. 921.

under a contract of insurance after breach of a condition.³ If it is the duty of the party who elects to take advantage of a breach of condition to restore what he has received under such contract, his act in retaining the benefits of the contract for an unreasonable time with full knowledge of the facts operates as a waiver.⁴ If the insurance company, with knowledge of a breach of condition, retains premiums which it should repay if it elects to take advantage of such breach, such conduct on the part of the insurance company operates as a waiver of such breach.⁵ If a condition is not self-executing, the failure to object to a breach of such condition before loss is said to operate as a waiver thereof.⁶ Since in a case of this sort the adversary party would have been given an opportunity to protect himself by making a new contract if he had been notified of the intention to enforce such breach, the result which is reached seems to be just whatever we may think of the reasoning which is employed.

If a provision in a contract with a common carrier for the transportation of goods requiring written notice of loss may be

³ *Ancient Order v. Davidson*, — Ark. —, L. R. A. 1917C, 914, 191 S. W. 961; *McClure v. Mutual F. Ins. Co.*, 242 Pa. St. 59, 48 L. R. A. (N.S.) 1221, 88 Atl. 921.

⁴ *Alabama. Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

California. Sharp v. Scottish Union & Nat. Ins. Co., 136 Cal. 542, 69 Pac. 253.

Minnesota. Schreiber v. German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708.

Nebraska. Hanover F. Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; *German Ins. Co. v. Shadler*, 68 Neb. 1, 60 L. R. A. 918, 93 N. W. 972.

South Carolina. Pearlstine v. Westchester F. Ins. Co., 70 S. Car. 76, 49 S. E. 4.

Wisconsin. McQuillan v. Mutual Reserve Fund Life Asso., 112 Wis. 665, 88 Am. St. Rep. 986, 56 L. R. A. 233, 87 N. W. 1069, 88 N. W. 925; *Fraser v.*

Aetna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

⁵ *Alabama. Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

California. Sharp v. Scottish Union & Nat. Ins. Co., 136 Cal. 542, 69 Pac. 253.

Minnesota. Schreiber v. German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708.

Nebraska. Hanover F. Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; *German Ins. Co. v. Shadler*, 68 Neb. 1, 60 L. R. A. 918, 93 N. W. 972.

Wisconsin. McQuillan v. Mutual Reserve Fund Life Asso., 112 Wis. 665, 88 Am. St. Rep. 986, 56 L. R. A. 233, 87 N. W. 1069, 88 N. W. 925; *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 90 N. W. 476.

⁶ *Arnold v. American Ins. Co.*, 142 Cal. 660, 25 L. R. A. (N.S.) 6, 84 Pac. 162.

waived,¹ such provision is waived by the act of the carrier in treating such claim as presented in sufficient form before the lapse of the period within which the shipper could present his claim in compliance with the original provisions of the contract.² If one party reserves the right to terminate the contract and such option is to be exercised within a certain time, the provision as to time is waived by the act of the adversary party in requesting the party for whose benefit such condition is inserted not to exercise such option within such time, in the hope that performance of the contract may be such that he will eventually decide not to exercise such option.³

§ 2661. Repudiation of liability on grounds other than breach of condition. If it is still possible to perform a given condition, the act of the party for whose benefit such condition is inserted in repudiating liability upon some other ground operates as a waiver of such condition.¹ A repudiation of liability upon an insurance policy waives a right of treating such policy as discharged because of the subsequent failure to pay premiums,² or to furnish proofs of loss.³ If, on the other hand, performance of a condition is not

¹For the right to waive such provision and the effect of legislation which forbids discrimination between shippers, see §§ 736 et seq.

²**Arkansas.** *Wells v. Townsend & Freeman Co.*, 134 Ark. 560, 204 S. W. 417.

Michigan. *Slider v. Pere Marquette R. Co.*, 184 Mich. 581, 161 N. W. 961.

Mississippi. *Illinois Central R. Co. v. Wm. Atkinson & McDonald Co.*, 113 Miss. 678, 74 So. 616; *Illinois Central R. Co. v. Bauer*, 114 Miss. 516, 75 So. 376; *Berstein v. Yazoo & M. V. R. Co.*, 116 Miss. 382, 77 So. 146.

North Carolina. *Reynolds v. Adams Express Co.*, 172 N. Car. 487, 90 S. E. 510.

North Dakota. *Shark v. Great Northern Ry. Co.*, 37 N. D. 342, 164 N. W. 39.

³**Lorenz v. Hart-Parr Co.**, 146 Wis. 261, 50 L. R. A. (N.S.) 796, 131 N. W. 446.

¹*Inter-Southern Life Ins. Co. v. Duff*,

184 Ky. 227, 211 S. W. 738; *Young v. Hartford Life Ins. Co.*, — Mo. —, 211 S. W. 1; *Gilbert v. Globe & Rutgers Fire Insurance Co.*, 91 Or. 59, 3 A. L. R. 205, 174 Pac. 1161; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Dietz v. Providence Washington Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; *Peninsular Land Transpor. & Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. 237; *Cleavenger v. Franklin F. Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Medley v. German-Alliance Ins. Co.*, 65 W. Va. 342, 2 Am. & Eng. Ann. Cas. 99, 47 S. E. 101; *Houseman v. Home Ins. Co.*, 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048; *Pauley v. Sun Ins. Office*, 79 W. Va. 187, L. R. A. 1918E, 473, 90 S. E. 552.

²*Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738.

³*Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Deitz v. Providence Washington Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; *Peninsular Land*

possible, or if the condition rests solely with the will of the party in whose favor it is inserted, a repudiation of the contract on one ground does not induce the adversary party to act to his prejudice, and accordingly such conduct is frequently said not to amount to a waiver of such condition.⁴ If A has reserved the right to terminate a contract at his option, his declaration that he terminates the contract for a specific though insufficient reason is not a waiver of his right to terminate at will.⁵

The repudiation of liability for a given reason has been held to be a waiver of a breach of another condition, even though it is no longer possible for the party in default to perform such other condition.⁶ A refusal of a beneficial association to pay a claim on the ground that the assessments were in default waives a defense that the insured had made a false statement which is material to the risk.⁷

§ 2662. Waiver by owner of certificate or approval of architect as condition. The owner may waive a provision of the contract providing for a certificate by the architect or engineer.¹ Such pro-

Transpor. & Mfg. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237; *Cleavenger v. Franklin F. Ins. Co.*, 47 W. Va. 595, 35 S. E. 998; *Medley v. German-Alliance Ins. Co.*, 55 W. Va. 342, 2 Am. & Eng. Ann. Cas. 99, 47 S. E. 101; *Houseman v. Home Ins. Co.*, 78 W. Va. 203, L. R. A. 1917A, 299, 88 S. E. 1048; *Pauley v. Sun Ins. Office*, 79 W. Va. 187, L. R. A. 1918E, 473, 90 S. E. 552.

⁴ *Corgan v. George F. Lee Coal Co.*, 218 Pa. St. 386, 120 Am. St. Rep. 891, 67 Atl. 655.

⁵ *Corgan v. George F. Lee Coal Co.*, 218 Pa. St. 386, 120 Am. St. Rep. 891, 67 Atl. 655.

⁶ *Taylor v. Supreme Lodge*, 135 Mich. 231, 106 Am. St. Rep. 392, 97 N. W. 680.

⁷ *Taylor v. Supreme Lodge*, 135 Mich. 231, 106 Am. St. Rep. 392, 97 N. W. 680.

"As to the question arising out of the first contention, it may be stated that a waiver of this defense was clearly made out. After the death of Mr. Taylor, it appears that the defendant's officers were in correspondence with Dr. Pitcher, and were in-

formed by him that he had treated Mr. Taylor for an acute ailment some four or five years earlier. With this information before them, they wrote plaintiff's attorney, in response to a letter demanding a settlement of the claim, declining on the distinct ground that John I. Taylor never paid an assessment. No mention of any other defense is made, the ground of refusal being distinctly stated that the deceased never became a member of the order. This constituted a waiver of other known defenses, and defendant will not, after expense of suit has been incurred, be permitted to shift ground, and assert additional grounds of defense." *Taylor v. Supreme Lodge*, 135 Mich. 231, 106 Am. St. Rep. 392, 97 N. W. 680 [citing, *Marthinson v. Insurance Co.*, 64 Mich. 372, 31 N. W. 291; *Towle v. Insurance Co.*, 91 Mich. 219, 51 N. W. 987, and *Burnham v. Casualty Co.*, 117 Mich. 142, 75 N. W. 445].

¹ *Illinois. Andrew Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35; *Expanded Metal*

vision may be waived by express agreement between the property owner and the contractor, setting aside an estimate which has already been made.² The necessity of producing a certificate may also be waived by the conduct of the parties without specific agreement.³ Thus the conduct of the owner in inspecting and approving material about to be used by the contractor,⁴ or in taking charge of the building himself under a clause in the contract permitting him so to do,⁵ or in ignoring the clause providing for such certificate throughout the performance of the contract,⁶ or wrongfully breaking the contract and preventing performance,⁷ waives such provision. The provision of a contract which requires the certificate of two architects, is waived where such architects who were partners dissolve the partnership, where the property owner refused to permit one of the architects to render further services, and where he accepts the certificates of the other architect for intermediate payments without objection.⁸ The necessity of obtaining a certificate is waived where payment is refused absolutely on grounds other than the failure to obtain the certificate.⁹ The fact that the owner has made one payment without requiring such cer-

Fireproofing Co. v. Boyce, 233 Ill. 284, 84 N. E. 275.

Kansas. **Edwards v. Hartshorn**, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

Maryland. **Filston Farm Co. v. Henderson**, 106 Md. 335, 67 Atl. 228.

New York. **Smith v. Molleson**, 148 N. Y. 241, 42 N. E. 669.

Pennsylvania. **Hunn v. Pennsylvania Inst. for Blind**, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

Washington. **Lavanway v. Cannon**, 37 Wash. 593, 79 Pac. 1117.

² **Edwards v. Hartshorn**, 72 Kan. 19, 1 L. R. A. (N.S.) 1050, 82 Pac. 520.

³ **Illinois.** **Andrew Lohr Bottling Co. v. Ferguson**, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

Missouri. **Standard Stamping Co. v. Hemminghaus**, 157 Mo. 23, 57 S. W. 746.

New York. **Campbell v. Coon**, 149 N. Y. 556, 38 L. R. A. 410, 44 N. E. 300.

Washington. **Lavanway v. Cannon**, 37 Wash. 593, 79 Pac. 1117.

Wisconsin. **Ashland, etc., Co. v. Shores**, 105 Wis. 122, 81 N. W. 136; **Boden v. Maher**, 105 Wis. 539, 81 N. W. 661.

⁴ **Standard Stamping Co. v. Hemminghaus**, 157 Mo. 23, 57 S. W. 746.

⁵ **Campbell v. Coon**, 149 N. Y. 556, 38 L. R. A. 410, 44 N. E. 300; **Hunn v. Pennsylvania Inst. for Blind**, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁶ **Ashland, etc., Co. v. Shores**, 105 Wis. 122, 81 N. W. 136; **Boden v. Maher**, 105 Wis. 539, 81 N. W. 661; **Halsey v. Waukesha Springs Sanitarium**, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

⁷ **West v. Luda**, 69 Conn. 60, 36 Atl. 1015.

Contra, Mitchell v. Dougherty, 86 Fed. 859.

⁸ **Lavanway v. Cannon**, 37 Wash. 593, 79 Pac. 1117.

⁹ **Andrew Lohr Bottling Co. v. Ferguson**, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

tificate, does not waive the production of such certificate to obtain subsequent payment,¹⁰ although his habitual course of action in making payments repeatedly without insisting on such certificate or approval is said to operate as a waiver.¹¹ A certificate given by an architect for an instalment which is to be paid when the building is completed, does not waive the production of his certificate for instalments due by the terms of the contract thereafter.¹² The fact that the occupants of a building were permitted to make use of an elevator, does not waive a provision in the contract under which it was constructed, requiring the certificate of an architect as a condition precedent to payment therefor.¹³ If a contract for repairs provides for payments only on certificate of an architectural engineer, the act of the owner in making use of the building after it has been repaired does not of itself operate as a waiver of the condition requiring such certificate;¹⁴ and no recovery can be had unless such certificate is produced.¹⁵

§ 2663. Rights of parties fixed—Subsequent waiver not recognized. Whether the breach of a condition may be waived after such condition has been broken, and after the rights of the parties have become fixed, by reason of the fact that the contract has either been discharged in some other way, or has been fully performed except as to the covenants affected by such breach of condition, is a question upon which there has been a divergence of judicial opinion, depending to a large extent upon the nature of the contract in question. In such cases the adversary party does not act in reliance upon such waiver, since his rights have already been fixed, and since no further action on his part is called for by the terms of the contract. In non-negotiable contracts there is, therefore, a strong tendency to hold that under these circumstances waiver in the more limited sense is inoperative.¹ If there is a

¹⁰ *McNamara v. Harrison*, 81 Ia. 486, 46 N. W. 976.

See to the same effect, *Brown v. Winchill*, 3 Wash. 524, 28 Pac. 1037.

Waiver by making partial payments is not waiver as to the final payment which was due after complete performance. *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275.

¹¹ *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308.

¹² *Michaelis v. Wolf*, 136 Ill. 68, 26 N.

E. 384; *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407.

¹³ *Louisville Foundry & Machine Co. v. Patterson* (Ky.), 93 S. W. 22, 29 Ky. L. Rep. 349.

¹⁴ *Pope v. King*, 108 Md. 37, 10 L. R. A. (N.S.) 489, 69 Atl. 417.

¹⁵ *Pope v. King*, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

¹ *Huff v. Century Fire Ins. Co.*, 136 Ia. 464, 113 N. W. 1078; *Allen v. Milwaukee Mechanics' Ins. Co.*, 106 Mich.

consideration for the agreement not to take advantage of such breach of condition, the rights of the parties are, of course, fixed by such new contract.² In the absence of consideration there is no way of upholding such waiver as the result of an estoppel, since the party against whom the condition has sought to be enforced, has not acted in reliance upon such waiver. Such waiver can not be upheld as the result of an election in the proper sense of the term, since in a case of this sort, the party in whose favor such condition is inserted has no right of election between two inconsistent rights, and it is a perversion of terms to say that he has a right of election between making use of such defense and in not making use of it. If the rights of the parties have been fixed in a contract of life insurance by the death of the insured, the act of the insurer in retaining the premium after the death of the insured, does not operate as a waiver,³ and if the insurer did not know of such breach before the rights of the parties were fixed by the death of the insured, waiver does not exist. If the act of the insured in furnishing proofs of loss is not regarded as an act to his prejudice, the conduct of the insurer, who has not learned of the breach of the condition until after the loss, in failing to take advantage of such breach until after the insured has furnished proofs of loss, does not amount to a waiver.⁴ It has, however, been held that the act of the insurer in demanding proof of loss may operate as a waiver if the insured furnishes proofs of loss in response to such demand, on the theory that such conduct will induce the insured to furnish proofs of loss by which he will be, to some extent, prejudiced if such conduct is not treated as a waiver.⁵ The conduct of the insurance company in proceeding to make an adjustment after loss, is said to amount to a waiver only if by such conduct on the

204, 64 N. W. 15; *Thompson v. Travelers' Life Ins. Co.*, 13 N. D. 444, 101 N. W. 900; *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23.

² See §§ 2457 et seq.

³ *Thompson v. Travelers' Life Ins. Co.*, 13 N. D. 444, 101 N. W. 900.

⁴ *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23.

⁵ *Arkansas. Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719.

Iowa. Petroff v. Equity Fire Ins. Co., 183 Ia. 906, 167 N. W. 660.

Michigan. Veenstra v. Farmers' Mutual Fire Ins. Co., 195 Mich. 55, 161 N. W. 824.

New York. Kierman v. Dutchess County Mutual Ins. Co., 150 N. Y. 190, 44 N. E. 698.

Wisconsin. Reiner v. Dwelling House Ins. Co., 74 Wis. 89, 42 N. W. 208; *Kidder v. Knights Templars' and Masons' Life Idemnity Co.*, 94 Wis. 538, 69 N. W. 364.

part of the insurance company the insured is induced to incur expenses and the like in making such adjustment.⁶

In many cases the courts insist in terms upon action by the insured in reliance upon the conduct of the insurer as an essential element of waiver. At the same time the acts which are done in reliance are, in many cases, so trifling in their character, as in the cases of furnishing proofs of loss or showing the value of the property, that the courts are evidently seeking any available pretext for applying the doctrine of waiver.⁷ The conduct of the insurer in requiring the insured to establish the value of the property after the loss, is held to amount to a waiver if the insured thereby incurs any expense or suffers other detriment.⁸ If the insurance company sells the property which is salvaged without knowledge of the facts, but retains the proceeds of such sale after it learns of the facts on which it could have relied as breach of condition, its conduct in retaining the proceeds of such sale operates as a waiver.⁹

While the weight of authority is in favor of the theory that waiver of certain rights arising out of breach of condition is possible, in the case of negotiable instruments, although such breach has already occurred, and the rights of the parties are already fixed,¹⁰ in some jurisdictions, on the other hand, it is held that defenses such as failure to make demand or to give notice of non-payment, whereby the indorser is discharged, can not be waived after the rights of the parties have been fixed except by a new contract for which a new and additional consideration is requisite.¹¹ The Negotiable Instruments Law provides: "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."¹² This provision was clearly intended to adopt the majority rule and to make waiver of presentment, de-

⁶ Huff v. Century Fire Ins. Co., 136 Ia. 464, 113 N. W. 1078; Allen v. Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. 15.

⁷ Scottish Union and National Ins. Co. v. Colvard, 135 Ga. 188, 68 S. E. 1097; Devil's Lake First National Bank v. Manchester Fire Assurance Co., 64 Minn. 96, 66 N. W. 136.

⁸ Scottish Union & National Ins. Co. v. Colvard, 135 Ga. 188, 68 S. E. 1097.

⁹ Devil's Lake First National Bank v. Manchester Fire Assurance Co., 64 Minn. 96, 66 N. W. 136.

¹⁰ See § 2604.

¹¹ Huntington v. Harvey, 4 Conn. 124; Sebree Deposit Bank v. Moreland, 96 Ky. 150, 29 L. R. A. 305, 28 S. W. 153.

¹² Section 109, Negotiable Instruments Law.

mand and protest after maturity final and conclusive, although without consideration.¹³

§ 2664. Rights of parties fixed—Subsequent waiver recognized. In a number of jurisdictions the courts have recognized the existence of waiver, although the acts which are relied upon to show such waiver take place after the rights of the parties are fixed by loss, performance, and the like, and although no elements of estoppel or consideration can be found.¹ A provision in a building contract which makes the certificate of the architect or engineer a condition precedent, is waived, if, after performance, the owner promises to pay without such certificate.² Such a provision is waived if the property owner refuses to pay on other grounds without reference to the certificate of the architect.³

In the foregoing cases it is possible to contend that the party who seeks to treat such conduct as a waiver, was misled in some way by the conduct of the adversary party and that he may have been induced to maintain an action without seeking to comply with the provisions of such condition. In other cases no such explanation can be offered. If an insurance company attempts to settle a loss,⁴ or if it makes a partial payment after loss,⁵ or if it attempts to make an adjustment, even though such adjustment does not operate as a detriment to the insured,⁶ such conduct is a waiver of

¹³ See on this question, *Mechanics and Farmers' Savings Bank v. Katterjohn*, 137 Ky. 427, 22 Am. & Eng. Ann. Cas. 439, 125 S. W. 1071, in which, however, this statement was an obiter since the conditions upon which the indorser agreed to become liable did not take place.

¹ *Alabama*. *Mutual Benefit Life Ins. Co. v. Lehman*, 132 Ala. 640, 32 So. 733.

Kansas. *German Ins. Co. v. Allen*, 69 Kan. 729, 77 Pac. 529.

Kentucky. *Gardner v. Continental Ins. Co.*, 125 Ky. 464, 101 S. W. 908.

Missouri. *Travis v. Continental Ins. Co.*, — Mo. —, 179 S. W. 766.

New Jersey. *Steelman v. Ludy*, 77 N. J. L. 446, 72 Atl. 423.

New York. *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418.

Tennessee. *North German Ins. Co. v. Morton-Scott-Robertson Co.*, 108 Tenn. 384, 87 S. W. 816.

Wisconsin. *Sherman v. Madison Mutual Ins. Co.*, 39 Wis. 104; *Boden v. Maher*, 105 Wis. 539, 81 N. W. 661.

² *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418.

³ *Steelman v. Ludy*, 77 N. J. L. 446, 72 Atl. 423; *Boden v. Maher*, 105 Wis. 539, 81 N. W. 661.

⁴ *Mutual Benefit Life Ins. Co. v. Lehman*, 132 Ala. 640, 32 So. 733.

⁵ *Gardner v. Continental Ins. Co.*, 125 Ky. 464, 101 S. W. 908; *Sherman v. Madison Mutual Ins. Co.*, 39 Wis. 104.

⁶ *German Ins. Co. v. Allen*, 69 Kan. 729, 77 Pac. 529; *Travis v. Continental Ins. Co.*, — Mo. —, 179 S. W. 766; *North German Ins. Co. v. Morton-Scott-Robertson Co.*, 108 Tenn. 384, 87 S. W. 816.

the right to take advantage of such breach of condition. The conduct of an insurance company recognizing a policy as in effect, may operate as a waiver of a breach of condition caused by non-payment of a premium,⁷ as where such premium is paid by check which has been protested and the insurance company agrees to treat such policy as in effect if the bank had made a mistake in protesting such check.⁸ In cases of this sort it is impossible to explain the result which is actually reached—either on the theory of new contract, for there is no agreement and no consideration; or on the theory of estoppel, for there is no action in reliance upon such statements or acts; or on the theory of election, because there are no inconsistent rights between which to elect. While this result is reached in many courts, and while its true significance is disguised by calling it waiver, it is really a case in which the courts give effect to the declaration of one of the parties to a transaction without requiring the common-law elements of contract, estoppel or election.

In the case of negotiable instruments, the weight of authority is in favor of the theory that a waiver, after the rights of the parties are fixed, is operative without any new and additional consideration, at least as to certain forms of conditions.⁹ While presentment, demand and notice are ordinarily made express conditions of the contract of indorsement, they are conditions which are as truly a part of the contract of indorsement, in most jurisdictions, as if they were set forth in so many words;¹⁰ and yet it is held by the great weight of authority that after the indorser has been discharged by the failure of the holder of the negotiable instrument to make presentment, demand and notice, he may, nevertheless, waive such breach of condition on the part of the holder, and may make himself liable as an indorser in spite of such discharge by a waiver without any new or additional consideration.¹¹ While this result may be justified in part on the theory that failure to make

⁷ *Inter-Southern Life Ins. Co. v. Cooke*, 183 Ky. 109, 209 S. W. 45.

⁸ *Inter-Southern Life Ins. Co. v. Cooke*, 183 Ky. 109, 209 S. W. 45.

⁹ See cases cited in note 11, this section.

¹⁰ See § 2200.

For the theory that an ordinary indorsement is not a complete contract, see § 2201.

¹¹ *United States, Sigerson v. Matthews*, 61 U. S. (20 How.) 496, 15 L. ed. 989; *Yeager v. Farwell*, 80 U. S. (13 Wall.) 6, 20 L. ed. 476.

Georgia. Hoadley v. Bliss, 9 Ga. 303.

Indiana. Neal v. Wood, 23 Ind. 523.

Iowa. Hughes v. Bowen, 15 Ia. 446;

Creshire v. Taylor, 29 Ia. 492.

Louisiana. Wall v. Bry, 1 La. Ann. 312.

presentment and demand and to give notice is not a self-executing form of discharge, but that it merely gives to the indorser the right to interpose such facts as a defense which right he may waive if he so chooses, the fact still remains that according to this theory he may waive such defense by a gratuitous declaration and that he is bound thereby.¹²

§ 2665. Form of waiver—Provision of contract requiring writing. The results which the courts seek to reach by invoking the doctrine of waiver could ordinarily not be attained if any specific form of waiver were required; and accordingly it is generally held that the form of waiver is immaterial.¹ Even if the contract contains a specific provision to the effect that the conditions of such contract can be waived only by writing, oral waiver is, neverthe-

Maine. *Lane v. Steward*, 20 Me. 98.

Maryland. *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059.

Massachusetts. *Rindge v. Kimball*, 124 Mass. 209; *Toole v. Crafts*, 193 Mass. 110, 118 Am. St. Rep. 455, 78 N. E. 775.

Minnesota. *Lockwood v. Bock*, 50 Minn. 142, 52 N. W. 391.

New York. *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Ross v. Hurd*, 71 N. Y. 14, 27 Am. Rep. 1.

Pennsylvania. *Day v. Ridgway*, 17 Pa. St. 303; *Barclay v. Weaver*, 19 Pa. St. 306, 57 Am. Dec. 661; *Annville National Bank v. Kettering*, 106 Pa. St. 531, 51 Am. Rep. 536; *Burgettstown National Bank v. Nill*, 213 Pa. St. 456, 3 L. R. A. (N.S.) 1079, 63 Atl. 186.

¹² See cases cited in note 11, this section.

¹ **United States.** *Insurance Co. v. Wilkinson*, 80 U. S. (13 Wall.) 222, 20 L. ed. 617; *Fire Ins. Association v. Wickham*, 141 U. S. 564, 35 L. ed. 860.

Alabama. *Ins. Co. v. Williams*, — Ala. —, 77 So. 159.

California. *Arnold v. American Ins. Co.*, 148 Cal. 660, 25 L. R. A. (N.S.) 6, 84 Pac. 182.

Illinois. *Chicago, etc., R. R. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Phenix Ins. Co. v. Grove*, 215 Ill. 299, 25 L. R. A. (N.S.) 1, 74 N. E. 141.

Iowa. *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038.

Kansas. *Hartford Fire Ins. Co. v. McCarthy*, 69 Kan. 555, 77 Pac. 90.

Kentucky. *Illinois Central R. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

Maine. *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36.

New York. *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378.

Ohio. *B. & O. Ry. Co. v. Jolly*, 71 O. S. 92, 72 N. E. 888; *Expanded Metal Fireproofing Co. v. Noel Construction Co.*, 87 O. S. 428, 101 N. E. 348.

Pennsylvania. *Fay v. Moore*, 261 Pa. St. 437, 104 Atl. 686.

South Carolina. *Wilson v. Commercial Union Ins. Co.*, 51 S. Car. 540, 64 Am. St. Rep. 700, 29 S. E. 245.

Washington. *Richie v. State*, 39 Wash. 95, 81 Pac. 79.

Wyoming. *Kahn v. Traders' Ins. Co.*, 4 Wyom. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

less, sufficient, since oral waiver is regarded as waiving the provision requiring a written waiver as well as waiving the conditions to which such waiver relates.² A provision in a contract, to the effect that such contract can not be modified unless such modification is in writing, imposes a condition as to such modification, but such provision may be waived by the conduct of the party for whose benefit such provision is inserted in leading the adversary party to believe that full effect will be given to the oral modification.³ Where a provision which requires a written notice of loss may be waived, such waiver need not be in writing.⁴

While effect is frequently given to provisions to the effect that a waiver shall be inoperative unless it is in writing, this result is ordinarily reached on the ground that the agent by whom it is alleged that such provision was waived had in fact no authority to waive such provision.⁵ Where oral waiver in a contract for transportation of goods, which requires written notice, is not recognized, it is either through lack of authority of the agent who is alleged

² **Alabama.** Insurance Co. v. Williams, — Ala. —, 77 So. 159.

California. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N.S.) 6, 84 Pac. 182.

Illinois. Phenix Ins. Co. v. Grove, 215 Ill. 209, 25 L. R. A. (N.S.) 1, 74 N. E. 141.

Kansas. Hartford Fire Ins. Co. v. McCarthy, 69 Kan. 555, 77 Pac. 90.

South Carolina. Wilson v. Commercial Union Ins. Co., 51 S. Car. 540, 64 Am. St. Rep. 700, 29 S. E. 245.

Wyoming. Kahn v. Traders' Ins. Co., 4 Wyom. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

³ **United States.** Insurance Co. v. Wilkinson, 80 U. S. (13 Wall.) 222, 20 L. ed. 617.

Alabama. Insurance Co. v. Williams, — Ala. —, 77 So. 159.

Illinois. Chicago, etc., R. R. v. Moran, 187 Ill. 316, 58 N. E. 335; Foster v. McKeown, 192 Ill. 339, 61 N. E. 514; Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038.

Kentucky. Illinois Central R. R. Co. v. Manion, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

Maine. Copeland v. Hewett, 96 Me. 525, 53 Atl. 36.

New York. Pechner v. Ins. Co., 65 N. Y. 195; Perry v. Levenson, 178 N. Y. 559, 70 N. E. 1104; Beatty v. Gugenheim Exploration Co., 225 N. Y. 380, 122 N. E. 378.

Ohio. Expanded Metal Fire-Proofing Co. v. Noel Construction Co., 87 O. S. 428, 101 N. E. 348.

Pennsylvania. Fay v. Moore, 261 Pa. St. 437, 104 Atl. 686.

Washington. Richie v. State, 39 Wash. 95, 81 Pac. 79.

⁴ **Bush v. Curry**, 131 Ark. 237, 199 S. W. 375; **Emery v. Wabash R. Co.**, 183 Ia. 687, 166 N. W. 600; **New Orleans & N. E. R. Co. v. Wood**, 112 Miss. 614, 73 So. 615; **Schloss-Bear-Davis Co. v. Louisville & N. R. Co.**, 171 N. Car. 350, 88 S. E. 476.

⁵ **Northern Assurance Co. v. Grand View Building Association**, 183 U. S. 308, 46 L. ed. 213; **Roper v. National Fire Ins. Co.**, 161 N. Car. 151, 76 S. E. 869; **Oshkosh Match Works v. Manchester Fire Assurance Co.**, 92 Wis. 510, 66 N. W. 525.

to have waived such provision, or because of the fact that under modern legislation the carrier can not discriminate between shippers by waiving such provisions in favor of individual shippers.⁶

§ 2666. Effect of waiver. From the nature of waiver,¹ it is a final renunciation of a right, and accordingly the waiver of a breach of condition is final as to a past breach,² and the party who has waived such breach can not avoid the effect of such waiver by making restitution to the adversary party of what he has parted with in reliance thereon.³

Whether a waiver of a past breach operates as a waiver of a future breach of the same general character, depends on whether the adversary party was misled by such waiver, and was induced to believe that such condition would not be insisted upon in the future. If the waiver of a past breach does not mislead the adversary party, it does not operate as a waiver of a subsequent breach of the same general kind.⁴ While the act of an insurance

¹ **United States.** *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. 948; *St. Louis, Iron Mountain & Southern Ry. v. Starbird*, 243 U. S., 592, 61 L. ed. 917; *Olson v. Chicago, B. & Q. R. Co.*, 250 Fed. 372.

Mississippi. *Illinois Central R. Co. v. W. J. Davis & Co.*, 112 Miss. 119, 72 So. 874.

New Jersey. *Olivit Bros. v. Pennsylvania Railroad (N. J. L.)*, 96 Atl. 582.

Oklahoma. *Chicago, R. I. & P. Ry. Co. v. Gray*, — Okla. —, 165 Pac. 157; *Chicago, R. I. & P. Ry. Co. v. Brockmeier*, — Okla. —, 168 Pac. 1011.

South Carolina. *Murray v. Atlantic Coast Line R. Co.*, 108 S. Car. 88, 93 S. E. 387.

Utah. *Baird v. Denver & R. G. R. Co.*, 49 Utah 58, 162 Pac. 79.

¹ See § 2652.

² *Rundell v. Anchor Fire Ins. Co.*, 128 Ia. 575, 25 L. R. A. (N.S.) 20, 105 N. W. 112; *Beauchamp v. Retail Merchants' Association Mutual Fire Ins. Co.*, 38 N. D. 483, 165 N. W. 545.

³ *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936.

⁴ **England.** *Panoutsos v. Raymond Hadley Corporation* [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767].

United States. *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 9 L. R. A. (N.S.) 433.

California. *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

Georgia. *Hartford F. Ins. Co. v. Liddell Co.*, 130 Ga. 8, 14 L. R. A. (N.S.) 168, 60 S. E. 104.

Kansas. *Citizens' State Bank v. Shawnee F. Ins. Co.*, 91 Kan. 18, 49 L. R. A. (N.S.) 972, 137 Pac. 78.

Massachusetts. *Boston Co-Operative Bank v. American C. Ins. Co.*, 201 Mass. 350, 23 L. R. A. (N.S.) 1147, 87 N. E. 594.

Pennsylvania. *Moore v. Niagara Fire Ins. Co.*, 199 Pa. St. 49, 85 Am. St. Rep. 771, 48 Atl. 869.

South Dakota. *Smith v. Retail Merchants' F. Ins. Co.*, 29 S. D. 332, 42 L. R. A. (N.S.) 173, 137 N. W. 47.

Wisconsin. *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297, 17 N. W. 138.

company in accepting a payment after the policy has expired will operate as a waiver of such default in that particular instance, it will not operate as a waiver of such conditions with reference to renewals of the policy in the future.⁵ Waiver of a condition against incumbrances in favor of a given incumbrance, does not operate as a waiver of a subsequent incumbrance,⁶ although such incumbrance is given to the same creditor.⁷ A waiver of a condition against incumbrances on realty is not a waiver of a condition against incumbrances on personalty which are included in the same insurance policy.⁸ A waiver of a condition against incumbrances is not a waiver of a condition against sale,⁹ although the property is sold in satisfaction of such incumbrance.¹⁰ A waiver of a condition against an absolute assignment is not a waiver of a condition requiring absolute ownership where the assignment is made to an assignee in trust.¹¹

If, on the other hand, the waiver as to a past breach is of such a character that it misleads the adversary party and induces him to believe that such conditions will not be insisted upon in the future, such waiver of a past breach operates as a waiver of a future breach of the same general character.¹² If the property owner under a building contract has made payments habitually without insisting upon the approval of the architect as a condition precedent, such conduct on his part will be regarded as a waiver of such approval as to subsequent payments,¹³ at least if the property owner has not given fair notice to the contractor that he proposes to insist upon such condition in the future. The habitual

⁵ *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

⁶ *Hartford F. Ins. Co. v. Liddell Co.*, 130 Ga. 8, 14 L. R. A. (N.S.) 168, 60 S. E. 104.

⁷ *Hartford F. Ins. Co. v. Liddell Co.*, 130 Ga. 8, 14 L. R. A. (N.S.) 168, 60 S. E. 104.

⁸ *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 9 L. R. A. (N.S.) 433.

⁹ *Citizens' State Bank v. Shawnee F. Ins. Co.*, 91 Kan. 18, 49 L. R. A. (N.S.) 972, 137 Pac. 78; *Boston Co-operative Bank v. American C. Ins. Co.*, 201 Mass. 350, 23 L. R. A. (N.S.) 1147, 87 N. E. 594.

¹⁰ *Citizens' State Bank v. Shawnee F. Ins. Co.*, 91 Kan. 18, 49 L. R. A. (N.S.) 972, 137 Pac. 78; *Boston Co-operative Bank v. American C. Ins. Co.*, 201 Mass. 350, 23 L. R. A. (N.S.) 1147, 87 N. E. 594.

¹¹ *Smith v. Retail Merchants' F. Ins. Co.*, 29 S. D. 332, 42 L. R. A. (N.S.) 173, 137 N. W. 47.

¹² *Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738; *Young v. Hartford Life Ins. Co.*, — Mo. —, 211 S. W. 1; *Pacific Mutual Life Insurance Co. v. McDowell*, 42 Okla. 300, L. R. A. 1918E, 391, 141 Pac. 273; *Pauley v. Sun Ins. Office*, 79 W. Va. 187, 90 S. E. 552.

¹³ *Lansford v. Wren*, 64 W. Va. 458, 63 S. E. 308.

conduct of an insurance company in accepting premiums after the time specified in the original contract for the renewal thereof, will operate as a waiver as to future payments if such custom has misled such policyholders.¹⁴

If the party to a contract waives a condition which is inserted for his benefit,¹⁵ such as a condition requiring the adversary party to give certain security for credit which is extended to him,¹⁶ it is held that on the one hand such waiver does not prevent the party for whose benefit such condition is inserted from retracting such waiver and electing to insist on the performance of such condition in the future; but that on the other hand he must, in such case, give reasonable notice to the adversary party of his intention to insist upon the performance of the original contract.

If a provision in a policy of insurance, requiring action thereon to be brought within a certain time, has been waived by the conduct of the insurer in treating such policy as in effect, it is held in some jurisdictions that his subsequent denial of liability operates as a retraction of such waiver to the extent that the insured must at least bring an action within a reasonable time after the insurer has denied such liability.¹⁷ In other jurisdictions, however, it is held that if such provision is waived, it is waived as a finality; and that the insured can bring an action at any time within the period fixed by the Statute of Limitations.¹⁸ This result is due in part to the fact that provisions of this sort are regarded by the courts with considerable hostility as being in derogation of the general policy of the state as expressed in its Statute of Limitations; and while, as a rule, the dislike of these covenants is not strong enough to induce the courts to treat them as invalid,¹⁹ the courts are quite willing to find that the parties have waived such provisions and that such waiver is final.

¹⁴ Pacific Mutual Life Insurance Co. v. McDowell, 42 Okla. 300, L. R. A. 1918E, 391, 141 Pac. 273.

¹⁵ Panoutsos v. Raymond Hadley Corporation [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767].

¹⁶ Panoutsos v. Raymond Hadley Corporation [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767].

¹⁷ Phillips v. Union Central Life Ins. Co., 101 Fed. 33; Goodwin v. Merchants' & Bankers' Mutual Ins. Co., 118 Ia.

601, 92 N. W. 894; Gilbert v. Globe & Rutgers Fire Insurance Co., — Cr. —, 3 A. L. R. 205, 174 Pac. 1161; David v. Oakland Home Ins. Co., 11 Wash. 181, 39 Pac. 443.

¹⁸ Lynchburg Cotton Mill Co. v. Travelers' Ins. Co., 149 Fed. 954, 9 L. R. A. (N.S.) 654; Philadelphia Casualty Co. v. Thacher, 236 Fed. 860; Galloway v. Standard Fire Ins. Co., 45 W. Va. 237, 31 S. E. 969.

¹⁹ See § 732.

CHAPTER LXXVIII

IMPOSSIBILITY

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I

NATURE AND CLASSES

§ 2667. General nature of impossibility. The term “impossibility,” like so many other terms of our law, is not in its origin a technical legal term, but it is a term taken over from popular usage and employed in the law in a variety of meanings, varying from its original popular meaning to a highly technical legal meaning, which, however, it is difficult to define in abstract terms.¹ This is one of the characteristics of our unfortunate legal nomenclature;² but the difficulties which are always caused by so lax a use of technical legal language are perhaps more marked in the use of this term than in the use of most of the other terms, since, in many of the other terms which are carried over from ordinary use, the popular meaning has frequently been superseded by the technical

¹ See §§ 2668 et seq.

² See § 55.

meaning, at least in the usage of the courts and the text-writers, while in the case of this term the popular meaning survives in ordinary language and is frequently employed by the courts.

In its ordinary meaning, impossibility is practically synonymous with impracticability. It means the quality of being impossible; and "impossibility" is frequently defined as insuperably difficult in view of the circumstances. In this sense of the term, the ability of the person who is attempting to perform, together with the special circumstances of the case, is the test for determining whether the thing is impossible or not. In law the term "impossibility" is frequently used in this sense, but it is then said that impossibility has no effect upon the contract.³ If impossibility is used as indicating a state of facts which operate to prevent the contract from coming into existence, on the one hand, or which operate as a discharge of an existing contract, on the other, it is ordinarily used without any reference to the actual ability of the specific individual whose obligation to perform is in question; and the facts which are regarded as creating impossibility are, at the very least, facts which would prevent any one, no matter what his actual ability, from performing such obligation. In this connection, however, it may be added that even facts of this sort are frequently regarded by the courts as falling short of impossibility, in the sense in which the term is used to indicate that the contract does not come into existence, on the one hand, or is discharged, on the other.⁴

While the term impossibility is ordinarily used without any qualifying adjectives, it might be suggested that if the courts are to continue to use the term impossibility as applying to facts which do not affect the contract as well as to facts which do affect it in some way, the former class of facts might be called inoperative impossibility, while the latter class of facts might be called operative impossibility. No such distinction is ordinarily made, however; and the term impossibility is used without qualification, both of the operative and of the inoperative facts.

§ 2668. Classes of operative impossibility. Operative impossibility may be classified according to the time at which the impossibility exists, and according to the nature of the means by which performance is rendered impossible. With reference to the time at which the impossibility exists, impossibility may be classed as

³ See §§ 2696 and 2703 et seq.

⁴ See §§ 2696 and 2703 et seq.

impossibility which exists when the contract is made, which is sometimes referred to as original impossibility;¹ and impossibility which arises after a contract is made and which operates as a discharge thereof, which is sometimes referred to as subsequent impossibility or supervening impossibility.² The importance of the distinction between the two classes grows out of the fact that original impossibility prevents the existence of the contract,³ while subsequent or supervening impossibility does not prevent the existence of a contract, but operates as a discharge of a contract which was originally valid and enforceable.⁴ For this reason, in some jurisdictions at least, quasi-contractual rights arise when a contract which was originally valid and which has been performed in part, has been discharged in this way.⁵

With reference to the means by which a contract is rendered impossible, impossibility may be classed as impossibility caused by certain facts,⁶ and impossibility caused by the act or operation of the law or of the state.⁷ It may be noted in this connection that while subsequent or supervening impossibility may be due either to the existence of certain classes of facts,⁸ or to the operation of the law or the act of the state,⁹ original impossibility is ordinarily regarded, with few exceptions,¹⁰ as due to the existence or non-existence of certain facts.¹¹ Except for a few examples of original impossibility which are explained as being due to the operation of the rule of law,¹² a contract which is inoperative when it is made, because it violates certain rules of law, is ordinarily treated as a void or illegal contract,¹³ and not as a contract which is inoperative because of impossibility.

II

ORIGINAL IMPOSSIBILITY

§ 2669. Original impossibility—Impossibility of fact—Impossibility apparent on face of contract. Original impossibility of fact is ordinarily divided into two classes, one of which includes contracts in which the impossibility is apparent on the face of the

¹ See §§ 2669 et seq.

² See §§ 2673 et seq.

³ See §§ 2669 et seq.

⁴ See §§ 2673 et seq. and 2711 et seq.

⁵ See §§ 2714 et seq.

⁶ See §§ 2669 et seq. and 2681 et seq.

⁷ See § 2672 and §§ 2697 et seq.

⁸ See §§ 2669 et seq. and 2681 et seq.

⁹ See §§ 2697 et seq.

¹⁰ See § 2672.

¹¹ See §§ 2669 et seq.

¹² See § 2672.

¹³ See §§ 637 et seq.

contract, at least to one who has the knowledge with which the law assumes all reasonable human beings to be possessed, irrespective of the knowledge which the specific individual actually possesses in the specific case.¹ The other examples which are usually given by way of illustration, such as a contract to secure a unicorn, or to touch the sky, or to go from London to Rome in three hours, are usually taken from Roman law or from early English illustrations, which were possibly borrowed in part through Bracton from Roman law.² Some of the illustrations found in the earlier books with reference to the period within which a journey is to be accomplished would be regarded as perfectly possible under modern conditions.

From the nature of the case, it is far easier to suggest hypothetical illustrations than actual adjudications. A covenant to perform an act before the covenant itself is made,³ or to perform conjurations,⁴ are actual illustrations of the application of this doctrine.

It is not necessary, however, to invoke the theory of responsibility to explain cases of this sort. If the covenant is impossible of performance on its face, it can not operate as a consideration for the covenant of the adversary party, which is made in consideration of such impossible covenant. Cases of this sort are therefore really cases in which the promise of one party is gratuitous in legal effect, because the promise of the other party is unenforceable; but it is unenforceable, however, because it is impossible on its face.

§ 2670. Original impossibility—Impossibility of fact—Impossibility not apparent on face of contract. Original impossibility of fact may exist where the contract is not impossible of performance on its face, since the subject-matter of the contract is one the existence of which is possible; but where the contract is, nevertheless, impossible of performance in fact, because the subject-matter with which the parties believe that they are dealing, does not exist in fact.¹ One of the most common illustrations of impossibil-

¹ Hall v. Cazenove, 4 East. 477; The Harriman, 76 U. S. (9 Wall.) 161, 19 L. ed. 629; Cooper v. Livingston, 19 Fla. 684; LeRoy v. Jacobosky, 136 N. Car. 443, 67 L. R. A. 977, 48 S. E. 796.

² Rolle's Abridgment. Conditions 420.

³ Hall v. Cazenove, 4 East. 477; Le

roy v. Jacobosky, 136 N. Car. 443, 67 L. R. A. 977, 48 S. E. 796.

⁴ Cooper v. Livingston, 19 Fla. 684. (The covenant in this case was illegal by statute as well as impossible.)

¹ England. Couturier v. Hastie, 5 H. L. 673; Smidt v. Tiden, L. R. 9 Q. B. 446.

ity of this sort is found in contracts by which the owner of mineral land grants to another the privilege of removing mineral therefrom, and the latter agrees to remove a certain minimum quantity of mineral and to pay a specified royalty therefor. If the specified amount of mineral does not exist under such land, this fact operates as a discharge of the contract unless the party who agreed to remove such minimum amount also agreed to take the risk of a deficiency in quantity.² A sale of an interest in realty which does

United States. *Allen v. Hammond*, 36 U. S. (11 Pet.) 63, 9 L. ed. 633; *Great Northern Ry. Co. v. Reid*, 245 Fed. 86.

Alabama. *Brooks v. Cook*, 135 Ala. 219, 34 So. 960.

Illinois. *Koenig v. Haddix*, 21 Ill. App. 53.

Kansas. *Smith v. Kansas City*, 102 Kan. 518, 171 Pac. 9.

Kentucky. *Blakemore v. Blakemore*, (Ky.), 44 S. W. 96.

Maine. *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348.

Massachusetts. *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065.

Michigan. *Gibson v. Pelkie*, 37 Mich. 379; *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570; *Blake v. Lobb*, 110 Mich. 608, 68 N. W. 427; *Gauntlett v. Sea Ins. Co.*, 127 Mich. 504, 86 N. W. 1047; *Hewitt Iron Min. Co. v. Dessau Co.*, 129 Mich. 590, 89 N. W. 365.

Minnesota. *Diamond Iron Min. Co. v. Buckeye Iron Min. Co.*, 70 Minn. 500, 73 N. W. 507; *Althoff v. Torrison*, 140 Minn. 8, 167 N. W. 119.

Missouri. *Fisher v. During*, 53 Mo. App. 548.

New York. *Duncan v. New York Mutual Ins. Co.*, 138 N. Y. 88, 20 L. R. A. 386, 33 N. E. 730.

Ohio. *Cook v. Andrews*, 36 O. S. 174; *Brick Co. v. Pond*, 38 O. S. 65.

Pennsylvania. *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144; *McCahan v. Wharton*, 121 Pa. St.

424, 15 Atl. 615; *Riegel v. American Life Ins. Co.*, 140 Pa. St. 193, 23 Am. St. Rep. 225, 11 L. R. A. 857, 21 Atl. 392; *Riegel v. American Life Ins. Co.*, 153 Pa. St. 134, 19 L. R. A. 166, 25 Atl. 1070; *Fink v. Smith*, 170 Pa. St. 124, 50 Am. St. Rep. 750, 32 Atl. 566; *Boyer v. Fulmer*, 176 Pa. St. 282, 35 Atl. 235; *Bannan v. Graeff*, 186 Pa. St. 648, 40 Atl. 805.

Virginia. *Burton v. Haden*, 108 Va. 51, 15 L. R. A. (N.S.) 1038, 60 S. E. 736; *Virginia Iron, Coal & Coke Co. v. Graham*, — Va. —, 98 S. E. 659.

Vermont. *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589.

²**Alabama.** *Brooks v. Cook*, 135 Ala. 219, 34 So. 960.

California. *Williams v. Miller*, 68 Cal. 291, 9 Pac. 166; *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 458.

Florida. *Hiller v. Ray*, 59 Fla. 285, 20 Am. & Eng. Ann. Cas. 1162, 52 So. 623.

Iowa. *Fritzler v. Robinson*, 70 Ia. 500, 31 N. W. 61; *Carr v. Whitebreast Fuel Co.*, 88 Ia. 136, 55 N. W. 205; *Bloomfield Coal & Mining Co. v. Tidrick*, 99 Ia. 83, 68 N. W. 570.

Michigan. *Gribben v. Atkinson*, 64 Mich. 651 [sub nomine, *Gibben v. Atkinson*, 31 N. W. 570]; *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N. W. 427; *Hewitt Iron Mining Co. v. Dessau Co.*, 129 Mich. 590, 89 N. W. 365.

Minnesota. *Diamond Iron Mining Co. v. Buckeye Iron Mining Co.*, 70 Minn. 500, 73 N. W. 507.

not exist, is inoperative unless the parties thereto intended that such risk should be assumed by one or the other.³

Cases of this sort are frequently explained on the theory of original impossibility; and they are frequently explained on the theory that a contract must have a subject-matter, and that unless a subject-matter exists, the contract lacks one of its essential elements.⁴

These cases can be better explained, however, on the theory of mistake. If the parties assume or believe that the subject-matter exists when in fact it does not exist, they enter into the contract through mistake as to the existence as to one of the essential elements of the contract, and for this reason no valid contract exists.⁵ That it is mistake rather than the non-existence of the subject-matter that renders contracts of this sort invalid, is shown by the fact that if the existence of the subject-matter is uncertain, and the parties know of such uncertainty, and entered into a contract by which the risk of its non-existence is placed upon one or the other of the parties, such transaction is valid whether the subject-matter exists or not.⁶ If the parties to a transaction involving realty are

Ohio. *Cook v. Andrews*, 36 O. S. 174; *Brick Co. v. Pond*, 38 O. S. 65.

Pennsylvania. *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144; *McCahan v. Wharton*, 121 Pa. St. 424, 15 Atl. 615; *Boyer v. Fulmer*, 176 Pa. St. 282, 35 Atl. 235; *Bannan v. Graeff*, 186 Pa. St. 648, 40 Atl. 805.

Texas. *Edwards v. Trinity B. V. Ry. Co.*, 54 Tex. Civ. App. 334, 118 S. W. 572; *St. Louis S. W. Ry. Co. v. Johnston*, 58 Tex. Civ. App. 639, 125 S. W. 61.

Virginia. *Virginia Iron, Coal & Coke Co. v. Graham*, — Va. —, 98 S. E. 659.

Washington. *Adams v. Washington Brick, Lime & Mfg. Co.*, 38 Wash. 243, 80 Pac. 446.

England. *Bingham v. Bingham*, 1 Ves. Sr. 126.

Iowa. *Lewis v. Mote*, 140 Ia. 698, 119 N. W. 152.

Minnesota. *Houston v. Northern Pacific Ry. Co.*, 109 Minn. 273, 123 N. W. 922.

South Carolina. *Lawrence v. Beau-*

bien, 2 Bail. L. (S. Car.) 623, 23 Am. Dec. 155.

Texas. *Pegues v. Haden*, 76 Tex. 94, 13 S. W. 171.

⁴ See §§ 657 to 659.

⁵ See §§ 261 et seq.

⁶ **Georgia.** *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400.

Iowa. *Morgan v. Messenger*, 125 Ia. 247, 101 N. W. 127.

Michigan. *Valley City Milling Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074.

Pennsylvania. *Gormly v. Gormly*, 130 Pa. St. 467, 18 Atl. 727; *Ancient Order of United Workmen v. Mooney*, 230 Pa. St. 16, 79 Atl. 233.

Texas. *Houston & Texas Central, etc., Ry. Co. v. McCarty*, 94 Tex. 298, 86 Am. St. Rep. 854, 53 L. R. A. 507, 60 S. W. 429 [reversing, 21 Tex. Civ. App. 568, 54 S. W. 421].

Wisconsin. *Kowalke v. Milwaukee Electric Ry. & Light Co.*, 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762.

aware that they are ignorant of the condition of the title, failure of title is not regarded as impossibility.⁷

If the alleged subject-matter never existed, or has ceased to exist, and the parties both know such fact, the contract is not regarded as invalid because of impossibility or mistake. It may be invalid if such alleged subject-matter was the only consideration for the promise which it is sought to enforce, but the invalidity of the contract in cases of this sort is due to lack of consideration, and not to mistake or impossibility.

If the subject-matter is one which might possibly exist, the fact that it is not shown to exist does not seem to be regarded as sufficient to show original impossibility.⁸ A contract to sell salmon packed in Alaska, to be "exactly like Puget Sound fancy Sockeye," has been held to be valid, although such fish had not been found in Alaska, since it was not shown to be impossible that they should exist there.⁹

§ 2671. Difficulty or expense as original impossibility. Difficulty or expense in performance is not regarded as original impossibility¹ any more than it is regarded as subsequent impossibility.² A contract to pack a certain kind of fish at a given point, and to sell them, has been held to be possible although it was not shown that such fish could be obtained within many hundreds of miles of the point at which they were to be packed.³

The technical application of the rules of original impossibility undoubtedly leads to absurd results in extreme cases, although the nature of the facts is such that these absurdities do not appear so much in original impossibility as they do in subsequent impossibility. The same reasons which are beginning to cause the courts to declare that questions of subsequent impossibility should be treated as the average man would treat them,⁴ and that in cases in which performance is possible only at an expense which is ruinous to the

⁷ *Sheffield v. Hancock County*, 164 Ia. 561, 146 N. W. 439.

⁸ *Reid v. Alaska Packing Co.*, 43 Or. 429, 73 Pac. 337.

⁹ *Reid v. Alaska Packing Co.*, 43 Or. 429, 73 Pac. 337.

(An additional reason for upholding this contract was found in the suggestion that the contract might be per-

formed by packing such fish in Alaska no matter where they were captured.)

¹ *Reid v. Alaska Packing Co.*, 43 Or. 429, 73 Pac. 337.

For the unconscionable contract, see §§ 636 et seq.

² See §§ 2705 et seq.

³ *Reid v. Alaska Packing Co.*, 43 Or. 429, 73 Pac. 337.

⁴ See § 2706.

one party, and of little benefit to the other, the parties should not be forced into such economic waste under penalty of an action to recover damages for breach of contract, induce a similar feeling in cases of original impossibility.

The difficulty in formulating a rule which will protect the rights of both parties is due in fact to our theory of the consequences of impossibility. The courts have felt that they had to choose between holding, on the one hand, that the contract was possible of performance, and giving damages for breach thereof; and of holding, on the other hand, that the contract was impossible and that in case of original impossibility no contractual liability had ever existed. In this dilemma the courts have been strongly inclined to hold doubtful contracts as possible of performance, since to do otherwise would be to deny all rights to the party to whom such promise was made, and who had acted in reliance thereon. At the same time, a more nearly just result could frequently be reached if some means could be devised for making full compensation for damages actually sustained by reliance upon such promise, while denying damages for breach of contract based on the ordinary rules for determining the amount of damages.⁵

§ 2672. Original impossibility—Impossibility of law. A contract, the performance of which is forbidden by rules of law, or the performance of which the law will not enforce, is ordinarily an illegal or a void contract because of the nature of its subject-matter.¹ There are, however, cases in which contracts have been held to be unenforceable on the theory that the covenant was one which was legally impossible.² The leading case on this subject is the case by which an agent agreed to cause the discharge of a debt which was due to his principal.³ Possibly the agent was seeking a private advantage for himself, since the courts referred to the contract as "illegal." If this were the case, the theory of legal impossibility would be superfluous.⁴ If he was not seeking a personal advantage, but was assuming to act as agent, he was exceeding his authority. Whatever legal consequences might follow, it is not ordinarily regarded as a case of impossibility. It has been held that a contract by which one party covenants that the land of another will

⁵ See ch. LXXXVII.

¹ See §§ 660 et seq.

² *Harvey v. Gibbons*, 2 Lev. 161;
Providence Albertype Co. v. Kent & Stanley Co., 19 R. I. 561, 35 Atl. 152;

Specht v. Collins, 81 Tex. 213, 16 S. W. 934; *Stevens v. Coon*, 1 Pinn. (Wis.) 356.

³ *Harvey v. Gibbons*, 2 Lev. 161.

⁴ See § 879.

sell for a certain price at a certain time, is legally impossible.⁵ Recent authorities, however, do not regard a contract of this sort as legally impossible.⁶ A contract by a town to pay for a system of waterworks, which involves the use of wells which the town has not been authorized by law to use, has been held to be invalid as legally impossible.⁷ A contract which involves the sale of mining land by a locator, in violation of the mining laws of the United States,⁸ or a contract by which one corporation agrees to discharge its debts by issuing stock of another corporation which is to be formed in the future,⁹ or a contract by which a parent agrees to transfer the custody of an adult child,¹⁰ all have been regarded as contracts to perform legal impossibilities.

Outside of cases in which no consideration exists, or the subject-matter is such as to render the contract void or illegal, the tendency of modern authorities seems to be strongly against the recognition of the doctrine of legal impossibility.¹¹ A contract by which A agrees to sell B's property at a certain price,¹² is regarded as legally possible. A contract by which A agrees to obtain the release of a mortgage which is due to B, and which has been given to secure a debt which is past due, is said to be legally possible, since B can be compelled to accept payment.¹³

⁵ *Stevens v. Coon*, 1 Pinn. (Wis.) 336.

⁶ *Hampe v. Sage*, 87 Kan. 536, 125 Pac. 53; *Hurless v. Wiley*, 91 Kan. 347, L. R. A. 1915C, 177, 137 Pac. 981.

⁷ *Smith v. Stoughton*, 185 Mass. 329, 70 N. E. 195.

⁸ *Miller v. Thompson*, 40 Nev. 35, 160 Pac. 775.

⁹ *Providence Alberttype Co. v. Kent & Stanley Co.*, 19 R. I. 501, 35 Atl. 152.

¹⁰ *Dittrich v. Gobey*, 119 Cal. 509, 51 Pac. 962.

¹¹ *England. Hibblewhite v. M'Morine*, 5 M. & W. 462.

Alabama. Baker v. Lehman, 186 Ala. 493, 65 So. 321.

California. Brimmer v. Salisbury, 167 Cal. 522, 140 Pac. 30.

Kansas. Hampe v. Sage, 87 Kan. 536, 125 Pac. 53; *Hurless v. Wiley*, 91 Kan. 347, L. R. A. 1915C, 177, 137 Pac. 981.

Michigan. Tyng v. Converse, 180 Mich. 195, 146 N. W. 629.

Oregon. Page v. Ford, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

A contract by which A agrees to sell property to B, which A does not own at the time of making the contract is legally possible.

England. Hibblewhite v. M'Morine, 5 M. & W. 462.

Alabama. Baker v. Lehman, 186 Ala. 493, 65 So. 321.

California. Brimmer v. Salisbury, 167 Cal. 522, 140 Pac. 30.

Michigan. Tyng v. Converse, 180 Mich. 195, 146 N. W. 629.

Oregon. Page v. Ford, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

¹² *Hampe v. Sage*, 87 Kan. 536, 125 Pac. 53; *Hurless v. Wiley*, 91 Kan. 347, L. R. A. 1915C, 177, 137 Pac. 981.

¹³ *Waterman v. Dutton*, 6 Wis. 265. (B could not, however, be compelled to accept payment from any one except his debtor or the agent of the debtor.)

As in the case of subsequent impossibility,¹⁴ a contract to perform one of two covenants in the alternative, is not regarded as impossible, although performance of one of the covenants is originally impossible, since performance of the alternative covenant is legally possible.¹⁵ Even if a covenant by which A agrees that B's land shall sell for a certain price is legally impossible, a covenant by which a vendor agrees that the land which he sells to the vendee shall sell at a certain profit within a certain time, or that in default thereof, the vendor will repurchase such land, and pay the purchase price to the vendee, is enforceable, since the last covenant is legally possible.¹⁶

III

SUBSEQUENT IMPOSSIBILITY

§ 2673. Subsequent impossibility—Origin of modern doctrine. In an English case,¹ it was said that "where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will excuse him. * * * But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." The case in which this statement was made was really not a case of impossibility at all. An action was brought upon a covenant in a lease to pay rent, and the lessee pleaded that he had been expelled and kept out of possession of the demised premises by Prince Rupert, an alien-born and an enemy to the king and his kingdom, and that by reason of such expulsion or deprivation of possession the lessee could not come into possession of the profits. Either this was an attempt to set up dispossession by one who did not claim under the lessor, as an excuse for non-payment of rent, or else it amounted to an allegation that the lessee had not been able to obtain the funds with which he had been expected to pay the rent, and therefore that he should be excused from paying. Even in the most liberal possible view of impossibility, the fact that the debtor has

¹⁴ See § 2708.

¹⁵ *Jones & Laughlin Steel Co. v. Graham*, 273 Ill. 377, 112 N. E. 967; *Heinrich v. Jenkins*, 98 Minn. 489, 108 N. W. 877.

¹⁶ *Jones & Laughlin Steel Co. v. Graham*, 273 Ill. 377, 112 N. E. 967. (The legal possibility of the contract was assumed without discussion in this case.)

¹ *Paradine v. Jane*, Aleyn 26.

not sufficient funds with which to pay his debts, is not a defense to the debtor in an action by the creditor; and this case could be ignored if it were not for the fact that the decisions since that time have gone back to this case as the basis of the distinctions which modern courts draw, and of the fundamental theory of subsequent impossibility. For this reason it is necessary to distinguish between impossibility as an excuse for the non-payments of obligations which are not assumed by voluntary agreement, and subsequent impossibility as an excuse for non-payments of obligations which are assumed by voluntary agreement.

§ 2674. Impossibility as affecting obligation not assumed by voluntary agreement. If the obligation upon which the action is brought is not assumed by voluntary agreement, but it has been imposed by the law in connection with the surrounding facts and circumstances of the case, certain forms of subsequent impossibility, in the popular sense of the term, which arise without the fault of the promisor, may discharge him from liability.¹ A common carrier, whose liability to transport and deliver is implied from the circumstances of his accepting goods for transportation, is discharged by any subsequent impossibility, which amounts to an act of God,² or an act of the public enemy,³ though in other cases he is liable as an insurer.⁴

The term "act of God" is an unfortunate expression. It is used to describe natural forces as distinct from the consequences of

¹ *Hick v. Rodocanachi* [1891] 2 Q. B. 626; *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, L. R. A. 1916D, 982, 70 So. 467 (obiter); *Armstrong v. Illinois Central Railroad Co.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216.

² *Gulf Coast Transportation Co. v. Howell*, 70 Fla. 544, L. R. A. 1916D, 974, 70 So. 567 (obiter); *Wald v. Ry.*, 162 Ill. 545, 53 Am. St. Rep. 332, 35 L. R. A. 356, 44 N. E. 888; *Shellabarger Elevator Co. v. Illinois Central Railroad Co.*, 278 Ill. 333, L. R. A. 1917E, 1011, 116 N. E. 170 (obiter); *Armstrong v. Illinois Central Railroad Co.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216; *St. Louis & San Francisco R. R.*

Co. v. Dreyfus, 42 Okla. 401, L. R. A. 1915D, 547, 141 Pac. 773 (obiter).

A constitutional provision fixing a carrier's liability will be construed as containing an implied exception as to acts of God or the public enemy. *Shellabarger Elevator Co. v. Illinois Central Railroad Co.*, 278 Ill. 333, L. R. A. 1917E, 1011, 116 N. E. 170.

³ *Shellabarger Elevator Co. v. Illinois Central Railroad Co.*, 278 Ill. 333, L. R. A. 1917E, 1011, 116 N. E. 170 (obiter); *Bland v. Adams Express Co.*, 62 Ky. (1 Dur.) 232, 85 Am. Dec. 623; *Lewis v. Ludwick*, 46 Tenn. (6 Cold.) 363, 99 Am. Dec. 454.

⁴ For the common law liability of the common carrier, see § 740.

human action,⁵ in which no human act has contributed to the loss. An unexpected freezing of a river,⁶ or an unexpected and unprecedented flood,⁷ or an earthquake,⁸ or an unprecedented snow storm,⁹ or a tornado or unprecedented wind storm,¹⁰ is an act of God in this sense. To effect a discharge of liability in such cases, the direct and sole cause of the loss must be the act of God.¹¹ If the negligence of the carrier contributes to the loss,¹² as where through

⁵ **England.** *Forward v. Pittard*, 1 T. R. 27.

Colorado. *Blythe v. Denver & R. G. Ry.*, 15 Colo. 333, 22 Am. St. Rep. 403, 11 L. R. A. 615, 25 Pac. 702.

Florida. *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, L. R. A. 1916D, 982, 70 So. 467.

Oklahoma. *Armstrong v. Illinois Central Ry.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216.

South Carolina. *Slater v. South Carolina Ry.*, 29 S. Car. 96, 6 S. E. 936.

The fear of collusion between the common carrier and thieves, led to the adoption of this term so as to indicate the liability of the common carrier for all losses which could be attributed to human action, and his non-liability only in cases in which the loss could not be attributed to human agency.

⁶ *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745.

⁷ **Alabama.** *Smith v. Ry.*, 91 Ala. 455, 24 Am. St. Rep. 929, 11 L. R. A. 619, 8 So. 754.

California. *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244.

Maine. *Libby v. Ry.*, 85 Me. 34, 20 L. R. A. 812, 26 Atl. 943.

New York. *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426.

Ohio. *American Express Co. v. Smith*, 33 O. S. 511, 31 Am. Rep. 561.

Oklahoma. *Chicago, Rock Island & Pacific Railroad Co. v. Logan*, 23 Okla. 707, 29 L. R. A. (N.S.) 663, 105 Pac. 343 (obiter); *Armstrong v. Illinois Central Railroad Co.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216.

⁸ *Slater v. South Carolina Ry.*, 29 S. Car. 96, 6 S. E. 936.

⁹ *Jones v. Minneapolis Ry.*, 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Feinberg v. Delaware, Lackawanna & Western Ry.*, 52 N. J. L. 451, 20 Atl. 33; *St. Louis & San Francisco R. R. Co. v. Dreyfus*, 42 Okla. 401, L. R. A. 1915D, 547, 141 Pac. 773 (obiter).

¹⁰ *Blythe v. Denver Ry.*, 15 Colo. 333, 22 Am. St. Rep. 403, 11 L. R. A. 615, 25 Pac. 702.

¹¹ **Kentucky.** *Styles v. Louisville & N. R. Co.*, 129 Ky. 175, 18 L. R. A. (N.S.) 86, 110 S. W. 820.

Michigan. *Michigan Central Ry. v. Burrows*, 33 Mich. 6.

Missouri. *Davis v. Ry.*, 89 Mo. 340.

Ohio. *Daniels v. Ballentine*, 23 O. S. 532, 13 Am. Rep. 264.

Oklahoma. *St. Louis & Santa Fe Ry. v. Dreyfus*, 42 Okla. 401, L. R. A. 1915D, 547, 141 Pac. 773.

Pennsylvania. *Lloyd v. Haugh & K. Storage & T. Co.*, 223 Pa. St. 148, 21 L. R. A. (N.S.) 188, 72 Atl. 516.

¹² **Arkansas.** *Jonesboro Lake City & Eastern Ry. v. Dunnivant*, 117 Ark. 451, 174 S. W. 1187.

Florida. *Gulf Coast Transportation Co. v. Howell*, 70 Fla. 544, L. R. A. 1916D, 974, 70 So. 567; *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, L. R. A. 1916D, 982, 70 So. 467 (obiter).

Louisiana. *National Rice Milling Co. v. New Orleans & Northeastern Ry.*, 132 La. 615, 61 So. 708 (obiter).

Nebraska. *Wabash Ry. v. Sharpe*, 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; *Sunderland Bros. Co. v. Chica-*

his negligence the goods are exposed to a flood,¹³ or to a storm,¹⁴ and such exposure might have been prevented by reasonable care on his part, the fact that an act of God is in part the operating cause of the loss does not discharge his liability. If the carrier neglects to employ reasonable means of finding the goods after the flood, he is liable therefor.¹⁵ If a flood (such as the Johnstown flood) causes a wreck, and the carrier neglects to protect the goods, which are plundered, the negligence of the carrier to guard the goods contributes to the loss and the carrier is liable.¹⁶

The term "act of God" is not equivalent, however, to "overpowering force" or to "inevitable casualty."¹⁷ Considerations of public policy, the chief of which was the danger of collusion between the common carrier and robbers,¹⁸ caused the courts to hold the common carrier to his liability as insurer of the goods in all other cases, outside of the act of God and the public enemy, even if the loss or injury to the goods was due to inevitable casualty or overpowering force.¹⁹ The act of a mob is not the act of the public

go. Burlington & Quincy Ry., 89 Neb. 660, 131 N. W. 1047.

Oklahoma. Chicago, Rock Island & Pacific Railroad Co. v. Logan, 23 Okla. 707, 29 L. R. A. (N.S.) 663, 105 Pac. 343; St. Louis & San Francisco R. R. Co. v. Dreyfus, 42 Okla. 401, L. R. A. 1915D, 547, 141 Pac. 773.

South Carolina. Ferguson v. Southern Ry., 91 S. Car. 61, 74 S. E. 129.

Washington. Smith v. Trading Co., 20 Wash. 580, 44 L. R. A. 557, 56 Pac. 372.

Arkansas. Jonesboro, Lake City & Eastern Ry. v. Dunnavant, 117 Ark. 451, 174 S. W. 1187.

Florida. Gulf Coast Transportation Co. v. Howell, 70 Fla. 544, L. R. A. 1916D, 974, 70 So. 567; Seaboard Air Line Ry. v. Mullin, 70 Fla. 450, L. R. A. 1916D, 982, 70 So. 487 (obiter, as delay in transportation was not regarded as proximate cause of loss).

Louisiana. National Rice Mill Co. v. New Orleans & N. E. Ry., 132 La. 615, 61 So. 708.

Nebraska. Wabash Ry. v. Sharpe 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; Sunderland Bros. Co. v. Chi-

cago, Burlington & Quincy Ry., 89 Neb. 660, 131 N. W. 1047.

South Carolina. Ferguson v. Southern Ry., 91 S. Car. 61, 74 S. E. 129.

¹⁴ St. Louis & San Francisco R. R. Co. v. Dreyfus, 42 Okla. 401, L. R. A. 1915D, 547, 141 Pac. 773.

¹⁵ Chicago, Rock Island & Pacific Railroad Co. v. Logan. 23 Okla. 707, 29 L. R. A. (N.S.) 663, 105 Pac. 343.

¹⁶ Lang v. Ry., 154 Pa. St. 342, 35 Am. St. Rep. 846, 20 L. R. A. 380, 26 Atl. 370.

¹⁷ Trent & Mersey Navigation Co. v. Wood, 4 Dougl. 287; Missouri Pacific Ry. v. Nevill, 60 Ark. 375, 46 Am. St. Rep. 208, 28 L. R. A. 80, 30 S. W. 425; Merchants' Despatch Co. v. Smith, 76 Ill. 542; Merritt v. Earle, 29 N. Y. 115.

¹⁸ Forward v. Pittard, 1 T. R. 27.

¹⁹ Missouri Pacific Ry. v. Nevill, 60 Ark. 375, 46 Am. St. Rep. 208, 28 L. R. A. 80, 30 S. W. 425; Merchants' Despatch Co. v. Smith, 76 Ill. 542; Pittsburgh, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 44 L. R. A. (N.S.) 358, 89 N. E. 1022.

enemy within the meaning of this rule, and the carrier is liable for damage inflicted by a mob on goods in his custody as carrier.²⁰ He is also liable for damage due to fire which was occasioned by human agency, although he is not at fault, and although he could not have prevented the loss or injury.²¹

Even in jurisdictions in which the act of a tenant for years in holding over after his term, is held to make him a tenant for years without regard to his actual intention, such consequence does not follow if his act in holding over is due to inevitable casualty,²² such as illness,²³ or inability to secure means of moving the goods.²⁴ If the holding over is due to the illness of a subtenant, who is in the premises in violation of a covenant against subletting, the tenant will be treated as a tenant from year to year, if the lessor so elects,²⁵ on the theory that the impossibility would not have arisen if the tenant had performed his covenant.

Since these are cases in which the liability is imposed by law, and not created by contract, further discussion here is unnecessary.

§ 2675. Impossibility as affecting liability assumed by voluntary agreement—General nature of impossibility. If the obligation which it is sought to enforce is one which is created by the express agreement of the promisor, it is laid down as a general rule, subject to exceptions which are considered hereafter,¹ that subsequent impossibility does not excuse performance.² Since there are certain well-

²⁰ *Pittsburg, C. C. & St. L. R. Co. v. Chicago*, 242 Ill. 178, 44 L. R. A. (N.S.) 358, 89 N. E. 1022; *Missouri Pacific Ry. v. Nevill*, 60 Ark. 375, 46 Am. St. Rep. 208, 28 L. R. A. 80, 30 S. W. 423.

²¹ *Merchants' Despatch Co. v. Smith*, 76 Ill. 542.

²² *Herter v. Mullin*, 159 N. Y. 28, 70 Am. St. Rep. 517, 44 L. R. A. 703, 53 N. E. 700; *Grice v. Todd*, 120 Va. 481, L. R. A. 1917D, 512, 91 S. E. 609.

Contra, *Mason v. Wierengo*, 113 Mich. 151, 67 Am. St. Rep. 461, 71 N. W. 489.

²³ *Herter v. Mullen*, 159 N. Y. 28, 70 Am. St. Rep. 517, 44 L. R. A. 703, 53 N. E. 700.

²⁴ *Grice v. Todd*, 120 Va. 481, L. R. A. 1917D, 512, 91 S. E. 609.

²⁵ *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94.

¹ See §§ 2676 et seq.

² *England. Prince v. Haworth* [1905] 2 K. B. 768.

United States. Dermott v. Jones, 69 U. S. (2 Wall.) 1, 17 L. ed. 702; *The Harriman*, 76 U. S. (9 Wall) 161, 19 L. ed. 629; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Chicago, M. & St. P. Ry. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515; *Northern P. R. Co. v. American Trading Co.*, 195 U. S. 439, 49 L. ed. 269; *Barry v. United States*, 229 U. S. 47, 57 L. ed. 1060; *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 409]; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Fed. 440; *Robson v. Mississippi River Logging Co.*, 61 Fed. 893;

recognized exceptions to this rule,³ it is clear that the rule itself is not intended as a complete or agreed statement of the law. In most cases in which it is necessary to lay down a general rule and then to qualify the rule by a number of exceptions, either the original rule is stated inadequately, on the one hand, or else the courts have decided the cases as they arise without any regard to general theory. The lack of a general theory is apparent as soon as an attempt is made to state the classes of the exceptions to the general rule; and it is even more apparent when an attempt is made to formulate a general principle which underlies the specific classes of exceptions and which will solve new cases as they arise. Attempts have been made to state a general principle which will explain all the recognized exceptions.

Link Belt Engineering Co. v. United States, 142 Fed. 243; **Ferguson v. Omaha & S. W. R. Co.**, 227 Fed. 513; **Berg v. Erickson**, 234 Fed. 817, L. R. A. 1917A, 648.

Alabama. **McGehee v. Hill**, 4 Port. (Ala.) 170, 29 Am. Dec. 277; **Meriwether v. Lowndes County**, 89 Ala. 362, 7 So. 198.

California. **Law v. San Francisco Gas & Electric Co.**, 168 Cal. 112, 142 Pac. 52.

Connecticut. **School Dist. v. Dauchy**, 25 Conn. 530, 68 Am. Dec. 371.

Illinois. **Summers v. Hibbard**, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

Indiana. **Prather v. Latshaw**, — Ind. —, 122 N. E. 721.

Iowa. **Mahaska County State Bank v. Brown**, 159 Ia. 577, 141 N. W. 459.

Kansas. **Cox v. Chase**, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766; **Carter v. Wilson**, 102 Kan. 200, 169 Pac. 1139.

Kentucky. **Louisville & N. R. Co. v. Crowe**, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

Maryland. **Ees-Arr Knitting Mills v. Fischer**, 132 Md. 1, 103 Atl. 91.

Massachusetts. **Adams v. Nichols**, 36 Mass. (19 Pick.) 275, 31 Am. Dec. 137; **Rowe v. Peabody**, 207 Mass. 226, 93 N. E. 604.

Minnesota. **Cowley v. Davidson**, 13 Minn. 92; **Stees v. Leonard**, 20 Minn. 494; **Anderson v. May**, 50 Minn. 280, 36 Am. St. Rep. 642, 17 L. R. A. 555, 52 N. W. 530; **Belle Plaine First National Bank v. McConnell**, 103 Minn. 340, 123 Am. St. Rep. 336, 14 L. R. A. (N.S.) 616, 114 N. W. 1129 (obiter); **Halloran v. Schmidt Brewing Co.**, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

Mississippi. **Hood v. Moffett**, 109 Miss. 757, L. R. A. 1916B, 622, 69 So. 664.

New York. **Beach v. Crain**, 2 N. Y. 86, 49 Am. Dec. 369; **Tompkins v. Dudley**, 25 N. Y. 272, 82 Am. Dec. 349; **Dexter v. Norton**, 47 N. Y. 62, 7 Am. Rep. 415; **Stewart v. Stone**, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595.

North Dakota. **Grady v. Schweinler**, 16 N. D. 452, 125 Am. St. Rep. 674, 14 L. R. A. (N.S.) 1089, 113 N. W. 1031; **Gile v. Interstate Motor Car Co.**, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

Pennsylvania. **Hoy v. Holt**, 91 Pa. St. 88, 36 Am. Rep. 659.

Rhode Island. **Parker v. Macomber**, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464.

Virginia. **Virginia Iron, Coal & Coke Co. v. Graham**, — Va. —, 98 S. E. 659.

West Virginia. **Vale v. Suiter**, 58 W. Va. 353, 52 S. E. 313.

³ See §§ 2676 et seq.

It has been said that any subsequent act or event which prevents performance must be regarded as operative impossibility which will discharge the contract, as it appears that the parties intended such act or event as an implied condition subsequent upon the happening of which the contract should be discharged.⁴ As in other cases in which the doctrine of implied conditions is invoked,⁵ the courts are attempting to justify the result, which they have reached on other grounds, by the use of a fiction which is unnecessary and which gives no help to the solution of cases in advance. Until we know whether the court regards the subsequent act or event as amounting to operative impossibility which discharges the contract, it is impossible to know whether the court regards such act or event as an implied condition subsequent.

Another attempt to state the general theory which underlies the exceptional cases in which operative impossibility exists, puts the principle in the following form: If the subsequent act or event which prevents performance is one which is not fairly within the meaning of the contract, and which the parties can not be assumed to have contemplated when they entered into the contract, such act or event amounts to operative impossibility and discharges performance.⁶

⁴ **England.** Nickoll v. Ashton [1901], 2 K. B. 126; Horlock v. Beal [1916], 1 A. C. 486; F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co. [1916], 2 A. C. 397.

United States. Reed v. United States, 78 U. S. (11 Wall.) 591, 20 L. ed. 220.

Alabama. Griel Bros. Co. v. Mabson, 179 Ala. 444, 43 L. R. A. (N.S.) 664, 60 So. 876.

Maine. American Mercantile Exch. Co. v. Blunt, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 10 Am. & Eng. Ann. Cas. 1022, 66 Atl. 212.

Michigan. Hooper v. Mueller, 158 Mich. 595, 133 Am. St. Rep. 399, 123 N. W. 24.

Minnesota. Dow v. Sleepy Eye State Bank, 88 Minn. 355, 93 N. W. 121.

New York. Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Dolan v. Rodgers, 149 N. Y. 489, 44 N. E. 167; Buffalo & Lancaster Land Co. v. Bellevue

Land & Improvement Co., 165 N. Y. 247, 51 L. R. A. 951, 59 N. E. 5; Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 49 L. R. A. (N.S.) 922, 101 N. E. 162.

Tennessee. Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364.

Virginia. Virginia Iron, Coal & Coke Co. v. Graham, — Va. —, 98 S. E. 659.

Washington. The Stratford v. Seattle Brewing & Malting Co., 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31.

For a genuine case of construction see, *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

⁵ See § 2577 and ch. LXXXIV.

⁶ *Chicago, Milwaukee & St. Paul Ry. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595; *Park-*

This form of stating the rule conforms more nearly to the actual facts of the case than the former method of stating it. The converse of the statement is undoubtedly correct. If the contract shows that the parties have contemplated the possibility of some subsequent act or event which renders performance impossible, and if they have made provision therefor, putting the risk of loss on one or the other of the parties to the contract or apportioning the loss, such provisions are valid, and full effect will be given thereto.⁷ This, however, is merely a special form of express condition subsequent,⁸ and since the parties have agreed in advance upon the consequences of the happening of such future act or event which prevents performance, the ordinary rules of impossibility have no application.

er v. Macomber, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464.

"We regard it as thoroughly settled that the words of a mere general covenant will not be construed as an undertaking to answer for a subsequent event, happening without the fault of the covenantor, which renders performance of the covenant itself not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract. Where performance is thus rendered impossible, the inquiry naturally arises as to whether there was a purpose to covenant against such an extraordinary and therefore presumably unapprehended event, the happening of which it was not within the power of the covenantor to prevent. The tempest, for instance, may destroy that which must exist if performance of the covenant is to remain possible, and it would seem evident in such a case that it was not within the contemplation of the parties that the maker of the covenant should answer in damages for what he could in no wise control. But, on the other hand, a person entering into a charter party might be answerable for delay caused by adverse winds, since it would be presumed that the parties contracted with such a possibility in

mind. *Shubrick v. Salmond*, 3 Burr. 1637. A well-known English writer on the law of contracts says: 'By the modern understanding of the law, we are not bound to seek for a general definition of "the act of God," or vis major, but only to ascertain what kind of events were within the contemplation of the parties;' and he further says upon the same point: 'We can not arrive, then, at any more distinct conception than this: an event which, as between the parties and for the purpose of the matter in hand, can not be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract.' Pollock, *Principles of Contract*, 362. In *Hayes v. Bickerstaff, Vaughan*, 113, 122, it was declared that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers impossible for him to prevent, or, probably, to attempt preventing." *Krause v. Board of Trustees*, 182 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

⁷ See § 2578.

⁸ See §§ 2574 et seq.

There are many future acts or events which prevent performance which are apparently not within the contemplation of the parties at the time at which they entered into the contract, but which nevertheless do not amount to a discharge.⁹ In order to bring these cases within the operation of the general principle, it is necessary to disregard the actual intention of the parties and to substitute therefor a standardized intention which the law fixes arbitrarily. Accordingly, it is necessary to ascertain the facts which the law regards as operative discharge before it is possible to tell what acts the parties are assumed to contemplate in advance and what acts are assumed not to be within the contemplation of the parties.

§ 2676. Classification of subsequent impossibility. An attempt has been made in obiter to state the classes of acts or events which will operate as impossibility which will discharge the contract. It has been said that apart from impossibility due to the act of the adversary, which is a form of breach,¹ operative impossibility consists of acts of God and acts of the law.² This classification, however, is generally repudiated whenever it is sought to apply it. There are many forms of impossibility due to the act of God as distinguished from the act of man, which do not operate as a discharge.³ The attempt to carry the idea of the "act of God" over from the law of carriers, where the use of the term has some justification,⁴ has met with little support in the adjudicated cases. If the covenant is unconditional in terms, the fact that performance is prevented by an act of God does not of itself operate as a discharge.⁵ The fact that the act of God might have been foreseen by a reasonable man, has been regarded as sufficient in many cases to prevent it from acting as a discharge.⁶

⁹ See §§ 2705 et seq.

¹ See ch. LXXXIV.

² *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284; *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 490]; *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 11 L. R. A. (N.S.) 713; *Toomey v. United States*, 49 Ct. Cl. 172; *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Zanello v. Smith & W. Iron Works*, 62 Or. 213, 124 Pac. 660.

³ *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 848; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

See §§ 2703 et seq.

⁴ See § 2674.

⁵ *Prather v. Latshaw*, — Ind. —, 122 N. E. 721; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766; *Runyon v. Culver*, 168 Ky. 45, L. R. A. 1916F, 3, 181 S. W. 640.

⁶ See §§ 2703 et seq.

Another attempt to classify impossibility has resulted in the following classification: (1) Where the impossibility is created by law. (2) Where the continued existence of something essential to the performance is an implied condition of the contract, and such thing has ceased to exist. (3) Where contracts are made for personal services which can not be performed by the assignee or a personal representative, and the person who has agreed to perform has died, or is prevented from performing by sickness, imprisonment and the like.⁷ This classification is substantially correct, as far as it goes, and the classes of impossibility there indicated are generally regarded as operative; but in many jurisdictions forms of operative impossibility are recognized which can not be brought under any of these classes except by a liberal use of fictions and by an artificial explanation of the meaning of the terms which are employed in defining such classes.⁸ In cases which arose out of the war of 1914 an attempt has been made, especially by the English courts, to add another class of cases to the existing classes of impossibility which had been recognized by the courts. The new class of cases consists of those in which there has been a frustration of the voyage or the venture which the parties had undertaken. The difficulties which arise from taking an idea which is essentially one of construction of the terms of the contract and of performance of the terms as thus construed, and of importing it into the doctrine of impossibility, the essence of which is that a combination of facts has arisen which the parties had not anticipated, has been discussed elsewhere.⁹ It may be added that the results of the attempt to work this idea into the general doctrine of impossibility have not been such as to indicate that this doctrine will aid in the development of the doctrine of impossibility of performance.

Whatever basis of classification may be adopted, it is clear that external facts are necessary to cause operative impossibility. The fact that performance is impracticable to the specific individual does not amount to impossibility.¹⁰ A contract to deliver goods is

⁷ *Middlesex Water Co. v. Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 49 L. R. A. 572, 45 Atl. 692.

⁸ See, *Impossibility of Performance, as an Excuse for Breach of Contract*, by Frederick C. Woodward, 1 Columbia Law Review 529; and, *Intervening Impossibility of Performance as Affecting the Obligations of Contracts*, by Wil-

liam J. Conlen, 66 University of Pennsylvania Law Review 28.

⁹ See § 2675 and §§ 2758 et seq.

¹⁰ *American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 84 Atl. 182; *Brown v. Ehlinger*, 90 Wash. 585, 156 Pac. 544; *Roberts v. American Column & Lumber Co.*, 76 W. Va. 290, 85 S. E. 535.

not discharged by the fact that the shipper is unable to obtain cars.¹¹ A contract to pay money is not discharged by the fact that the specific promisor is unable to obtain the money with which to perform.¹²

§ 2677. Assumption of risk as affecting impossibility. The terms of the contract and the surrounding circumstances may show that one or the other party had agreed to assume certain risks; and in such case the happening of the event the risk of which has been assumed, does not amount to impossibility so as to discharge the liability of the party who assumed such risk.¹ A contract to rebuild or to keep in repair is ordinarily so worded as to show the intention of the contractor to assume all risk of accident or destruction of the property which he has engaged to keep in repair

¹¹ *Hesser-Milton Renahan Coal Co. v. La Crosse Fuel Co.*, 114 Wis. 654, 90 N. W. 1094.

See also, *Emack v. Hughes*, 74 Vt. 382, 52 Atl. 1061.

¹² See § 2707.

¹ *England*. *Elliott v. Crutchley* [1906] A. C. 7.

United States. *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648.

Kentucky. *Runyon v. Culver*, 108 Ky. 45, L. R. A. 1916F, 3, 181 S. W. 640.

Kansas. *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 765.

Indiana. *Prather v. Latshaw*, — Ind. —, 122 N. E. 721.

"Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for his non-performance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one who makes a positive agreement to do a lawful act, is not absolved from liability for a failure to fulfil his covenant by a subsequent impossibility of performance, caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it

without any reservation or exception, which, if he desired, he could make in his agreement, thereby inducing the other contracting party, in consideration of his positive covenant, to enter into and become bound by the contract; and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense. . . . But where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of intermarriage, or in a contract for the personal service of an artist, such as a singer, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible without his fault, by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like condition.

"There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract, that they must have known

or to rebuild, as the case may be;² or to assume all risk due to defective plans.³ A contract to reconstruct a bridge if it is removed by any cause except fire, shows that the contractor intends to assume the risk of extreme flood;⁴ and he is bound to rebuild such bridge if it is destroyed by an unprecedented flood.⁵ A covenant that a bridge should remain safe for five years shows that the promisor assumes the risk of flood;⁶ and the contractor is liable if the bridge is destroyed by an unprecedented flood within such period.⁷

The fact that the impossibility in question might have been foreseen readily, and that no provision is made against it, is regarded

when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence, should exist at the time of performance, or unless an indispensable thing or condition of things not then in existence should come into existence before and remain in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of performance of the contract, without fault of the obligor, either by the act of God, or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. . . . But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.

"It is that, although general words, which can not be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified under-

taking to perform, he must do so or pay the damages for his failure." *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648.

² *Alabama*. *Nave v. Berry*, 22 Ala. 382; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446.

California. *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115.

Connecticut. *School District No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

Michigan. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686.

Mississippi. *Abby v. Billups*, 35 Miss. 678, 72 Am. Dec. 143.

New York. *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

Pennsylvania. *Hoy v. Holt*, 91 Pa. St. 88, 36 Am. Rep. 659.

Virginia. *Ross v. Overton*, 3 Call. (Va.) 309, 2 Am. Dec. 552.

Texas. *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814.

³ *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 49 L. R. A. (N.S.) 922, 101 N. E. 162.

⁴ *Mitchell v. Weston*, 91 Miss. 414, 15 L. R. A. (N.S.) 833, 45 So. 571.

⁵ *Mitchell v. Weston*, 91 Miss. 414, 15 L. R. A. (N.S.) 833, 45 So. 571.

⁶ *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198.

⁷ *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198.

as sufficient to show that the party who made an unconditional and unqualified promise intended to assume the risk of the happening or event in question.⁸

§ 2678. Express provision as to effect of impossibility in case of death. If, however, the contract shows that the parties thereto contemplated the death of one of them, and provided for the effect thereof, full effect is given to such provision.¹ A provision by which A appoints B to represent her interests during A's life, and to represent A's estate on A's death, is not discharged by A's death.²

If a contract is personal in its nature, it has been held, however, that the death of one of the parties thereto operates as a discharge in spite of the fact that the contract contains an express provision to the effect that it is to be binding upon the personal representatives of one or the other of the parties.³ A contract by which A authorized B to collect rent from A's realty, to make repairs and to pay the balance over to A, was held to be personal in its nature so that it could not possibly have been enforced against B's personal representatives; and accordingly it was held that A's death operated as a discharge of such contract in spite of such provision.⁴ A contract for the sale of property which provides that the purchaser's notes in such numbers and for such amounts as he should determine by aggregating an agreed sum, should be given for part of the purchase price, was held to be discharged by the death of the purchaser before he had given such notes, although the contract provided expressly that it should be "binding upon and enure to the benefit of the respective heirs, executors and administrators" of the parties thereto.⁵ The seller was accordingly denied the right to enforce the contract as against the estate of the purchaser if the purchaser was not in default at the time of his death.⁶

¹ *Prather v. Latshaw*, — Ind. —, 122 N. E. 721; *Carter v. Wilson*, 102 Kan. 200, 169 Pac. 1139; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766; *Runyon v. Culver*, 168 Ky. 45, L. R. A. 1916F, 3, 181 S. W. 640.

² *In re McIntosh*, 182 Ia. 23, 159 N. W. 223.

³ *In re McIntosh*, 182 Ia. 23, 159 N. W. 223.

⁴ *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556; *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

⁵ *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

⁶ *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

⁷ *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

§ 2679. Impossibility as affected by entire or severable character of contract. If a contract is entire, impossibility of performance of one of the material covenants operates as a discharge of the entire contract.¹ A contract to furnish stenographic and clerical assistance from a certain date until the happening of a certain event in consideration of half of the net fees received by the employer during such period, is an entire contract in this sense;² and if the employe is prevented by illness from rendering services for almost half of such period, he can not recover at the contract rate for the remaining period,³ but he is entitled only to reasonable compensation or for the value of the services rendered by him.⁴ An unconditional promise on the part of one of two or more joint promisors is not discharged by the fact that one of the joint promisors is an infant and that performance can not be enforced against the infant.⁵

§ 2680. Partial impossibility of performance. In most of the cases in which impossibility of performance is relied upon as a discharge, the impossibility has gone to the entire performance of the contract.¹ Cases are, however, presented in which the impossibility of performance goes to part of the contract only. This impossibility may involve alternative covenants, which have been discussed elsewhere,² or it may involve conjunctive covenants. In the latter case, the same principles seem to apply to impossibility as apply to breach of one of a number of distinct covenants.³ If the contract is entire, the question to be determined is whether the covenant which has become impossible of performance is a vital covenant or is merely a subsidiary provision. If the covenant is a vital covenant, subsequent impossibility of performance of such covenant operates as a discharge of the entire contract.⁴ The federal employers' liability act, which renders invalid a covenant in a contract between an employe and a railway whereby the employe agrees that if he accepts relief from the relief department he waives

¹ Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

² Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

³ Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

⁴ See § 2717.

⁵ Prince v. Haworth [1905] 2 K. B. 768.

¹ See §§ 2681 et seq.

² See § 2708.

³ See ch. LXXXIV.

⁴ Baltimore & O. R. Co. v. Miller, 183 Ind. 323, 107 N. E. 545; American Mercantile Exchange v. Blunt, 102 Me. 128, 120 Am. St. Rep. 464, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

his claim for damages, renders invalid the remaining covenants of such contract and prevents the employe from asserting any claim against the relief department of such railway.⁵ This result was reached, however, in a case in which the employe had sued the railway for his injuries and had recovered damages; and he was now attempting to recover from the relief department of such railway in addition to his recovery in a tort action.⁶ If a contract by which A is to collect B's accounts provides for the use of B's system of advertising judgments against delinquent debtors, and such method of collecting accounts is subsequently made illegal, such impossibility operates as a discharge of the entire contract.⁷

If, on the other hand, the covenant which has become impossible is a minor and subsidiary covenant, impossibility of performing such covenant does not discharge the entire contract.⁸ A contract by which A is to remove rock from B's land, and to crush it, and B is to permit A to make use of B's premises for such purposes, is not discharged by the fact that A is enjoined from crushing rock upon such premises, since the place of performance is not of the essence of the contract.⁹ A contract of fidelity insurance is not discharged by the death of the employe whose fidelity is insured during the time for which such insurance is to run, so as to permit a recovery of the unearned amount of the premium, at least if the great bulk of the risks to secure which such insurance was given, have been accounted for during the lifetime of such employe.¹⁰ A lease which passes an interest in certain realty is not discharged by the destruction of the buildings thereon.¹¹ A lease of premises for a number of purposes, including their use as a saloon, is not dis-

⁵ *Baltimore & O. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

⁶ *Baltimore & O. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

⁷ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 464, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

⁸ *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917C, 929, 99 Atl. 661; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Crouch v. Southern Surety Co.*, 131 Tenn. 260, L. R. A. 1915D, 966, 174 S. W. 1116; *Brown v. Ehlinger*, 90 Wash. 585, 156 Pac. 544.

⁹ *Brown v. Ehlinger*, 90 Wash. 585, 156 Pac. 544.

¹⁰ *Crouch v. Southern Surety Co.*, 131 Tenn. 260, L. R. A. 1915D, 966, 174 S. W. 1116.

¹¹ *England*. *Hare v. Groves*, 3 Anstr. 687.

Massachusetts. *Ware v. Hobbs*, 222 Mass. 327, 110 N. E. 963.

Michigan. *Bowen v. Clemens*, 161 Mich. 493, 120 N. W. 639.

Ohio. *Linn v. Ross*, 10 Ohio 412, 36 Am. Dec. 95.

Oregon. *Moline v. Portland Brewing Co.*, 73 Or. 532, 144 Pac. 572.

See, *Destruction of Demised Building*, by J. E. Hogg, 26 Law Quarterly Review 71.

charged by the fact that the use of such premises for use as a saloon is prevented by subsequent legislation or competent political authority.¹² If a carrier has agreed to transport a passenger to a specific place, and from that place to another by a specific steamer, the identity of the steamer is not so vital an element of the contract that, on its destruction, the carrier can abandon the passenger at a point far from his own home. On the contrary, the carrier must, at least, use due diligence to furnish other means of transportation to him.¹³

If the party who is prejudiced by the destruction of part of the subject-matter is willing to perform regardless of the fact of such destruction, the party not prejudiced thereby can not invoke such fact as a discharge.¹⁴ Thus destruction of buildings upon certain land after a contract for the sale thereof does not discharge the contract if the vendee is willing to carry out the contract as if the buildings were still standing.¹⁵ A contract to remodel a building using old walls was partly performed when the walls fell. The owner restored the building to the condition in which it was just before the accident, and demanded that the contractor complete it. Such facts were held not to discharge the contractor.¹⁶

If the party who is prejudiced by the partial injury on destruction demands performance with compensation for actual damage, it has been held that the adversary party can not treat the contract as discharged.¹⁷

If the covenant, the performance of which has become impossible, is an independent covenant, the impossibility of such performance does not operate as a discharge of the remaining covenants.¹⁸ If A entered into a contract by which he agreed to furnish seed potatoes to B at a specified price, and it was further agreed that if A demanded B's crop at a price of fifty cents per bushel above the market price, B should deliver his entire crop to A and should pay an additional amount per bushel for such seed, and A

¹² *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917C, 929, 99 Atl. 661.

See § 2698.

¹³ *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

¹⁴ *Hallett v. Parker*, 68 N. H. 598, 39 Atl. 433.

¹⁵ *Hallett v. Parker*, 68 N. H. 598, 39 Atl. 433.

¹⁶ *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1013.

In some cases this is regarded as requiring performance different from that agreed upon. See § 2693.

¹⁷ *Cunningham Iron Co. v. Warren Mfg. Co.*, 80 Fed. 878.

¹⁸ *Varney v. Cole*, 114 Me. 329, 96 Atl. 232.

demands delivery of such crop after it has been destroyed without B's fault, it has been held that the destruction of the crop does not discharge B's covenant to pay such additional amount for the seed, since the two covenants are independent and since the covenant to pay such additional amount has not become impossible.¹⁹

§ 2681. Classes of facts which constitute impossibility—Impossibility in contracts for personal services—Death—Dissolution of partnership. A contract whereby the promisor is to perform certain services of a personal nature, and such as can not be performed by his assignee, or his successors, is discharged by the death of either party,¹ whether of the party who was to perform such services,² or of the party for whom such services were to be performed.³ A contract by which A made advances to B to enable B to prepare himself to prac-

¹⁹ *Varney v. Cole*, 114 Me. 329, 96 Atl. 232.

¹ *England*. *Hyde v. Dean of Windsor*, Cro. Eliz. 552; *Siboni v. Kirkman*, 1 M. & W. 418.

Alabama. *Herren v. Harris*, — Ala. —, 78 So. 921.

Connecticut. *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

Kansas. *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760.

Louisiana. *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597.

Massachusetts. *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117; *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

Mississippi. *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

Nebraska. *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

New York. *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Sargent v. McLeod*, 209 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164.

North Carolina. *Siler v. Gray*, 86 N. Car. 566.

Pennsylvania. *Sorber v. Masters*, — Pa. St. —, 107 Atl. 892.

Rhode Island. *Parker v. Macomber*,

17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464.

Washington. *Mendenhall v. Davis*, 52 Wash. 169, 21 L. R. A. (N.S.) 914, 100 Pac. 336.

² *England*. *Stubbs v. Ry.*, L. R. 2 Exch. 311; *Cocke v. Colcraft*, 2 W. Bl. 856.

Alabama. *Herren v. Harris*, — Ala. —, 78 So. 921.

Connecticut. *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

Louisiana. *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597.

Massachusetts. *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117; *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

Mississippi. *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

New York. *Sargent v. McLeod*, 209 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164.

Pennsylvania. *Blakely v. Sousa*, 197 Pa. St. 305, 80 Am. St. Rep. 821, 47 Atl. 286.

³ *Krumdick v. White*, 92 Cal. 143, 28 Pac. 219; *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782; *Lacy v. Getman*, 119 N. Y. 109, 16 Am. St. Rep. 806, 6 L. R. A. 728, 23 N. E. 452.

tice a profession and by the terms of which B was to repay A out of his professional earnings, was held to be discharged by the death of B.⁴ A contract to support another is discharged by the death of either party to such contract,⁵ and a contract to render personal services as a servant for the life of the employer is discharged by the death of the servant during the life of the employer.⁶ A promise by A to B to pay a certain sum if B marries C is not, however, discharged by A's death.⁷ So a contract for services as an attorney,⁸ or a consulting engineer,⁹ or for managing an invention,¹⁰ or

⁴ *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597.

⁵ Death of party bound to furnish support. *Sorber v. Masters*, — Pa. St. —, 107 Atl. 892; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464.

Death of a party to be supported. *Glidden v. Korter*, 90 Me. 269, 38 Atl. 159.

"There are cases, of the same general character as the one before us, where the bargain was considered as merely for maintenance and support, without regard to the essential elements of a home, and therefore not as a personal undertaking on the part of the grantee; but, in these instances, it will be found that either the grantor elected thus to treat the contract or the latter in effect so provided. Here, however, the alleged bargain is between a mother and her two sons for the maintenance of a home by the latter for the former, and, in the making of such a contract, it must be assumed the mother desired to provide for something more than mere shelter and food; that she desired, contemplated, and bargained for the companionship, comfort, personal attention, and affection of her own flesh and blood, and none of the contracting parties intended that the mother, in her old age, should be obliged to live with such strangers to her blood as might acquire the real estate in question. Thus it may be seen that the alleged contract, in this case, calls for something more, of a personal nature, than the mere payment of money for the support and maintenance

of plaintiff; and, in addition, it expressly requires the sons to live upon and manage the farms during the whole of their mother's life. Such an undertaking is a distinctly personal one, which terminated with the death of the two boys. *Eastman v. Batchelder and Wife*, 36 N. H. 141, 150, 72 Am. Dec. 295; *Leahy v. Cheney*, 90 Conn. 611, 614, 98 Atl. 132, L. R. A. 1917D, 800, note, page 812; *Prater v. Prater*, 94 S. C. 267, 275, 77 S. E. 936. And see *Dickinson v. Calahan's Admrs.*, 19 Pa. 227; *Shirley v. Shirley*, 59 Pa. 267, 273; *Blakely v. Sousa*, 197 Pa. 305, 329, 47 Atl. 286, 80 Am. St. Rep. 821." *Sorber v. Masters*, — Pa. St. —, 107 Atl. 892.

⁶ *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

⁷ *Berisford v. Woodruff*, Cro. Jac. 404.

⁸ *England*. *Whitehead v. Lord*, 7 Exch. 691.

California. *Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

Illinois. *Turnan v. Temke*, 84 Ill. 286.

Indiana. *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

Mississippi. *Clayton v. Merrett*, 52 Miss. 353; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

New York. *Sargent v. McLeod*, 209 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164.

⁹ *Stubbs v. Ry.*, L. R. 2 Exch. 311.

¹⁰ *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117.

to engage in managing a brokerage business,¹¹ or a drug store,¹² or to act as business manager of a band,¹³ or not to carry on a business,¹⁴ or to sell hemp "of his own raising,"¹⁵ have each been held a contract for personal services which was discharged by the death of either party. If a contract is to be performed in part by delivering notes in the future to be executed by one party, the personal credit of such party who is to execute such notes is a material element of the contract, and accordingly his death without executing such notes operates as a discharge of such contract.¹⁶ A contract by a pastor to pay an organist personally is discharged by the pastor's death, the church being thereafter closed.¹⁷ A contract between the state and an employer of convict labor is discharged by the death of such employer.¹⁸ Under a contract for employing a firm of attorneys which requires the services of all the members of the firm, the death of one of the attorneys before complete performance does not operate as an automatic discharge, but it is said to give to the client the election to treat the contract as discharged, or as in force between himself and the surviving partners.¹⁹ A contract of employment between joint employers on the one side and an agent on the other has been held not to be discharged by the death of one of the principals.²⁰ The death of a partner discharges contracts of employment so that if no services are rendered thereunder after such partner's death the employe can not recover.²¹ On the other hand, if the surviving partner continues the partnership business and treats the contract of employment as in force, the death of the partner does not as a matter of law work a discharge.²² Thus the firm of A and B had a contract with X for employment for one year which at his option was renewable for another year. Soon after the contract was made A

¹¹ *Herren v. Harris*, — Ala. —, 78 So. 921.

¹² *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760.

¹³ *Blakely v. Sousa*, 107 Pa. St. 305, 80 Am. St. Rep. 821, 47 Atl. 286.

¹⁴ *Cooke v. Colcraft*, 2 W. Bl. 856.

¹⁵ *Shultz v. Johnson*, 44 Ky. (5 B. Mon.) 497.

¹⁶ *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

¹⁷ *Harrison v. Conlan*, 92 Mass. (10 All.) 85.

¹⁸ *State v. Oliver*, 78 Miss. 5, 27 So. 988. Hence the estate and bondsmen of such employer are liable only up to his death.

¹⁹ *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

²⁰ *Martin v. Hunt*, 83 Mass. (1 All.) 418.

²¹ *Griggs v. Swift*, 82 Ga. 392, 14 Am. St. Rep. 176, 5 L. R. A. 405, 9 S. E. 1062.

²² *Hughes v. Gross*, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031.

died. B continued the business and treated X's contract as in full force until the end of the first year of X's employment, when on X's demand for a renewal for a second year, B refused. It was held that B was liable to X for breach of such contract.²³ An executory contract to form a partnership is discharged by the death of one of the parties.²⁴

Apart from the question of dissolution by death, the dissolution of a partnership is held in most jurisdictions not to discharge an executory contract to which such partnership was a partner,²⁵ at least as long as such contract is not one in which the personality of the parties thereto is a vital element. A contract of indemnity insurance in which the beneficiary is a partnership, is said not to be discharged as a matter of law by the dissolution of such partnership.²⁶ If the personality of one of the parties is vital, it is generally held that the dissolution of a partnership which is one of the parties to such contract, operates as a discharge thereof.²⁷ Accordingly, a logging contract,²⁸ or a contract by which a partnership agrees to act as an agent,²⁹ is discharged by the dissolution of the partnership which is a party thereto.

A contract by which one agrees to become surety for the performance of an executory contract by a partnership, is said to be discharged by the dissolution of such partnership before performance is complete, at least as to the covenants in such contract which are still executory at the time of the dissolution.³⁰

In some cases it seems to be assumed that the dissolution of a partnership discharges an executory contract, even though the

²³ *Hughes v. Gross*, 106 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031.

²⁴ *Dow v. Bank*, 88 Minn. 355, 93 N. W. 121.

²⁵ *Cholmondeley v. Clinton*, 19 Ves. Jr. 261; *Illinois Indemnity Exchange v. Industrial Commission*, 289 Ill. 233, 124 N. E. 665; *Hughes v. Gross*, 106 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031; *Dew v. Pearson*, 73 Wash. 602, 132 Pac. 412; *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497 [sub nomine, *Burdett v. Hayman*, 15 L. R. A. (N.S.) 1019].

²⁶ *Illinois Indemnity Exchange v. In-*

dustrial Commission, 289 Ill. 233, 124 N. E. 665.

²⁷ *Tasker v. Shepherd*, 6 H. & N. 575; *Schlau v. Enzenbacher*, 265 Ill. 626, L. R. A. 1915C, 576, 107 N. E. 107; *Roberts v. Kelsey*, 38 Mich. 602; *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399.

²⁸ *Roberts v. Kelsey*, 38 Mich. 602.

²⁹ *Tasker v. Shepherd*, 6 H. & N. 575; *Schlau v. Enzenbacher*, 265 Ill. 626, L. R. A. 1915C, 576, 107 N. E. 107; *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399.

³⁰ *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Black v. Alberty*, 89 O. S. 240, 106 N. E. 38.

personality of the parties is not material.³¹ A contract by which a creditor of a partnership was to take charge of certain property and to manage it, was said to be discharged by the dissolution of the partnership, so that the retiring partner could not claim any rights thereunder.³²

§ 2682. Discharge of contract of agency. A contract of agency not creating a power coupled with an interest is terminated by the death of either party.¹ Thus authority to sell property,² as personality,³ or to collect money,⁴ is revoked by the death of the principal. In some cases, however, transactions of third persons with agents after the death of the principal, but in ignorance thereof, have been upheld as binding on the principal's estate. Thus payment to an agent,⁵ or a purchase of goods by him,⁶ or delivery of notes by him,⁷ have, contrary to the general rule, been upheld under such circumstances. So a contract to prosecute a claim, which was in part performed after the client's death, has been held not to be discharged.⁸ Some of the cases, however, which appear to support this proposition really depend upon principles of estoppel. The administrator of the decedent,⁹ or those who succeed the principal in interest,¹⁰ have, with full knowledge of the material facts, elected to accept the benefits of the agent's acts, and are therefore estopped to deny his authority.¹¹

³¹ Turk v. Nicholson, 30 Ia. 407.

³² Turk v. Nicholson, 30 Ia. 407.

¹ England, In re Overweg [1900], 1 Ch. 209; Hovey v. Blakeman, 4 Ves. Jr. 596.

United States. Howe Sewing Machine Co. v. Rosensteel, 24 Fed. 583.

Massachusetts. Mills v. Smith, 193 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765.

Michigan. Adriance v. Rutherford, 57 Mich. 170, 23 N. W. 718.

Nebraska. Homan v. Redick, 97 Neb. 209, L. R. A. 1915C, 601, 149 N. W. 782.

Ohio. McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 448.

² Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. ed. 589; Scruggs v. Driver, 31 Ala. 274; Travers v. Crane,

15 Cal. 12; Lewis v. Kerr, 17 Ia. 73; Harris v. Irving, 28 Cal. 645.

³ Dickinson v. Calahan, 19 Pa. St. 227.

⁴ Weber v. Bridgeman, 113 N. Y. 600, 21 N. E. 985; Davis v. Bank, 46 Vt. 728.

⁵ Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 30 Am. Dec. 76.

⁶ Garrett v. Trabue, 82 Ala. 227, 3 So. 149; Davis v. Davis, 93 Ala. 173, 9 So. 736.

⁷ Nicolet v. Pillot, 24 Wend. (N. Y.) 240.

⁸ Wylie v. Coxe, 56 U. S. (15 How.) 415, 14 L. ed. 753.

⁹ Succession of Zenon & Elsie Labauve, 34 La. Ann. 1187.

¹⁰ Ish v. Crane, 8 O. S. 520, s. c. 13 O. S. 574.

¹¹ See §§ 1730 and 1764.

The rule that the death of the principal terminates the contract of agency, is not limited to cases in which the agent has attempted to bind his principal by a contract made after the death of the principal; but the death of the principal terminates such authority for all purposes.¹² An agent is not entitled to commissions on collections or remittances after the death of the principal,¹³ nor is he entitled to be indemnified by his principal's estate against transactions into which he has entered after the death of the principal.¹⁴ If the agent's power is also coupled with an interest in the subject of the agency, the death of the principal¹⁵ does not revoke the power of the agent. What constitutes a power coupled with an interest is a question on which the courts have disagreed. A power of sale in a mortgage to be exercised by the mortgagee has been held in some states to be such a power coupled with an interest that it is not revoked by the death of the mortgagor,¹⁶ and the same principle has been applied to powers of sale in deeds of trust.¹⁷ In other states the death of the mortgagor is held to revoke a power of sale in a mortgage.¹⁸

§ 2683. Sickness—In general. A contract for services personal in their nature which can not be performed by deputy within the meaning of the contract is discharged by such sickness on the part of the person by whom such services are to be rendered as to incapacitate him from performing them.¹ A contract to perform

¹² *Hovey v. Blakeman*, 4 Ves. Jr. 596. In re Overweg [1900], 1 Ch. 209.

¹³ *Hovey v. Blakeman*, 4 Ves. Jr. 596.

¹⁴ In re Overweg [1900], 1 Ch. 209.

¹⁵ *Gordon v. Stubbs*, 38 La. Ann. 625; *Merry v. Lynch*, 68 Me. 94; *White v. Allen*, 133 Mass. 423; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241.

¹⁶ *Arkansas*. *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104.

Illinois. *Strother v. Law*, 54 Ill. 413.

Maryland. *Barriek v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111.

Massachusetts. *Connors v. Holland*, 113 Mass. 50.

Missouri. *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.

North Carolina. *Carter v. Slocomb*, 122 N. Car. 475, 65 Am. St. Rep. 714, 29 N. E. 720.

South Dakota. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

¹⁷ *Wilburn v. Spofford*, 36 Tenn. (4 Sneed) 698; *Hodges v. Gill*, 68 Tenn. (9 Baxt.) 378.

¹⁸ *Miller v. McDonald*, 72 Ga. 20; *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. Car. 309, 13 Am. St. Rep. 636, 3 S. E. 606; *Buchanan v. Monroe*, 22 Tex. 537.

¹ In re Oldfield, 175 Ia. 118, L. R. A. 1916D, 1260, 156 N. W. 977; *Powell v. Newell*, 59 Minn. 406, 61 N. W. 335; *Davidson v. Gaskill*, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

stenographic and clerical services for one-half of the fees received by the employer is discharged by sickness of the employe which prevents him from such services for almost half of the time for which the contract was to run.² If no fault of his intervenes between the making of such contract and his sickness creating such conditions, the party who becomes ill is not liable in damages for breach of such contract. A contract for the services of an opera troupe is discharged by the sickness of the leading tenor, without whom the troupe could not perform.³ Under a contract of employment requiring the employe to give notice before leaving the service, such provision is discharged by the sickness of the employe.⁴ A contract to pay tuition is discharged by the sickness of the pupil which prevents him from attending at all.⁵

It has been suggested that the fact that sickness, death or physical incapacity might have been foreseen, prevents such facts from operating as a discharge.⁶ It has been said that a contract by a married woman for personal services is not discharged by her pregnancy,⁷ on the theory that she might have anticipated such condition; and that, accordingly, she intended to assume such risk.⁸ Since some illness is to be anticipated, and since death is inevitable, a rigid application of this theory would leave nothing of the general doctrine of impossibility.

§ 2684. Sickness as affecting contracts to intermarry. If A and B have entered into a contract to intermarry, and subsequently without the fault of either A becomes so ill that marriage in the ordinary sense of the term would be impossible or would shorten his life, the question of the effect of such physical condition and a discharge of the contract may come up in two ways: A may demand performance of the contract, and B may set up A's physical condition as a discharge. On the other hand, B may demand performance of the contract at least as far as the marriage ceremony itself is concerned, and B may express himself as willing to waive any further performance in case A's physical condition makes fur-

² Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 602, 121 Pac. 649.

³ Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7.

⁴ Harrington v. Iron Works Co., 119 Mass. 82; Fuller v. Brown, 52 Mass. (11 Met.) 440.

⁵ Stewart v. Loring, 87 Mass. (5 All.) 306, 81 Am. Dec. 747.

⁶ Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57.

⁷ Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57.

⁸ Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57.

ther performance impossible. If A, without the fault of either party, has developed a disease which makes marriage in the ordinary sense impracticable, such physical condition of A is held to operate as a discharge to B if B wishes to treat such fact as a discharge.¹

If A agrees to marry B, and subsequently A, without his fault, develops a disease which makes it unsafe or improper for him to marry,² as where sexual intercourse would shorten his life,³ or where without intervening fault a venereal disease develops,⁴ A's contract is discharged absolutely if the physical disability is permanent in its nature; and if temporary he is excused from liability for breach by delay until such physical disability is removed.⁵ If A and B enter into a contract to intermarry, and B subsequently refuses performance on learning that A has an abscess in his breast, A can not recover damages for B's refusal.⁶ In this case the doctrine of impossibility was not discussed by name at least, and the ground for the decision was said to be the fact that "it would be most mischievous to compel parties to marry who could never live happily together."⁷

The ill health of the plaintiff, existing when the engagement was entered into and known to the defendant, is not an excuse for breach of promise.⁸ If A and B have agreed to intermarry at a certain time, and A postpones performance because he realizes he

¹ *Travis v. Schnebly*, 68 Wash. 1, 40 L. R. A. (N.S.) 585, 122 Pac. 316 (a case of floating kidney and nervous prostration).

² *In re Oldfield*, 175 Ia. 118, L. R. A. 1916D, 1260, 156 N. W. 977; *Shakleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, 15 L. R. A. 531, 19 S. W. 5; *Allen v. Baker*, 86 N. Car. 91, 41 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 621.

Contra, on the theory that he can at least marry the woman in name only, giving to her the status of his wife, and that his sickness does not discharge his obligation to perform to this extent. *Hall v. Wright*, El. B. & El. 746 (a case of tuberculosis); *Smith v. Crompton*, 67 N. J. L. 548, 58 L. R. A. 480, 52 Atl. 386 (a case of urinary disease).

³ *In re Oldfield*, 175 Ia. 118, L. R. A. 1916D, 1260, 156 N. W. 977 (pernicious anemia).

For a case on identical facts, but not involving the question of impossibility, see *Parsons v. Trowbridge*, 226 Fed. 15; *Sanders v. Coleman*, 97 Va. 690, 47 L. R. A. 581, 34 S. E. 621.

⁴ *Trammel v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, 51 L. R. A. 854, 59 S. W. 79.

⁵ *Trammel v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, 51 L. R. A. 854, 59 S. W. 79.

⁶ *Atchinson v. Baker*, 2 Peake N. P. 103.

⁷ *Atchinson v. Baker*, 2 Peake, N. P. 103.

⁸ *Lemke v. Franzenburg*, 159 Ia. 466, 141 N. W. 332.

is becoming insane, such postponement does not amount to a breach; and if soon after he becomes insane, and dies while insane, no cause of action on the contract arises.⁹

Sickness which does not make the marriage impossible is not, however, a discharge.¹⁰ In exceptional cases, apprehended illness may operate as a discharge. Thus where A agrees to purchase an interest as partner in B's business, the value of which depended on B's knowledge and business ability, A may avoid such contract where B's health becomes such as to make it doubtful whether he will be able to give his personal attention to the business.¹¹

§ 2685. Death of party to contract not for personal services.

A contract for services which are not personal in their nature, but which may be performed by the assignee or the successors of the promisor, is not discharged by the death of either party.¹ Thus, a contract of guaranty,² or of sale,³ even if the article which is sold is far more useful or interesting to the purchaser than to his per-

⁹ Liddell v. Easton's trustees [1907], S. C. 154, 14 Scots L. T. Rep. 479 [affirming, Liddell v. Findley, 13 Scots L. T. Rep. 150, 13 Scots L. T. Rep. 744].

¹⁰ Smith v. Compton, 67 N. J. L. 548, 58 L. R. A. 480, 52 Atl. 386.

¹¹ Powell v. Cash, 54 N. J. Eq. 218, 34 Atl. 131.

¹ England. Morgan v. Ravey, 6 Hurl. & N. 265; Nield v. Smith, 14 Ves. Jr. 491.

In re Worthington [1914], 2 K. B. 290.

California. Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231.

Iowa. Ryan v. Litchfield, 162 Ia. 609, 144 N. W. 313.

Massachusetts. Drummond v. Crane, 159 Mass. 577, 38 Am. St. Rep. 400, 23 L. R. A. 707, 35 N. E. 90.

Mississippi. Cox v. Martin, 75 Miss. 229, 65 Am. St. Rep. 604, 36 L. R. A. 800, 21 So. 611.

Pennsylvania. Billing's Appeal, 106 Pa. St. 558; McLaughlin v. McLaughlin, 145 Pa. St. 582, 23 Atl. 400.

Wisconsin. Volk v. Stowell, 98 Wis. 385, 74 N. W. 118.

² Lloyd's v. Harper, L. R. 16 Ch. Div. 290; Hightower v. Moore, 46 Ala. 387; Janin v. Browne, 59 Cal. 37; Menard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610.

Such contract is not released by the death of a joint guarantor. Carter v. Hampton, 77 Va. 631.

³ England. Personalty. Wentworth v. Cock, 10 Ad. & El. 42.

Georgia. Allen v. Confederate Pub. Co., 121 Ga. 773, 49 S. E. 782.

Illinois. Smith v. Mfg. Co., 83 Ill. 498.

Michigan. McKeown v. Harvey, 40 Mich. 226.

New Hampshire. Sabre v. Smith, 62 N. H. 663.

New York. Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

Realty. Denton v. Sanford, 103 N. Y. 607, 9 N. E. 490.

Death of vendor after breach. Fowler v. Kelly, 3 W. Va. 71.

sonal representative,⁴ or a contract between a landlord and tenant,⁵ a covenant to rebuild leased property in case of fire,⁶ a contract to repair,⁷ or a contract to renew,⁸ are none of them discharged by the death of either party. A contract for future repairs of a partition fence, made between adjoining property owners, has been held to be discharged by the death of one of them.⁹ A contract of fire insurance,¹⁰ including mutual insurance,¹¹ or a contract to take and pay for a certain amount of water annually,¹² or a deed of trust upon growing crops to secure advancements,¹³ are none of them discharged by the death of either party. A contract in settlement of a bastardy suit,¹⁴ or a contract of pledge,¹⁵ or a contract giving the debtor the right to discharge his debt by sawing lumber,¹⁶ are none of them discharged by the death of a party. A contract to pay money so as to satisfy the needs of the payee as nearly as possible is not personal in character and is not discharged by the death of the payee.¹⁷

A contract for performing services of a personal nature for the benefit of a stranger to the contract may be personal as to one of the parties, but not personal as to the other.¹⁸ If A has agreed with B to render services as an attorney for C, the death of B while such contract is executory does not operate as a discharge

⁴ *Allen v. Confederate Pub. Co.*, 121 Ga. 773, 49 S. E. 782.

⁵ *Alsop v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294, 13 L. R. A. 598, 9 So. 895; *Becker v. Walworth*, 45 O. S. 169; 12 N. E. 1; *Keating v. Condon*, 68 Pa. St. 75; *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118.

⁶ *Chamberlain v. Dunlap*, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966.

⁷ *Chamberlain v. Dunlap*, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966.

⁸ *Hyde v. Skinner*, 2 P. Wms. 196.

⁹ *Bland v. Umstead*, 23 Pa. St. 316.

¹⁰ *Richardson v. German Ins. Co.*, 89 Ky. 571, 8 L. R. A. 800, 13 S. W. 1; *Towle v. Dirigo Mutual Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374; *Burbank v. Rockingham Mutual Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300.

¹¹ *Kimmel v. Ins. Co.*, 161 Ill. 43, 43 N. E. 615 [reversing, 59 Ill. App. 532].

¹² *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460, 23 L. R. A. 707, 35 N. E. 90.

¹³ *Cox v. Martin*, 75 Miss. 229, 65 Am. St. Rep. 604, 36 L. R. A. 800, 21 So. 611.

¹⁴ *Stumpf's Appeal*, 116 Pa. St. 33, 8 Atl. 866.

¹⁵ *Henry v. Eddy*, 34 Ill. 508. (Though the creditor has died the pledgor must pay the debt in order to obtain the collateral.)

¹⁶ *Hawkins v. Ball*, 57 Ky. (18 B. Mon.) 816, 68 Am. Dec. 755. (On the death of the creditor, the debtor if willing to do the work can not be made to pay the money.)

¹⁷ *Ryan v. Litchfield*, 162 Ia. 609, 144 N. W. 313.

¹⁸ *Barrett v. Towne*, 196 Mass. 487, 13 L. R. A. (N.S.) 643, 82 N. E. 698.

thereof;¹⁹ and A may recover from B's estate for services rendered under such contract for C after B's death.²⁰

§ 2686. Involuntary detention. If a contract provides for services which are personal in their nature, either with reference to the person by whom they were rendered or with reference to the person to whom they are rendered, the involuntary detention of such person in such a way as to make performance impossible operates as a discharge or as a suspension of such contract, according to circumstances.¹ What amounts to a substantial period of time so as to operate as a discharge, is a question upon which, as on the remaining questions under this subject, there is comparatively little authority. A contract to act as superintendent and manager of a factory for the manufacture of clothing for a period of three years, is discharged by the arrest and detention of such manager and superintendent for a period of nearly two weeks in the busiest season of the year,² although such arrest and detention are not due to his fault.³ Such manager and superintendent can not, on his release from imprisonment, tender his services and, on the refusal of his employer to permit him to re-enter his employment, maintain an action for damages for such refusal.⁴ A contract for the employment of a sailor is discharged by his imprisonment or involuntary detention which prevents him from performing the services required by his contract.⁵ If a contract of lease for a period of three years requires the lessee to live upon the land and to cultivate it and to pay a third of the crop to the lessor, the arrest and imprisonment of the lessee on a criminal charge for a period of about six months operates as a discharge of the contract at the election of the lessor,⁶ although the lease does not contain an express right of re-entry for default on the part of the lessee.⁷

¹⁹ Barrett v. Towne, 196 Mass. 487, 13 L. R. A. (N.S.) 643, 82 N. E. 698.

²⁰ Barrett v. Towne, 196 Mass. 487, 13 L. R. A. (N.S.) 643, 82 N. E. 698.

¹ Wiggins v. Ingleton, 2 Ld. Raym. 1211; Melville v. De Wolfe, 4 El. & Bl. 844; The Jack Park, 4 C. Rob. 308; Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; Jinnings v. Amend, 101 Kan. 130, L. R. A. 1917F, 626, 165 Pac. 845; Penas v. Cherveney, 135 Minn. 427, L. P. A. 1917F, 655, 161 N. W. 150.

² Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93.

³ Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93.

⁴ Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93.

⁵ Melville v. De Wolfe, 4 El. & Bl. 844; The Jack Park, 4 C. Rob. 308.

⁶ Jinnings v. Amend, 101 Kan. 130, L. R. A. 1917F, 626, 165 Pac. 845.

⁷ Jinnings v. Amend, 101 Kan. 130, L. R. A. 1917F, 626, 165 Pac. 845.

Contract for support is at least suspended during the involuntary detention of the person to whom support is to be furnished.⁸ If a child agrees to support his parent for life, and to furnish certain rooms in a specified house for residence purposes, such contract is suspended during the period in which such parent is confined in the hospital because of insanity,⁹ and the guardian of the parent can not enforce such contract.¹⁰

The imprisonment or involuntary detention of one of the parties has, at least, the effect of preventing his non-performance from amounting to a voluntary default.¹¹ Accordingly he can recover the wages which were due at the time that he was arrested, although such arrest was due to his own misconduct.¹² If an employe agreed to forfeit all wages due when he left his employment unless he gave two weeks' notice in advance, the fact that he had been arrested and imprisoned prevents such non-performance from being voluntary default on his part.¹³ Imprisonment is not a "voluntary" leaving of the employment,¹⁴ and a railway employe who is arrested and imprisoned on a criminal charge is entitled to an increase in pay for those who did not leave the employment voluntarily, unless such employe intended to secure his discharge from the employment by such conduct.¹⁵

§ 2687. Dissolution of corporation—Discharge of executory contracts. The effect of the dissolution of a corporation upon its contracts and contractual rights and liabilities is a question upon which there is a conflict of authority, due to the survival of primitive theories in some jurisdictions, and to their displacement by modern ideas in others.¹

The original theory was that the dissolution of a corporation was equivalent to the death of a natural person; that in the absence

⁸ *Penas v. Cherveny*, 135 Minn. 427, L. R. A. 1917E, 655, 161 N. W. 150.

⁹ *Penas v. Cherveny*, 135 Minn. 427, L. R. A. 1917E, 655, 161 N. W. 150.

¹⁰ *Penas v. Cherveny*, 135 Minn. 427, L. R. A. 1917E, 655, 161 N. W. 150.

¹¹ *Hughes v. Wamsutta Mills*, 93 Mass. (11 All.) 201; *Kowalski v. McAdoo*, — N. J. —, 107 Atl. 477.

¹² *Hughes v. Wamsutta Mills*, 93 Mass. (11 All.) 201.

¹³ *Hughes v. Wamsutta Mills*, 93 Mass. (11 All.) 201.

¹⁴ *Kowalski v. McAdoo*, — N. J. —, 107 Atl. 477.

¹⁵ *Kowalski v. McAdoo*, — N. J. —, 107 Atl. 477.

¹ On this subject see, *Voluntary Transfers of Corporate Undertakings*, by Edward H. Warren, 30 *Harvard Law Review* 335; *The Effect of Failure to Perform Contracts Made Prior to Receivership*, by Chas. P. Hine, 24 *Yale Law Journal* 111.

of statute the death of a natural person discharged all his contracts, including both his contractual rights and his contractual liabilities; and that since no statute of administration had been passed in the case of corporations, as it eventually was in the case of natural persons, the dissolution of a corporation caused its realty to escheat to the grantor or to be forfeited to the crown,² its personalty to be forfeited to the crown; and all debts, whether owing by it or owing to it, to be discharged.³ Even though prior debts remain in force and can be collected out of the assets of the corporation, scire facias will not lie against the corporation after dissolution to revive a dormant judgment.⁴ In some jurisdictions this theory still persists as to executory contracts.⁵ An executory contract of sale is discharged by the appointment of a receiver for the property of the vendor corporation, and an injunction against its making use of its own property.⁶ A contract whereby A guarantees to B that a given corporation will pay dividends upon its

² As to which disposition was to be made of its realty the early cases were in conflict. For various views see, *Johnson v. Norway*, Winch 37; *Southwell v. Ward*, Popham 91; *Case of Dean and Chapter of Norwich*, 3 Coke 73a; *Rolle's Abridgment* 816, *Eschete A(1)*; 2 Kyd on Corporations 516.

For a recent case holding that on dissolution of a corporation not for profit its realty belongs to the government, see *Church of Jesus Christ of the Latter Day Saints v. United States*, 136 U. S. 1, 34 L. ed. 478.

³ *Connecticut*. For discussions of the original common law theory, see *National Pahquioque Bank v. First National Bank*, 36 Conn. 325, 4 Am. Rep. 80.

Delaware. *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Mississippi. *Commercial Bank v. Chambers*, 8 S. M. & M. 9.

North Carolina. *Fox v. Horah*, 36 N. Car. (1 Ired. Eq.) 308, 36 Am. Dec. 48.

Tennessee. *White v. Campbell*, 24, Tenn. (5 Humph.) 38.

⁴ *Mumma v. Potomac Co.*, 33 U. S. (8 Pet.) 281, 8 L. ed. 945.

⁵ *United States*. *Malcomson v. Wappoo Mills*, 88 Fed. 680.

Maine. *Read v. Frankfort Bank*, 23 Me. 318.

New York. *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

West Virginia. *Griffith v. Blackwater Boom & Lumber Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442 [for former opinion, see *Griffith v. Lumber Co.*, 46 W. Va. 56, 33 S. E. 125].

Wisconsin. *Boyd v. Fire Association*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W. 171.

⁶ *Malcomson v. Wappoo Mills*, 88 Fed. 680. (Whether such property was specific or general, and whether the corporation was dissolved or not, are questions which the court does not appear to have considered.)

For the effect of the appointment of a receiver without dissolution, see § 2688, note 4, and § 2702.

corporate stock at a certain rate for seven years, is discharged as to the remaining period by the dissolution of such corporation at the end of five years.⁷ Appointing a receiver for a mutual insurance company and adjudging it insolvent cancels all policies.⁸ A contract by an insurance company with an agent has been held to be discharged by the dissolution of the corporation by the state as insolvent.⁹ A contract by which A agrees with a corporation to cut logs and haul them and transport them to a mill, is discharged by the dissolution of the corporation, so that A can not present a claim for the loss of future profits as damages.¹⁰

The dissolution of a corporation terminates a contract to which the corporation is not a party, by which the dividends of such corporation are guaranteed.¹¹

§ 2688. Dissolution of corporation—Breach of executory contracts. In most jurisdictions it is recognized, however, that a corporation is, for many purposes at least, a legal fiction and that the real interests involved, apart from those of the state, are those of the parties who do business with it on the one hand, and its members on the other. Equity treated the assets of the corporation as analogous, at least, to a trust fund, out of which must be paid all liabilities due from the corporation and into which must be paid all liabilities due to the corporation, whether the corporation is engaged in business or is dissolved; and the net balance of which on dissolution is to be distributed among the members of the corporation, at least if the corporation is one whose members have financial interests therein as in the case of the ordinary corporation for profit.¹ It is said that a judgment rendered against a corporation after dissolution, in a case which was submitted before dis-

⁷ *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

⁸ *Boyd v. Fire Association*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W. 171.

⁹ *People v. Ins. Co.*, 91 N. Y. 174.

¹⁰ *Contra, Spader v. Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378.

¹¹ *Griffith v. Blackwater B. & L. Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442 [for former opinion, see *Griffith v. Lumber Co.*, 46 W. Va. 56, 33 S. E. 125].

¹¹ *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546, 70 Atl. 934.

¹ *Curran v. Arkansas*, 56 U. S. (15 How.) 304, 14 L. ed. 705; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. ed. 896; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1915A, 539; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151; *Cole v. Millerton Iron Co.*, 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; *McClaren v. Union Roller Mills & Elevator Co.*, 95 Tenn. 696, 35 S. W. 88.

solution, may be rendered *nunc pro tunc* as of the day at which it was tried.²

This theory is generally recognized at modern law, and the dissolution of a corporation does not discharge its rights or its liabilities;³ although, of course, the corporation can not lawfully perform after dissolution. The fact that a corporation is insolvent and that a receiver has been appointed to manage its business and to wind up its affairs, does not operate as a dissolution of such corporation; nor do such facts prevent the corporation from suing to enforce obligations which are due to it or enforcing judgments which it has obtained.⁴ Dissolution of a corporation is held not to be a discharge of its executory contracts by impossibility of performance, which ends contractual liability without any right of action for damages,⁵ but breach, which may discharge the contract, but which leaves a right of action for damages.⁶ A contract by which a corporation employs an agent or employe for a certain period of time is not discharged by the dissolution of the corporation during such time; and, while dissolution terminates performance, it operates as a breach, giving to the agent or employe a right to recover damages therefor.⁷ A contract between a corporation which conducted a drug store and a person who agreed to construct a soda-

² *Shakman v. United States Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920, 32 L. R. A. 383, 66 N. W. 528.

³ *England*. In *re Higginson* [1899], 1 Q. B. 325.

United States. In *re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918 A, 539.

Arkansas. *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

Kansas. *Leonard v. Hartzler*, 90 Kan. 386, 50 L. R. A. (N.S.) 383, 133 Pac. 570.

Louisiana. *Schleider v. Dielman*. 44 La. Ann. 462, 10 So. 934.

New Jersey. *Rosenbaum v. U. S. Credit System Co.*, 65 N. J. L. 255, 48 Atl. 237; *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Bolles v. Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614, 32 Atl. 1061.

Oregon. *Dowd v. American Surety Co.*, 69 Or. 418, 130 Pac. 112.

Wisconsin. *Huber v. Martin*, 127 Wis. 412, 115 Am. St. Rep. 1023, 1038, 3 L. R. A. (N.S.) 653, 105 N. W. 1031, 1135.

See also, *George v. Rollins*, 176 Mich. 144, 142 N. W. 337.

⁴ *Leonard v. Hartzler*, 90 Kan. 386, 50 L. R. A. (N.S.) 383, 133 Pac. 570.

For the effect of the appointment of a receiver, see § 2702.

⁵ See § 2687.

⁶ In *re Wiltshire Iron Co.*, L. R. 3 Ch. A. C. 443; *Schleider v. Dielman*, 44 La. Ann. 463, 10 So. 934; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151.

⁷ *Yelland's Case*, L. R. 4 Eq. 350; *Rosenbaum v. United States Credit System Co.*, 61 N. J. L. 543, 40 Atl. 591; *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Potts v. Rose Valley Mills*, 167 Pa. St. 310, 31 Atl. 655.

water fountain in such store at his expense, and to share the gross receipts with the corporation, is not discharged by a decree adjudging the corporation insolvent.⁸ If a lease has been made to a corporation, and the charter of the lessee corporation expires, and substantially the same stockholders form a new corporation which keeps possession of such realty, such facts do not discharge the promise of the original corporation upon valuable consideration to pay to a third person a certain sum of money as long as such corporation and its successors should occupy such realty.⁹ The voluntary dissolution of a corporation does not operate as a discharge of a lease which has been made to it.¹⁰ If the lessor of such corporation and its trustee in bankruptcy repudiate the lease, the lessor may treat such conduct as a breach, and may present a claim for damages,¹¹ on the theory of breach by anticipation.¹² Upon the dissolution and liquidation of a corporation, all its executory contracts for the payment of money which is not yet due, mature at once.¹³

§ 2689. Dissolution of corporation—Contract between corporation and officer. Some jurisdictions treat the case in which the contract of employment is made between the corporation and its officer as governed by special principles, since the officer for some purposes represents the corporation and has knowledge of its affairs; and on dissolution of the corporation for insolvency, at least, such contract is discharged without any right to recover damages,¹ even though damages would be allowed in other cases; especially if such officer knew of the condition of the corporation,

⁸ *Bolles v. Crescent Drug, etc., Co.*, 53 N. J. Eq. 614, 32 Atl. 1061.

⁹ *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

¹⁰ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

¹¹ *In re Mullings Clothing Co.*, 238 Fed. 68, 151 C. C. A. 134, L. R. A. 1918, 539.

¹² See ch. LXXXIV.

¹³ *First State Bank v. Bank*, 43 Okla. 342, 142 Pac. 1183.

¹ *United States. In re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611.

Arkansas. Union Compress Co. v. Douglass, 60 Ark. 591, 31 S. W. 455.

Massachusetts. Commonwealth v. Eagle Fire Ins. Co., 26 Mass. (14 All.) 344.

New York. Simonson v. New York City Ins. Co., 141 N. Y. 12, 35 N. E. 969.

North Carolina. Lenoir v. Linville Improvement Co., 126 N. Car. 922, 51 L. R. A. 146, 36 S. E. 185.

Tennessee. Williamson County Banking & Trust Co. v. Roberts-Buford Dry Goods Co., 118 Tenn. 340, 9 L. R. A. (N.S.) 644, 101 S. W. 421.

See also, *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174.

and if the corporation is insolvent so that an award of damages to the officer is at the expense of the creditors.² It has, accordingly, been held that dissolution discharges the entire contract between the officer and the corporation, including a covenant on his part not to compete with the corporation.³

§ 2690. Dissolution of corporation—Special grounds for treating as discharge. The peculiar nature of certain contracts may make the dissolution of a corporation which is a party thereto operate as a discharge of such contract, although such dissolution would not operate as a discharge of ordinary contracts; e. g., a contract which is personal in its nature,¹ such as a grant to a corporation of the right to charge a special rate of fare.² If a corporation has employed an attorney at an annual salary under a contract by which such salary may be terminated at the will of either party, the appointment of a receiver for such corporation operates as a discharge of such contract.³

§ 2691. Distinction between voluntary and involuntary dissolution. In some jurisdictions there seems to be a tendency at least to distinguish between cases of voluntary and involuntary dissolution, with reference to the effect upon each of the outstanding executory contracts of the corporation. If the dissolution is involuntary, the corporation is compelled to refrain from engaging in further business by the act of the state; and it is accordingly said that in cases of this sort such dissolution operates as a discharge of the executory contracts of the corporation, without any liability for damages.¹ If the dissolution is voluntary, the members of the corporation have elected to take advantage of the promise given to them by the state to terminate the existence of the corporation. The dissolution is due to their act. It has accordingly been said that in cases of voluntary dissolution the corporation remains liable upon its outstanding executory contracts and that

² Williamson County Banking & Trust Co. v. Roberts-Burford Dry Goods Co., 118 Tenn. 340, 9 L. R. A. (N.S.) 644, 101 S. W. 421.

³ Measures Bros., Limited, v. Measures [1910], 2 Ch. 248.

¹ Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357.

² Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357.

³ Burton v. Bay State Gas Co., 188 Fed. 161.

¹ Tennis Bros Co. v. Wetzel & Tyler Ry., 140 Fed. 193; Griffith v. Boom & Lumber Co., 46 W. Va. 56, 33 S. E. 125.

damages can be recovered as for breach thereof.² Dissolution and voluntary liquidation do not bar a right of action for damages.³

§ 2692. Destruction of specific subject-matter as discharge—General nature. Under a contract which by the intent of the parties requires for its performance the continued existence of a specific subject-matter, the destruction of such subject-matter is an event not within the meaning of the contract, unless one of the parties has assumed the risk of its destruction; and such destruction therefore operates as a discharge where neither party has assumed such risk.¹ A contract for the use of a music hall in the future, is discharged by the destruction of such building.² A contract to ship a cargo by a specified steamer is discharged where

² *Tiffin Glass Co. v. Stoebr*, 54 O. S. 157, 43 N. E. 279.

³ *Ogdens, Limited v. Nelson* [1905], A. C. 109.

¹ *England*. *Taylor v. Caldwell*, 3 Best & S. 826; *Howell v. Coupland*, 1 Q. B. Div. 258; *Baily v. De Crespigny*, L. R. 4 Q. B. (N.S.) 180.

Arkansas. *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

California. *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co.*, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28.

Illinois. *Walker v. Tucker*, 70 Ill. 527; *Seigel v. Eaton, etc., Co.*, 165 Ill. 550, 46 N. E. 449; *Martin Emerich Outfitting Co. v. Siegel*, 237 Ill. 610, 20 L. R. A. (N.S.) 1114, 86 N. E. 1104.

Indiana. *Krause v. Crothersville*, 162 Ind. 278, 102 Am. St. Rep. 203, 1 Am. & Eng. Ann. Cas. 460, 65 L. R. A. 111, 70 N. E. 264.

Kansas. *Wells v. Sutphin*, 64 Kan. 873, 68 Pac. 648; *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

Maine. *Knight v. Bean*, 22 Me. 531.

Massachusetts. *Eliot National Bank v. Beal*, 141 Mass. 566, 6 N. E. 742; *Gilbert, etc., Co. v. Butler*, 146 Mass. 82, 15 N. E. 76; *Browne v. Fairhall*,

213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

Mississippi. *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

New Hampshire. *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

New Jersey. *Perlee v. Jeffcott*, 69 N. J. L. 34, 97 Atl. 789.

New York. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 23 N. E. 595.

North Carolina. *Pasquotauk & North River Steamboat Co. v. Eastern Carolina Transportation Co.*, 166 N. Car. 582, 82 S. E. 956.

Oregon. *Powell v. Ry.*, 12 Or. 488.

Rhode Island. *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

Washington. *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

Wisconsin. *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

See also, *Gottlieb v. Rinaldo*, 78 Ark. 123, 6 L. R. A. (N.S.) 273, 93 S. W. 750; and *Nutting v. Watson*, 84 Neb. 464, 25 L. R. A. (N.S.) 823, 121 N. W. 582.

² *Taylor v. Caldwell*, 3 Best. & 3. 826.

such steamer is so injured by the perils of the sea, without the fault of the contractors, as to make it impossible for her to arrive within the time agreed upon.³ A contract to mine coal in certain mines and to deliver it, is discharged by the destruction of the means of transporting such coal.⁴ A contract to construct an engine for a vessel which is then at sea, and to install such engine, is discharged by the loss of such vessel at sea before such work is completed.⁵ A lease of apartments, which gives no interest in the soil, and amounts only to a license to use such apartments, is discharged by the destruction of the building in which such apartments are situated.⁶ This rule must be distinguished from the rule applying to the lease giving an interest in the soil and binding the lessee expressly to pay rent. Such lease is not discharged by the destruction of the building leased, in the absence of some specific provision therefor, or of some positive statute.⁷ A contract by which A, a planter, is to grind the sugar cane from his plantation at his own sugar-house and to have the syrup refined at B's refinery

³ *Nickoll v. Ashton* [1900], 2 Q. B. 298.

⁴ *Lovering v. Buck Mountain Coal Co.*, 54 Pa. St. 291.

Where the building, as such, was destroyed by a windstorm, but the materials remained, it was held that the contract was not discharged, since the materials could be moved and the building could be rebuilt. *Board of Education v. Townsend*, 63 O. S. 514, 52 L. R. A. 868, 59 N. E. 223.

⁵ *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271.

⁶ *California. Ainsworth v. Ritt*, 38 Cal. 89.

Georgia. Alexander v. Dorsey, 12 Ga. 12, 56 Am. Dec. 443.

Indiana. Womack v. McQuarry, 28 Ind. 103, 92 Am. Dec. 306.

Massachusetts. Stockwell v. Hunter, 52 Mass. (11 Met.) 448, 45 Am. Dec. 220; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523 (obiter, as an interest in the soil passed).

New York. Graves v. Berdan, 26 N. Y. 498 [affirming *Graves v. Berdan*, 29 Barb. (N. Y.) 100].

Ohio. Winton v. Cornish, 5 Ohio 477.

Pennsylvania. Moving Picture Co. v. Scottish & National Ins. Co., 244 Pa. St. 358, 90 Atl. 642.

Tennessee. Nashville, C. & St. L. Ry. v. Heikens, 112 Tenn. 378, 65 L. R. A. 298, 79 S. W. 1038 (obiter, as interest in land passed).

West Virginia. Arbelz v. Exley, 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149 (obiter, as interest in land passed).

A contract by which a portion of a department store is to be used by a dealer at an agreed compensation, is held to be discharged by the destruction of the building in which such store is located; and such dealer has no legal right to insist that the department store shall permit him to make use of a corresponding space in the building in which such department store is subsequently located. *Martin Emerich Outfitting Co. v. Siegel*, 237 Ill. 610, 20 L. R. A. (N.S.) 1114, 86 N. E. 1104.

⁷ See § 2680.

is discharged as to the remainder of the term of years for which it was to run by the destruction of the sugar-house.⁸ A contract for the service of a stallion provided that if the first service should prove fruitless there should be the privilege of return free during the season. The first service proved fruitless and return was demanded during the season. In the meantime the stallion had died. This was held to discharge the liability of the owner of the stallion.⁹ The owner of the stallion was not bound to return the service fee as for failure of consideration.¹⁰ A covenant in an insurance contract requiring a surrender of the policy in order to change the beneficiary is held to be discharged if the policy is stolen without the fault of the owner¹¹ or the beneficiary refuses to return the former certificate.¹²

§ 2693. Special classes of contract—Work and labor on building of another. A contract by which one party agrees to perform labor on the building of another is discharged by the destruction of such building, without the fault of either party, before such contract is performed,¹ as a contract to repair a building,² or to paint it,³ or to paper it,⁴ or a contract to construct a floor therein,⁵ or to

⁸ *Romero v. Newman*, 50 La. Ann. 80, 23 So. 493.

⁹ *Pinkham v. Libby*, 93 Me. 575, 49 L. R. A. 693, 45 Atl. 823.

¹⁰ Contra, that such fee could under similar circumstances be recovered. *Tatro v. Bailey*, 67 Vt. 73, 30 Atl. 685.

¹¹ *Wilcox v. Assurance Society*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857.

¹² *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 61 L. R. A. 791, 66 N. E. 670.

¹ *Illinois*, *Chicago Edison Co. v. Mfg. Co.*, 66 Ill. App. 222.

Indiana, *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

Kansas, *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

Massachusetts, *Butterfield v. Byron*,

153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667.

Mississippi, *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

New Hampshire, *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

New York, *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

Texas, *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38, 3 S. W. 726.

Wisconsin, *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

² *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264; *Lord v. Wheeler*, 67 Mass. (1 Gray) 282.

³ *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

⁴ *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

⁵ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

install a heating system therein,⁶ or to remove an existing building.⁷ The falling of the walls of a brick building discharges a contract to construct woodwork therein.⁸ The question of the right of the contractor to recover for the work done up to the time of such destruction is elsewhere discussed.⁹

This rule must be distinguished from the rule that one who agrees to construct and to complete a building upon the land of another can not recover if such building is destroyed before it has been completed and accepted by the owner of the land.¹⁰ If the building contract provides for payment in instalments as the work progresses, and reaches certain specified stages, the destruction of the building does not prevent the contractor from recovering the instalments which were due by the terms of the contract at the time that the building was destroyed.¹¹ It seems to be assumed that if the contractor offers to rebuild the building which has been destroyed, the property owner is liable in damages if he refuses to permit the contractor to perform. In cases of this sort, performance is possible in accordance with the original terms of the contract except as to time; but the fact that performance according to the time fixed in the original contract is practically impossible seems to be disregarded in determining the rights of the parties. This rule is not limited to personal liability, but it prevents the contractor from asserting a lien against the realty on which the

⁶ *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

⁷ *Jones-Gray Construction Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659; *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 49 L. R. A. 562, 57 N. E. 674.

⁸ *Schwartz v. Saunders*, 46 Ill. 18.

⁹ See §§ 2716 et seq.

¹⁰ *Alabama. Commercial Fire Ins. Co. v. Ins. Co.*, 81 Ala. 320, 60 Am. Rep. 162, 8 So. 222; *Cutcliff v. McAnally*, 68 Ala. 507, 7 So. 331.

California. Humbolt Lumber Mill Co. v. Crisp, 146 Cal. 686, 106 Am. St. Rep. 76, 81 Pac. 30 (no lien can attach to the soil after destruction of the building).

Connecticut. School District v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

Kentucky. Doll v. Young, 149 Ky. 347, 149 S. W. 854.

Maryland. Milske v. Steiner Mantel Co. 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

Massachusetts. Adams v. Nichols, 36 Mass. (19 Pick) 275, 31 Am. Dec. 137.

New Jersey. Trenton Public Schools v. Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

New York. Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

¹¹ *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

The owner is not bound to restore the building as it was before the fire. *Newman Lumber Co. v. Purdum*, 41 O. S. 373.

building stood before it was destroyed.¹² Since a subsequent instrument executed by one party to a contract can not modify the terms of the original contract,¹³ a bond which is given by the contractor and which provides that neither the contractor nor his surety shall be liable for any damage which results from an act of God, can not modify the liability of the contractor under his original contract with the property owner to construct a building;¹⁴ and accordingly if such building is destroyed by a storm, the contractor can not recover on the theory that he is not liable for injury caused by a storm.¹⁵

A contract to build a barn upon a foundation furnished by the owner is a contract for the construction of a complete building and not for work to be done upon the building of another, and hence is not discharged by the destruction of such barn.¹⁶ Under a contract to build an annex to an existing building the burning of the building and the annex operates as a discharge.¹⁷

§ 2694. Sales and bailments. In the absence of a specific provision imposing the risk of loss on one party or the other, a contract to sell a specified chattel is discharged by the destruction of such chattel without the fault of the vendor before the title passes.¹ If the title to the chattel passes, the subsequent destruction does not discharge the vendee from his liability for the purchase price.² Thus when A makes a quantity of lithographic posters for B under a contract by which B is to take them by a certain time and to pay for them then, and B does not take them or pay for them at such

¹² *Humbolt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 106 Am. St. Rep. 75, 81 Pac. 30.

¹³ See § 2458.

¹⁴ *Milske v. Steiner Mantel Co.*, 103 Md. 235, 116 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

¹⁵ *Milske v. Steiner Mantel Co.*, 103 Md. 235, 116 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

¹⁶ *Voght v. Hecker*, 118 Wis. 306, 95 N. W. 90.

¹⁷ *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

¹ *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21, 53 L. R. A. 681, 66

Pac. 28; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Robinson v. McClaine*, 98 Wash. 322, 167 Pac. 912; *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471.

See, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, by Samuel Williston, 9 *Harvard Law Review* 106; *The Sale of Goods Act of 1893 and Recent Cases*, by J. Robertson Christie, 9 *Juridical Review* 275, and *Risk in Sale in Relation to Insurance*, by W. Harvey, 4 *Juridical Review* 248.

² *Central Lithographing Co. v. Moore*, 75 Wis. 170, 17 Am. St. Rep. 186, 6 L. R. A. 788, 43 N. W. 1124.

time, B is liable to A for the agreed price, and the fact that after such time the posters were destroyed by fire without A's fault does not discharge B from liability.³

In the absence of a specific agreement as to the risk of loss or injury, the destruction of a chattel bailed, without the fault of the bailee, discharges him from liability to redeliver the same.⁴

Whether an express provision for the return of the chattel in as good condition as when it was received is discharged by the subsequent destruction of such chattel without the fault of the bailee or purchaser, is a question upon which there is a conflict of authority. In some jurisdictions a specific agreement to return the thing bailed in as good condition as when it was received, is held to render the bailee absolutely liable for the return of such thing; and its loss or destruction without his negligence does not discharge him from such obligation.⁵ Under a contract for the bailment of a stallion by which the bailee agrees to return it in as good condition as when received or to pay therefor, the bailee is not excused from his promise to return such animal by the death of such animal without his fault.⁶ In other jurisdictions such language is not regarded as imposing upon the bailee the risk of loss or injury to the chattel without regard to his own fault, and he is not liable for the destruction of the chattel or injury thereto without his fault.⁷ Under a contract for the sale of a stallion with the privilege to the vendee of returning it by a certain date if it proves to be without value as a breeder, and if "in as sound and healthy

³ *Central Lithographing Co. v. Moore*, 75 Wis. 170, 17 Am. St. Rep. 186, 6 L. R. A. 788, 43 N. W. 1124.

⁴ *United States v. Thomas*, 82 (15 Wall.) 337, 21 L. ed. 89; *Seever v. Gabel*, 94 Ia. 75, 58 Am. St. Rep. 381, 27 L. R. A. 733, 62 N. W. 609; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595; *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N. W. 1091.

⁵ *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572; *Drake v. White*, 117 Mass. 10; *Laughren v. Barnard*, 115 Minn. 270, 132 N. W. 301; *Grady v. Schweinler*, 16 N. D. 452, 125 Am. St. Rep. 674, 14 L. R. A. (N.S.) 1089, 113 N. W. 1031.

⁶ *Grady v. Schweinler*, 16 N. D. 452, 125 Am. St. Rep. 674, 14 L. R. A. (N.S.) 1089, 113 N. W. 1031.

⁷ *Iowa. Seever v. Gabel*, 94 Ia. 75, 59 Am. St. Rep. 381, 27 L. R. A. 733, 62 N. W. 609.

Minnesota. St. Paul & Sioux City Ry. v. Minneapolis & St. L. Ry., 26 Minn. 243, 37 Am. Rep. 404, 2 N. W. 700.

Missouri. McEvers v. The Sangamon, 22 Mo. 188.

New York. Young v. Leary, 136 N. Y. 569, 32 N. E. 607.

North Carolina. Sawyer v. Wilkinson, 166 N. Car. 497, L. R. A. 1915B, 295, 82 S. E. 840.

condition as he now is," it was held that if the stallion had a disease when sold and in its natural development it grew worse, the progress of such disease did not defeat the right of the purchaser to return it.³

§ 2695. Sale of realty—Destruction of building. Whether a contract to sell realty upon which a building is situated is discharged by the destruction of the building after the contract of sale is made and before it is performed by the execution and delivery of a deed, is a question upon which there is some conflict of authority, depending, however, chiefly upon the effect which is to be given to the contract of sale as creating an equitable property right in the purchaser, and upon the extent to which the law will recognize such equitable property right.¹ The courts agree substantially in saying that such contract is discharged if it is entirely executory and that the loss is to fall upon the owner;² but they disagree as to the extent to which the contract is to be regarded as purely executory and as to the ownership of the realty under such circumstances. According to the weight of authority, the purchaser acquires an equitable interest in such realty as soon as the contract of sale is entered into. The contract is therefore no longer purely executory—the purchaser has become the owner in equity; such equitable right is recognized at law, and, accordingly, the destruction of the building upon such realty does not operate as a discharge of the contract, and if the vendor is not in default and is ready, willing and able to perform, the purchaser can be compelled to perform in spite of such destruction.³ This rule has been

³ *Rosenthal v. Rambo*, 165 Ind. 584, 3 L. R. A. (N.S.) 678, 76 N. E. 404.

¹ See, *The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract*, by William A. Keener, 1 Columbia Law Review 1.

² *Wilson v. Clark*, 60 N. H. 352; *Sewell v. Underhill*, 197 N. Y. 168, 134 Am. St. Rep. 863, 27 L. R. A. (N.S.) 233, 90 N. E. 430.

³ *England. Paine v. Meller*, 6 Ves. Jr. 349.

California. White v. Gilman, 138 Cal. 375, 71 Pac. 436.

Connecticut. Williams v. Lilley, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765.

Maryland. Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582.

New Jersey. Cropper v. Brown, 76 N. J. Eq. 406, 139 Am. St. Rep. 770, 74 Atl. 987; *Fraternal Order of Eagles v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847.

New York. Sewell v. Underhill, 197 N. Y. 168, 134 Am. St. Rep. 863, 27 L. R. A. (N.S.) 233, 90 N. E. 430.

Ohio. Gilbert v. Port, 28 O. S. 276.

Oklahoma. Dunn v. Yakish, 10

Okla. 388, 61 Pac. 926.

Pennsylvania. People's Street Ry. v. Spencer, 156 Pa. St. 85, 36 Am. St. Rep. 22, 27 Atl. 113.

applied even if the purchaser is not in possession of the realty, since it is held that the equitable interest of the purchaser comes into existence when the contract of sale is made and not when he takes possession.⁴ If this theory of the interest of the purchaser is held consistently and if he is regarded as having an insurable interest in the realty, up to the full value of the buildings thereon, he can, of course, protect himself against such loss by insuring such interest.

In other cases the courts have insisted upon applying the legal theory of ownership to the exclusion of the equitable theory. The contract is regarded as purely executory, and the vendor is regarded as the owner. Where this theory prevails, the contract is held to be discharged by the destruction of the building, if the building formed a substantial part of the consideration.⁵

An intermediate position has been taken in some jurisdictions and it has been held that if the vendee is not in possession he is not to be regarded as the owner, and accordingly the contract is discharged by the destruction of the building, if the building is a material part of the consideration.⁶ This position is taken on the theory that the vendee was not permitted to exercise any right of ownership and that it would be inequitable to impose upon him a duty to be performed over which the vendor had complete dominion until the performance of the contract.⁷

If the vendee is willing to pay the full contract price, he may have specific performance in spite of the destruction of the buildings,⁸ even if he could have treated the contract as discharged if he had so elected.

§ 2696. Destruction of property not specific subject-matter not discharge. If the contract is not to deliver specific property, but to deliver property of a given kind and quality, which may be performed by the vendor's delivering any property of that kind and quality which he may select, the destruction of property which the vendor had acquired with the intention of tendering it in perform-

Wisconsin. *Wetzler v. Duffy*, 78 Mass. 419, 10 L. R. A. (N.S.) 125, 79 Wis. 170, 12 L. R. A. 178, 47 N. W. N. E. 766; *Wilson v. Clark*, 60 N. H. 184. 352.

⁴ *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926.

⁵ *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325; *Thompson v. Gould*, 37 Mass. (20 Pick.) 134; *Hawkes v. Kehoe*, 193

⁶ *Good v. Jarrard*, 93 S. Car. 229, 43 L. R. A. (N.S.) 383, 76 S. E. 698.

⁷ *Good v. Jarrard*, 93 S. Car. 229, 43 L. R. A. (N.S.) 383, 76 S. E. 698.

⁸ *Hallett v. Parker*, 68 N. H. 598, 39 Atl. 433.

ance of his contract does not discharge him from liability.¹ A contract to manufacture and furnish tin cans which are not, by the terms of the contract, to be made out of any specific lot of metal, is not discharged by the fact that the arrival of the metal out of which the vendor intended to manufacture such cans was delayed by violent storms.² A contract to deliver "one thousand bushels" of wheat of a specified grade may be satisfied by the delivery of one thousand bushels of any wheat of that grade; and accordingly the destruction of the specific lot of wheat which the vendor had intended to deliver in performance of such contract is not a discharge.³ A contract to exchange flour for wheat is not discharged after the delivery of the wheat by the destruction of the mill with which the miller expected to grind the flour and in which the wheat was stored.⁴

The destruction of property which is not the subject-matter of the contract does not discharge the contract, even though the tacit assumption of its continued existence was a material inducement, and, it may be, the controlling inducement by which one party was led to make the contract. Thus a contract of employment of a traveling salesman⁵ or a clerk⁶ is not discharged by the destruction of his employer's place of business. So a contract by which A agrees with B, C and D, the owners of different boats, to solicit and secure freight for their boats for the following season for a fixed salary, to be paid one-third by each of the owners, is not discharged as to B by the destruction of his boat.⁷ So a contract to deliver ironwork is not discharged by the accidental burning of the vendor's mill at which he had expected to manufacture such ironwork.⁸ A contract employing a teacher is not discharged by the destruction of the schoolhouse in which it was expected that the school would be kept.⁹ So a contract to furnish electricity "for the purpose of operating his machinery," "in his business as

¹ *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980; *Anderson v. May*, 50 Minn. 280, 36 Am. St. Rep. 642, 17 L. R. A. 555, 52 N. W. 530; *Black v. Webb*, 20 Ohio 304.

² *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980.

³ *Black v. Webb*, 20 Ohio 304.

⁴ *Martin v. Mill Co.*, 40 Mo. App. 23.

⁵ *Turner v. Goldsmith* [1891], 1 Q. B. 544.

⁶ *Madden v. Jacobs*, 52 La. Ann. 2107, 50 L. R. A. 827, 28 So. 225.

⁷ *Nicol v. Fitch*, 115 Mich. 15, 69 Am. St. Rep. 542, 72 N. W. 988.

⁸ *Booth v. Rolling Mill Co.*, 60 N. Y. 487.

⁹ *School Directors v. Crews*, 23 Ill. App. 367; *Corn v. Board, etc.*, 39 Ill. App. 446; *Charleston School Township v. Hay*, 74 Ind. 127; *Smith v. School District*, 60 Mich. 589, 37 N. W. 567; *Cashen v. School District*, 50 Vt. 30.

Contra. Hall v. School District, 24 Mo. App. 213, which is subsequently explained in *Rudy v. School District*, 30

a miller," is not discharged by the destruction of the mill in which it was expected that the electricity would be used.¹⁰

§ 2697. Impossibility by subsequent act of domestic law—General principles. Impossibility of performance, which is created by a subsequent valid act of domestic law, operates as a discharge of a contract.¹ Subsequent legislation which impairs the obligation of a contract is ordinarily unconstitutional. Under the exercise of the police power, however, the legislature may make illegal the performance of contracts already entered into.² Such a change of law operates as a discharge of prior contracts which are thus made illegal; since otherwise the law would enforce a penalty against the promisor if he performed, and award damages against him if he did not.

Mo. App. 113, as being a contract to conduct a school in the specific building which was burned.

¹⁰ Ontario, etc., Co. v. Galloway Co., 5 Ont. Law Rep. 419.

¹ Canada. Ottawa v. Ry., 1 Ont. Law Rep. 377.

Georgia. Macon, etc., R. R. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442.

Indiana. Baltimore & O. R. Co. v. Miller, 183 Ind. 323, 107 N. E. 545.

Kentucky. Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

Maine. American Mercantile Exchange v. Blunt, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Maryland. Standard Brewing Co. v. Weil, 129 Md. 487, L. R. A. 1917C, 929, 99 Atl. 661.

Minnesota. Halloran v. Schmidt Brewing Co., 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

Mississippi. Brown v. Dillahunt, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499.

Washington. Cowley v. Northern P. R. Co., 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998; The Stratford v. Seattle Brewing & Malting Co., 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31; Bell v. Kanawha Traction &

Electric Co., — W. Va. —, 98 S. E. 885.

See, Moratory Legislation Relating to Bills and Notes and the Conflict of Laws, by E. G. Lorenzen, 28 Yale Law Journal, 324.

This point was avoided in Stent v. Bailis, 2 P. Wms. 218.

"Now a subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he has contracted to do or not to do something else." Metropolitan Water Board v. Dick [1918], A. C. 119.

Whether legislation which prevents performance of prior contracts is valid, see ch. XCV.

² United States. Louisville & Nashville Ry. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N.S.) 671 [reversing, Louisville & Nashville Ry. v. Mottley, 133 Ky. 652, 118 S. W. 982].
Indiana. Jamieson v. Oil Co., 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76; Baltimore & O. R. Co. v. Miller, 183 Ind. 323, 107 N. E. 545.

Kentucky. Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

§ 2698. Specific illustrations—Leases for sale of intoxicating liquors. If realty is leased for the exclusive purpose of using it as a place in which to sell intoxicating liquors, and such sale subsequently becomes illegal, either under local option provisions or by general legislation prohibiting such traffic, such subsequent illegality is held to prevent the performance of the contract in accordance with its terms and to discharge such lease.¹ Accordingly the lessee can not be held on his covenant to pay rent for the remainder of the term.² If the lease provides expressly that the premises shall not be used for any other purpose than a saloon, such subsequent legal impossibility clearly operates as a discharge,³ although permission has been given to the lessee to keep a boot-black stand, a cigar stand and a restaurant, in addition to the saloon.⁴ If other provisions in the lease show that the property was leased for the sole purpose of operating a saloon,⁵ such as a provision making the validity of the lease expressly conditioned upon the lessor's securing satisfactory bond for the lessee, to enable the lessee to conform to the statutory regulations of the business of dealing with intoxicating liquors,⁶ such lease is discharged if such business is thereafter forbidden either under local option laws or under general prohibition laws. It has, however, been held that if a local option law is in force when property is leased for saloon purposes exclusively, the lessee assumes the risk of subsequent action under such local option law; and accordingly such

Maryland. *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917C, 929, 99 Atl. 661.

Maine. *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Washington. *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31.

¹*Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 771, 162 N. W. 1082; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

²*Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

³*The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31.

⁴*The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31.

⁵*Hooper v. Mueller*, 158 Mich. 595, 123 N. W. 24.

⁶*Hooper v. Mueller*, 158 Mich. 595, 123 N. W. 24.

lease is not discharged by the fact that under such law the sale of intoxicating liquors is subsequently made unlawful in the district in which the saloon is situated.⁷

In some jurisdictions the city is held not to be responsible for action on the part of the state,⁸ at least if such action merely increases the amount of the license fee to be paid and does not absolutely forbid the sale of intoxicating liquor.⁹ No part of a license fee can therefore be recovered by one who has paid such fee for a license for a specified period of time, although he abandons the sale of intoxicating liquors when the state law which increases the fee takes effect.¹⁰

If, on the other hand, the lease of the premises is not for the purpose of conducting a saloon exclusively, but if such use is merely permissive, the fact that the business of dealing in intoxicating liquors is subsequently made illegal does not amount to a total failure of consideration, since the lessee may use such building for other purposes;¹¹ and accordingly a lease of this sort is not discharged by a subsequent change of law making the sale of intoxicating liquor illegal;¹² and the lessee can not treat such fact as amounting to a partial failure of consideration which will entitle him to an abatement of the rent which he has agreed to pay.¹³ A lease of a building to be used as a restaurant and saloon is held not to

⁷ *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197.

⁸ *Fitzgerald v. Witchard*, 130 Ga. 552, 16 L. R. A. (N.S.) 519, 61 S. E. 227.

⁹ *Fitzgerald v. Witchard*, 130 Ga. 552, 16 L. R. A. (N.S.) 519, 61 S. E. 227.

¹⁰ *Fitzgerald v. Witchard*, 130 Ga. 552, 16 L. R. A. (N.S.) 519, 61 S. E. 227.

¹¹ See § 2708.

¹² *England. Grimsdeck v. Sweetman* [1909], 2 K. B. 740

Alabama. O'Byrne v. Henley, 161 Ala. 620, 23 L. R. A. (N.S.) 496, 50 So. 83.

Georgia. Lawrence v. White, 131 Ga. 840, 15 Am. & Eng. Ann. Cas. 1097, 19 L. R. A. (N.S.) 986, 63 S. E. 631; *J. J. Goodrum Tobacco Co. v. Potts-*

Thompson Liquor Co., 133 Ga. 770, 26 L. R. A. (N.S.) 498, 66 S. E. 1081.

Kentucky. Baughman v. Portman, (Ky.), 14 S. W. 342, 12 Ky. L. Rep. 342.

Louisiana. Shreveport Ice & Brewing Co. v. Mandel, 128 La. 314, 54 So. 831.

Maryland. Standard Brewing Co. v. Weil, 129 Md. 487, L. R. A. 1917C, 929, 99 Atl. 661.

Massachusetts. Gaston v. Gordon, 208 Mass. 265, 94 N. E. 307.

Texas. Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Hecht v. Acme Coal Co.*, 19 Wyom. 18, Ann. Cas. 1913E, 258, 34 L. R. A. (N.S.) 773, 113 Pac. 788, 117 Pac. 132.

¹³ *Georgia. Fleming v. King*, 100 Ga. 449, 28 S. E. 239.

be discharged by subsequent change of law making the sale of intoxicating liquors illegal, since this does not result in a total failure of consideration.¹⁴ A lease of a "bar, barber shop, cigar stand, billiard room * * * and kitchen * * *" and certain floors of a hotel, is not discharged by the subsequent enactment of a statute forbidding the sale of intoxicating liquors.¹⁵

Whether a lease of property for saloon purposes exclusively is discharged by subsequent legislation, which renders illegal the traffic in intoxicating liquors, depends upon the sense which is to be given to the word "saloon." In some jurisdictions the term saloon is used in its ordinary meaning of a place in which intoxicating liquors are sold; and where such meaning is given to the term, the lease is discharged if the sale of intoxicating liquors is subsequently made illegal.¹⁶ In other jurisdictions the term "saloon" is regarded as meaning a place at which people gather to buy either intoxicating liquor or other forms of beverages;¹⁷ and where such meaning is given to the term, a lease of property for saloon purposes exclusively is not discharged by subsequent legislation making the sale of intoxicating liquors illegal.¹⁸ Even where the latter meaning is given to the term "saloon," a lease of "bar-room and fixtures * * * for occupation as a bar and not otherwise," is held to restrict the use of such property to the sale of intoxicating liquors; and accordingly such a lease is discharged if the sale of intoxicating liquors subsequently becomes illegal.¹⁹

If impossibility of performance is not due to any subsequent change in law, but to the failure of one of the parties to conform to the standards required by the existing law, such failure does

Kentucky. *Christian Moerlein Brewing Co. v. Roser*, 169 Ky. 198, 183 S. W. 479; *Barghman v. Portman*, (Ky.), 14 S. W. 342, 12 Ky. L. Rep. 342.

Massachusetts. *Taylor v. Finnigan*, 189 Mass. 568, 2 L. R. A. (N.S.) 973, 76 N. E. 203.

Pennsylvania. *Teller v. Boyle*, 132 Pa. St. 56, 18 Atl. 1069.

Rhode Island. *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966.

Washington. *Kellogg v. Lowe*, 38 Wash. 293, 70 L. R. A. 610, 80 Pac. 458.

¹⁴ *Standard Brewing Co. v. Weil*, 129

Md. 487, L. R. A. 1917C, 929, 99 Atl. 661.

¹⁵ *Lawrence v. White*, 131 Ga. 840, 19 L. R. A. (N.S.) 966, 63 S. E. 631.

¹⁶ *Kahn v. Wilhelm*, 118 Ark. 239, 177 S. W. 403; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917C, 931, 162 Pac. 31.

¹⁷ *O'Byrne v. Henley*, 161 Ala. 620, 23 L. R. A. (N.S.) 496, 50 So. 83.

¹⁸ *O'Byrne v. Henley*, 161 Ala. 620, 23 L. R. A. (N.S.) 496, 50 So. 83.

¹⁹ *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 43 L. R. A. (N.S.) 664, 60 So. 876

not operate as a discharge.²⁰ If property is leased for saloon purposes exclusively, and a license is denied to the lessee because of his personal disqualifications, he is regarded as having assumed such risk,²¹ and the refusal to grant him a license does not operate as a refusal to grant him the lease.²²

§ 2699. Contracts to issue passes. The state, acting through its legislative department, may, under its power to regulate and control common carriers, forbid the granting of passes, and it has power to make such legislation retroactive so as to render invalid contracts for granting passes which have been entered into before such legislation was enacted.¹ Where such legislation is regarded as retroactive in character, the party who has given value for a contract on the part of the carrier to issue passes to him in the future is denied the right to recover damages because of the refusal of the carrier to issue such passes thereafter;² and he can not compel the carrier to issue such passes by a suit for a specific performance.³ Where it is fairly possible to construe such a statute as prospective and not retroactive, the courts, however, are not regarded as rendering invalid prior valid contracts of this sort;⁴ and such contract will be enforced specifically.⁵ If the local procedure permits a judgment to be rendered not only as to instalments already due under a continuing contract, but as to instalments to become due in the future, the enactment of valid legis-

²⁰ *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

²¹ *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

²² *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

¹ *Louisville & Nashville Ry. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N.S.) 671 [reversing, *Louisville & Nashville Ry. v. Mottley*, 133 Ky. 652, 118 S. W. 982]; *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759; *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

² *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

Rescission in equity has been denied if the promisee has received the substantial part of the consideration. *Cowley v. Northern P. R. Co.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

³ *Louisville & Nashville Ry. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N.S.) 671 [reversing, *Louisville & Nashville Ry. v. Mottley*, 133 Ky. 652, 118 S. W. 982].

⁴ *Kentucky Traction & Terminal Co. v. Murray*, 176 Ky. 593, 195 S. W. 1119; *Emerson v. Boston & Maine Ry.*, 75 N. H. 427, 27 L. R. A. (N.S.) 331, 75 Atl. 529.

⁵ *Emerson v. Boston & Maine Ry.*, 75 N. H. 427, 27 L. R. A. (N.S.) 331, 75 Atl. 529.

lation which makes such contract illegal prevents the enforcement of such judgment as to instalments which fall due after such legislation was enacted.⁶

§ 2700. Other illustrations. If a contract by which A agrees to collect accounts for B, contemplates the use of A's system of obtaining judgments against the debtors, and advertising such judgments for sale by public advertisement, such contract is entire, and it is discharged by a subsequent statute which renders such advertisement illegal.¹ A contract between an employe of a railway and such railway, by which the employe is to contribute to a relief fund out of which he may at his election receive compensation for injury, in which case he agrees to release his claim for injuries, is rendered invalid by the subsequent enactment of the Federal Employers' Liability Act.² A contract to transport natural gas from Indiana to Chicago, Illinois, to perform which a pressure of three hundred and twenty-five pounds to the square inch is necessary, is discharged by subsequent valid police regulations of Indiana, forbidding gas to be transported at a pressure greater than three hundred pounds.³ A contract to construct a railroad on a given route is discharged by a subsequent valid amendment to its charter, the right to make which is reserved by statute altering the location of the road.⁴ A contract entered into by a corporation is discharged by the appointment of a receiver of the corporation, and an injunction against its further transaction of business,⁵ at least where the adversary party elects to treat such facts as discharging him from liability. Where A agrees with B to turn over to a bank certain notes and accounts received from B in satisfaction of a debt due to the bank from B, and the bank has refused to accept them, but subsequently consents, A is excused from complying with such demand by the appointment of a receiver under order of the court for such notes and accounts.⁶ A contract between two street railway companies, that neither will reduce fares below the

⁶ *Campbell v. Gullo*, 142 La. 1082, L. R. A. 1918D, 251, 78 So. 124.

¹ *American Mercantile Exchange v. Plunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

² *Baltimore & O. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

³ *Jamieson v. Oil Co.*, 128 Ind. 555; 12 L. R. A. 652, 28 N. E. 76.

⁴ *Macon, etc., R. R. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442.

⁵ *Malcomson v. Wappoo Mills*, 88 Fed. 680. See §§ 2687 et seq.

⁶ *Howell v. Hough*, 46 Kan. 152, 20 Pac. 436.

amount authorized by statute of a certain date, is discharged when the legislature reduces the fare.⁷ The appointment of a receiver of a corporation, together with an injunction restraining the corporation from collecting and paying out money, does not discharge a contract by the corporation with its general manager prior to the forfeiture of the charter of the corporation.⁸ A contract whereby A agrees with a school district to remove a schoolhouse is excused where the school district and its agent are enjoined from prosecuting the work, and the injunction is not dissolved soon enough to enable the contractor to resume the work under the contract.⁹

The order of a public official, if within his legal powers, may operate as a discharge of a contract between other persons. A contract between A and B, whereby A is to clear off standing timber on a specified highway, is discharged by an order of the county commissioners who propose to change the line of the remaining part of the road.¹⁰ No liability exists where a steamboat leaves before schedule time, but the government inspector has refused to allow more persons to go on board because it has already all that its license permits it to carry.¹¹ After a contract of insurance was entered into the statutes required a more substantial and expensive structure than that existing. The building insured was thereafter destroyed by fire. The liability of the insurance company under the policy was held not to be limited to the cost of replacing the structure described in the survey.¹² A contract to convey realty by "a good and clear title free from all encumbrances," was held not to be discharged by the city's taking part of the realty contracted for to widen a street after the contract and before the conveyance.¹³ A contract of a surety on a bond for the appearance of the accused is not, after his default, discharged by the act of the governor in pardoning him.¹⁴ An express stipulation against lia-

⁷ Buffalo, etc., R. R. v. R. R., 111 N. Y. 132, 2 L. R. A. 384, 10 N. E. 63.

⁸ Rosenbaum v. Credit System Co., 61 N. J. L. 543, 40 Atl. 507.

For the effect of the appointment of a receiver, see § 2702.

⁹ Burkhardt v. School Township, 9 S. D. 315, 69 N. W. 16.

¹⁰ Burns v. Koochiching, 68 Minn. 239, 71 N. W. 26.

¹¹ Hughson v. Steamboat Co., 181 Mass. 325, 58 L. R. A. 432, 64 N. E. 74.

¹² Pennsylvania Co. v. Philadelphia Contributionship, 201 Pa. St. 497, 57 L. R. A. 510, 51 Atl. 351.

¹³ Kares v. Covell, 180 Mass. 206, 91 Am. St. Rep. 271, 62 N. E. 244. (The vendee is not obliged to accept the realty at the contract price. He may either rescind the sale for the breach or recoup damages.)

¹⁴ Dale v. Commonwealth, 101 Ky. 612, 38 L. R. A. 808, 42 S. W. 93.

bility for non-performance if the contractor was "lawfully restrained," relieves a canal company for liability for failure to deliver water where the canal was filled in by the county supervisors.¹⁵ If the law stops performance for a limited time, this operates as a temporary suspension of the contract, but not as a discharge.¹⁶ If a judgment can be rendered for instalments of rent already due and to come due in the future, under a lease of a building for the purpose of prostitution, a subsequent statute rendering such use of such premises illegal, prevents recovery of such future instalments.¹⁷

§ 2701. Impossibility by subsequent act of foreign law. Impossibility of performance due to a change in foreign law or an act of a foreign state is said, by some courts, not to amount to a discharge, if the contract is not made in such state and is not governed by the law of such state.¹ A contract to transport laborers from one state to another, which is valid when made, but the performance of which is prevented by a law of the state from which such laborers are to be transported, forbidding such transportation, is not discharged thereby.² A similar result was reached under an English contract to export goods from Russia, the performance of which was subsequently forbidden by a decree of the Russian government.³ A court may have power to determine what acts amount to a discharge, and by what law performance is governed; but to award damages against one because of his failure to violate the law of the foreign state in which, by the terms of the contract, he is required to perform, seems an arbitrary exercise of power.

An English contract for the use of a Swedish vessel was said not to be discharged, as far as mere impossibility is concerned, by an order by the Swedish government forbidding the use of such vessel in the manner authorized by the contract.⁴ An order by the

¹⁵ *Fresno Milling Co. v. Irrigation Co.*, 126 Cal. 640, 59 Pac. 140.

¹⁶ *School District v. Howard*, (Neb.) 98 N. W. 666.

¹⁷ *Campbell v. Gullo*, 142 La. 1082, L. R. A. 1918D, 251, 78 So. 124.

¹ *Blight v. Page*, 3 Bos. & Pul. 295 (note); *Splidt v. Heath*, 2 Camp. 57 (note); *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 436; *Barker v. Hodgson*, 3 M. & S. 267; *Furness v. Rederiaktie-*

golabet Banco [1917], 2 K. B. 873; *Tweedie Trading Co. v. James P. McDonald Co.*, 114 Fed. 985; *Standard Silk Dyeing Co. v. Roessler & Haslach Chemical Co.*, 244 Fed. 250.

² *Tweedie Trading Co. v. James P. McDonald Co.*, 114 Fed. 985.

³ *Blight v. Page*, 3 Bos. & Pul. 295 (note.)

⁴ *Furness v. Rederiaktie-golabet Banco* [1917], 2 K. B. 873 (obiter, as the

English government, which prevented the exportation of goods from Germany, was held not to discharge a contract for the sale of general articles which could be obtained only from Germany.⁵ The fact that a railway is in the possession of a foreign power and that transportation on such road has become impossible, does not operate as a discharge of a contract for such transportation.⁶ A foreign embargo is not a discharge of the contract of employment of the seamen for all purposes.⁷ If the voyage is finally completed the seamen have been held to be entitled to wages for the entire period, including the time during which such embargo was in force.⁸

On the other hand, the act of a foreign government in prohibiting the unloading of certain goods has been held to operate as a discharge of a contract which can be performed only by unloading such goods in such country.⁹

§ 2702. Writ obtained by private litigant as act of law. If A enters into a contract with B which is valid when made, the fact that by proceedings for injunction, X prevents A from performing such contract does not, in some jurisdictions, discharge A from liability to B for breach.¹ Thus a contract to deliver water through an irrigation ditch,² or to construct a sewer within a given time,³ is neither one of them discharged by an injunction obtained by a

contract contained an exception in case of "restraint of princes;" and such order was held to be such restraint).

⁵ *Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co.*, 244 Fed. 250.

⁶ *West v. The Uncle Sam*, Fed. Cas. No. 17427.

⁷ *Beale v. Thompson*, 4 East 546 [affirmed, 1 Dowl. P. C. 299]; *Johnson v. Broderick*, 4 East 566.

⁸ *Beale v. Thompson*, 4 East 546 [affirmed, 1 Dowl. P. C. 299]; *Johnson v. Broderick*, 4 East 566.

⁹ *Cunningham v. Dunn*, 3 C. P. D. 443.

¹ *Sample v. Irrigation Co.*, 129 Cal. 222, 61 Pac. 1085; *Whittemore v. Sills*, 76 Mo. App. 248; *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166.

"No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual and not of the government." *Klauber v. Street Car Co.*, 95 Cal. 353, 357, 30 Pac. 555 [quoted in *Sample v. Irrigation Co.*, 129 Cal. 222, 227, 61 Pac. 1085].

A party who has caused the injunction to issue can not treat it as a ground of an action to recover damages. *Jordan v. Miller*, 25 Kan. 572.

² *Sample v. Irrigation Co.*, 129 Cal. 222, 61 Pac. 1085.

³ *Whittemore v. Sills*, 76 Mo. App. 248.

third person against the promisor and restraining him from doing the acts which he has promised to do.

In other jurisdictions injunction is held to be an act of law or of the state, in the sense that it operates as a discharge of a covenant to perform the act which such party is enjoined from performing.⁴ If A has sold property to B under a contract which contemplates the use thereof at once, and subsequently A and B are enjoined from using such property on the ground that such use is in violation of a patent which has issued to a third person, such injunction is held to discharge B from his duty to pay the contract price therefor to A.⁵

If one of the parties to the contract prevents the adversary party from performing, by obtaining an injunction to restrain performance, the party who obtains such writ can not treat non-performance by the adversary party as breach on his part,⁶ although the party who is thus restrained may treat the conduct of the adversary party in obtaining such writ as a breach.⁷ Time during which one was enjoined from issuing execution must be deducted from the time between the rendition of judgment and the issuing of execution.⁸ The time during which one was restrained can not be counted in determining whether the time within which an appeal may be perfected has elapsed.⁹ Whether the appointment of a receiver for one of the parties to a contract, as distinguished from cases in which the court not only appointed a receiver, but dissolved a corporation which was a party to an executory contract,¹⁰ operates as a discharge of covenants which are executory on the part of the party for whose benefit a receiver has been appointed, is a question upon which there has been some conflict of authority. In most jurisdictions it seems to be held that the appointment of a receiver for the property of one of the parties does not of itself operate as a discharge of covenants to be performed by such party,¹¹ although it may in fact render him unable to perform

⁴ *Kansas Union Life Ins. Co. v. Burman*, 141 Fed. 835; *De Forrest Radio Telephone & Telegraph Co. v. Standard Oil Co.*, 238 Fed. 346; *Burkhardt v. Georgia School Township*, 9 S. D. 315, 69 N. W. 16.

⁵ *De Forrest Radio Telephone & Telegraph Co. v. Standard Oil Co.*, 238 Fed. 346.

⁶ *Jordan v. Miller*, 25 Kan. 572.

⁷ *Tutwiler v. Burns*, 160 Ala. 336, 49 So. 455.

See ch. LXXXIV.

⁸ *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788.

⁹ *Williams v. Pouns*, 48 Tex. 141.

¹⁰ See §§ 2687 et seq.

¹¹ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 735; *Curtis v. Walpole Tire & Rubber Co.*, 227 Fed.

such covenants. Accordingly, the appointment of a receiver has not been held to discharge an executory contract of sale,¹² or a contract calling for continuous performance,¹³ such as a contract to maintain a switch;¹⁴ and it has even been held that such appointment does not operate as a discharge of a contract for personal services.¹⁵

In some jurisdictions, on the other hand, the appointment of a receiver has been held to operate as a discharge of executory covenants.¹⁶ A contract between a life insurance company and an agent has been held to be discharged by the appointment of a receiver on the ground of the insolvency of the life insurance company.¹⁷ In the case of the life insurance company the result may be justified on the theory that the funds of the insurance company in case of insolvency should be applied to the payment of existing debts and to the protection of the policyholders.¹⁸ The rule that the appointment of a receiver operates as a discharge of an executory contract, has also been applied to a contract to collect property which had been scattered by a storm; and the appointment of a receiver for the purpose of taking charge of such property has been held to prevent recovery upon such contract,¹⁹ even for property which had been collected before the appointment of such receiver, but which had not been delivered to the owners thereof.²⁰

An order of court which sets aside a judicial sale discharges a bidder from liability on his part if no provision is made in such order with reference to such liability.²¹

698; *Wells v. Hartford Manila Co.*, 76 Conn. 27, 55 Atl. 599; *Peck v. Southwestern Lumber & Exporting Co.*, 131 La. Ann. 177, 59 So. 113; *Commercial Publishing Co. v. Beckwith*, 167 N. Y. 329, 60 N. E. 642.

See, *Specific Performance in Connection with Receiverships*, by Ralph E. Clark, 33 *Harvard Law Review*, 64.

¹² *Peck v. Southwestern Lumber & Exporting Co.*, 131 La. Ann. 177, 59 So. 113.

¹³ *Brown v. Warner*, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032.

¹⁴ *Brown v. Warner*, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032.

¹⁵ *Reed v. Explosives Co.*, L. R. 19 Q. B. D. 264; *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378.

¹⁶ *Moller v. Herring*, 255 Fed. 670, 3 A. L. R. 624; *Law v. Waldron*, 230 Pa. St. 458, 79 Atl. 647.

¹⁷ *Law v. Waldron*, 230 Pa. St. 458, 79 Atl. 647.

¹⁸ See § 2687.

¹⁹ *Moller v. Herring*, 255 Fed. 670, 3 A. L. R. 624.

²⁰ *Moller v. Herring*, 255 Fed. 670, 3 A. L. R. 624.

²¹ *Cowper v. Weaver's Administrator*, 119 Ky. 401, 69 L. R. A. 33, 84 S. W. 323.

§ 2703. Events which could have been anticipated—Climatic conditions. In a number of cases, it is suggested as a general principle, that the happening of an event which might readily have been anticipated by a reasonable man, can not be regarded as impossibility so as to operate as a discharge of a positive and unconditional covenant to perform a certain act.¹

In the absence of a provision in the contract which shows an intention to impose the risk of climatic conditions upon one or the other of the parties to the contract, one who has made a positive and unconditional covenant to perform is assumed to take the risk of climatic conditions,² at least if such conditions are not abnormal; and the happening of climatic conditions which, in the particular case prevent him from performing, is not regarded as impossibility.³ Neither cold weather,⁴ nor floods,⁵ operate as a discharge of such covenants. One who has agreed to construct a building at a certain season of the year,⁶ or who has agreed to commence excavation whenever he is required so to do,⁷ can not treat such contract as discharged, although in the particular instance the weather is so cold that satisfactory performance of the contract is impracticable. The fact that there is so much ice about a dock in the early spring that it is difficult for a vessel to approach, is not a discharge of a contract to carry goods on the first

¹ *Illinois. Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Kansas. Cox v. Chase, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

Kentucky. Nance v. Patterson Building Co., 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484.

Michigan. Schliess v. Grand Rapids, 131 Mich. 52, 90 N. W. 700.

Oregon. Pengra v. Wheeler, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354.

² *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Nance v. Patterson Building Co.*, 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

³ *United States. Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648.

Illinois. Harley v. Sanitary District, 226 Ill. 213, 80 N. E. 771.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Kansas. Cox v. Chase, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

Oregon. Pengra v. Wheeler, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354.

Texas. Gunter v. Robinson (Tex. Civ. App.), 112 S. W. 134.

⁴ *Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

⁵ *Pengra v. Wheeler*, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354.

⁶ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

⁷ *Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771.

trip of a vessel.⁸ One who has entered into a contract to cultivate certain land is not discharged therefrom by the fact that an excessive rainfall rendered such cultivation impracticable.⁹ One who has agreed to furnish pasture for certain animals is not discharged by the fact that a drought,¹⁰ even if unprecedented,¹¹ makes it impracticable for him to perform with the means at his disposal. The fact that floods in western streams cause a change in the channel can not operate to discharge a contract for driving logs down to a slough which has once been filled up by a flood.¹² In this case the contract was not rendered absolutely impossible, since at some expense the promisor could make use of another slough for the purpose of performing his contract. The fact that the Ohio river is frozen in midwinter,¹³ and that the Yukon is too low for navigation by steamboat at certain stages of the year,¹⁴ are events which should have been foreseen, and can not operate to discharge a contract for transportation. A contract to raise and deliver a certain quantity of beans, not to be raised on any specific tract of land, is not excused by an unexpected early frost which destroyed the crop which the promisor was raising with the intention of delivering it when grown in completion of his contract.¹⁵ However, a contract to raise a certain kind of crop upon a specific tract of land has been held to be excused because of the failure of such crop due to a blight¹⁶ or to unusual climatic conditions.¹⁷ Such facts have been treated as a discharge even where the contract specified the minimum quantity which the promisor agreed to raise and deliver.¹⁸ One who agrees to complete a building,¹⁹ or grade a street,²⁰ by a

⁸ *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N. W. 431.

⁹ *Gunter v. Robinson* (Tex. Civ. App.), 112 S. W. 134.

¹⁰ *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

¹¹ *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1917A, 648.

¹² *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400 [affirming, 61 Fed. 893].

¹³ *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232.

¹⁴ *Smith v. Trading Co.*, 20 Wash. 580, 44 L. R. A. 557, 56 Pac. 372.

¹⁵ *Anderson v. May*, 50 Minn. 280, 36 Am. St. Rep. 642, 17 L. R. A. 555, 52 N. W. 530.

¹⁶ *Howell v. Coupland*, L. R. 9 Q. B. 462.

¹⁷ *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21, 53 L. R. A. 681, 66 Pac. 28.

¹⁸ *Ontario, etc., Association v. Packing Co.*, 134 Cal. 21, 53 L. R. A. 681, 66 Pac. 28.

¹⁹ *Georgia. Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Missouri. Cochran v. Ry., 131 Mo. 607, 33 S. W. 177.

New York. Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256.

Washington. Reichenbach v. Sage, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354.

²⁰ *McQuiddy v. Brannock*, 70 Mo. App. 535.

certain time, is not excused from liability for delay caused by bad weather, at least if such weather might have been anticipated as a possible contingency. So one who agrees to harvest a crop for another, to begin work not later than a given date, is liable for damages caused by high wind which might reasonably have been anticipated as possible, and which occurred during the week after the time fixed for commencing work in which the contractor delayed its commencement.²¹ So one who agrees to deliver certain logs by a given time if the logging season permits, is not excused by climatic conditions which are not uncommon, although more unfavorable to work than usual.²² A rise in a stream, threatening promisee's building, does not discharge a contract whereby promisor is to dig a ditch or canal, so that the promisee can stop the work without any liability for that which has been done already.²³ A lessor agreed to repair a dam within ten days after the water has fallen to an average winter stage. The lessor was held liable for failure to begin repairs at such time, even though it was expensive to make such repairs then, and a subsequent rise of the stream made it impossible to repair at a later time.²⁴ A bought land of an improvement company, which company agreed to run cars to such land from the town every half-hour "as such street railroads are usually run"; or, in default of such operation, to take back the land and pay certain damages to the vendee. A heavy snowfall prevented the running of such cars for some time, though the railroad company used snowplows and made every effort to clear the tracks. The cars were run as well and as regularly as cars on similar roads in the vicinity. This was held not to give the vendee the right to rescind the contract.²⁵ An unexpected flood has been held not to excuse delay in completing a bridge.²⁶ A contract to replace a bridge if removed by any cause except fire within a certain period, is not discharged by the fact that such bridge was destroyed by an unprecedented flood.²⁷ A contract to saw logs into lumber is not discharged by the fact that an unprecedented rainfall prevented access to such logs.²⁸

²¹ *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708.

²² *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410.

²³ *Vicksburg Water Supply Co. v. Gorman*, 70 Miss. 360, 11 So. 680.

²⁴ *Pengra v. Wheeler*, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354.

²⁵ *Buffalo, etc., Co. v. Improvement*

Co., 165 N. Y. 247, 51 L. R. A. 951, 59 N. E. 5.

²⁶ *Phoenix Bridge Co. v. United States*, 38 Ct. Cl. 492.

²⁷ *Mitchell v. Hancock County*, 91 Miss. 414, 45 So. 571 [sub nomine, *Mitchell v. Weston*, 15 L. R. A. (N.S.) 833].

²⁸ *Runyon v. Culver*, 168 Ky. 43, L. R. A. 1916F, 3, 181 S. W. 640.

§ 2704. Epidemics and personal danger. Whether an epidemic which renders the performance of a contract dangerous to life operates as a discharge of such contract, is a question upon which there has been a divergence of authority, even in cases in which the properly constituted authorities have forbidden the performance of the contract in question, in the interests of the public health. In most jurisdictions it seems to be held that such epidemic does not operate as a discharge.¹ A contract whereby a teacher is employed is not discharged by the act of the board in closing the schools on account of an epidemic of smallpox,² or diphtheria,³ so as to prevent the teacher from recovering for the period of employment if he is ready and willing to perform on his part. A contract to operate a mill is not discharged by an epidemic of smallpox in the neighborhood, at least if it was possible with due diligence to secure employes to take the places of those who left by reason of such epidemic.⁴

In other jurisdictions an epidemic which renders the performance of the contract in question dangerous to the public health is held to operate as a discharge.⁵ A contract to hold a baby show has been held to be discharged by an epidemic of infantile paralysis.⁶ A contract to work for a certain period is discharged by

¹ *Indiana*. *School Town v. Gray*, 10 Ind. App. 428, 37 N. E. 1059.

Michigan. *Dewey v. School District*, 43 Mich. 480, 38 Am. Rep. 206, 6 N. W. 646.

Massachusetts. *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808.

Texas. *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621.

Utah. *McKay v. Barnett*, 21 Utah 239, 50 L. R. A. 371, 60 Pac. 1100.

² *Dewey v. School District*, 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *McKay v. Barnett*, 21 Utah 239, 50 L. R. A. 371, 60 Pac. 1100.

³ *School Town v. Gray*, 10 Ind. App. 428, 37 N. E. 1059; *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808.

⁴ *Vale v. Suiter*, 58 W. Va. 363, 52 S. E. 313.

⁵ *Hanford v. Connecticut Fair Association*, 92 Conn. 621, 103 Atl. 839;

Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77.

⁶ *Hanford v. Connecticut Fair Association*, 92 Conn. 621, 103 Atl. 839. (See theory in dissenting opinion that such epidemic is not a discharge until the executive department has forbidden such performance.)

The majority of the court said: "It is conceded that if a contract is contrary to public policy it is void. As it is admitted that the holding of a baby show under the circumstances narrated would be highly dangerous to the health of the community, it must follow that such a show would be contrary to public policy. This court is now considering the sufficiency of an allegation, not how that allegation can be proved. The allegation that the baby show would be dangerous to public health might be avoided by the plaintiff by alleging, if such

an epidemic of cholera in the neighborhood which makes performance of such contract dangerous;⁷ and the employe may recover reasonable compensation for the time for which he worked before the outbreak of such epidemic.⁸

is the fact, that effectual precautions had been taken to prevent the communication of the disease from one child to another, or by setting up any other fact making it clear that no harm could result to the public from the show. But the court can not regard the averment that the assemblage of a number of children as proposed would be 'highly' dangerous to the public health other than as a fact which the plaintiff must answer, either by denial or matter in avoidance.

"The court will not require the performance or award damages for a breach of a contract in which the public have so great an interest as the preservation of health, if the health is in fact endangered, no more than it would require one to be performed the tendency of which was immoral, or which interfered with the right of every one to earn a livelihood by a lawful occupation. *Connors v. Connolly*, 96 Conn. 641, 86 Atl. 600, 45 L. R. A. (N.S.) 564. The plaintiffs in their brief rely upon these cases: *Libby v. Inhabitants of Douglas*, 175 Mass. 128, 55 Atl. 808; *Dewey v. Alpena School Dist.*, 43 Mich. 480, 5 N. W. 646, 38 Am. St. Rep. 206, and *Gear et al., Trustees, v. Gray* (Ind. App.), 37 N. E. 1059. These appear to be actions brought by school-teachers to recover salary when the schools had been closed by reason of the prevalence of some contagious or infectious disease in the community. There is a difference between a contract to teach school and one to promote and manage a baby show. Teaching proper subjects can never be unlawful or contrary to public policy, though the assemblage of a number of children in one room might

become very harmful. The teacher has usually no control over the attendance in his school. The baby show, however, would be highly dangerous to health, and this is just what the parties have agreed to promote and carry out for their mutual profit." *Handford v. Connecticut Fair Association*, 92 Conn. 621, 103 Atl. 839.

⁷ *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

"The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it; nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not then have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must, necessarily, have acted at his peril, under the guidance of his judgment.

"The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as then existing. When the laborer has adequate cause to justify an omission to fulfil his contract, such omission can not be regarded as his fault. Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury, upon the evidence."

⁸ *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

A contract of employment is said to be discharged if the employe is justified in believing, from the conduct and threats of strikers, that he will be in danger of serious bodily injury if he continues to work.⁹

§ 2705. Difficulty of performance as impossibility. Mere difficulty of performance is not such impossibility as operates as discharge of a contract.¹ A contract to render personal services and care is not discharged by the fact that the rendition of such services proves much more difficult than was anticipated when the contract was made.² A contract to furnish goods at a given point is not discharged by impossibility if the party who has agreed to furnish such goods is unable to secure freight cars.³ A contract to plow land is not discharged by the fact that the land is so stony

⁹ *Walsh v. Fisher*, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

¹ *England*, *Blight v. Page*, 3 Bos. & P. 205; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Brecknock v. Pritchard*, 6 T. R. 750.

United States, *Jacksonville, Mayport, Pablo Ry. & Navigation Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515; *United States v. Gleason*, 175 U. S. 588, 44 L. ed. 284; *Graham v. United States*, 231 U. S. 474, 58 L. ed. 319; *Toomey v. United States*, 49 Ct. Cl. 172; *Carnegie Steel Co. v. United States*, 49 Ct. Cl. 403.

Alabama, *Louisville & Nashville Railroad Co. v. Fuqua*, 187 Ala. 464, 52 L. R. A. (N.S.) 668, 65 So. 396.

Illinois, *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

Indiana, *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

Iowa, *Union v. Smith*, 39 Ia. 9, 18 Am. Rep. 39.

Maryland, *Ess-Arr Knitting Mills v. Fischer*, 132 Md. 1, 103 Atl. 91.

Massachusetts, *Boyle v. Canal Co.*, 39 Mass. (22 Pick.) 381, 33 Am. Dec.

749; *Adams v. Nichols*, 41 Mass. (19 Pick.) 275, 31 Am. Dec. 137.

Minnesota, *Anderson v. May*, 50 Minn. 280, 36 Am. St. Rep. 642, 17 L. R. A. 555, 52 N. W. 530.

Mississippi, *Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, 69 So. 664.

New Hampshire, *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156.

New Jersey, *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93.

New York, *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Rep. 518; *Prospect Park, etc., R. R. v. R. R.*, 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

North Dakota, *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

Oklahoma, *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216.

Pennsylvania, *Janes v. Scott*, 59 Pa. St. 178, 98 Am. Dec. 328.

West Virginia, *Vale v. Suiter*, 68 W. Va. 353, 52 S. E. 313.

² *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

³ *Graham v. United States*, 231 U. S. 474, 58 L. ed. 319.

that it is impracticable to plow it in the manner contemplated.⁴ A provision in a policy of fire insurance requiring proof of loss in sixty days, and action to be brought in one year, is not discharged by the fact that the loss occurred after the death of the insured; and that owing to a dispute about the probate of the will an executor was not appointed or proof of loss made for two years after the loss, since a special administrator might have been appointed to make proof of loss.⁵ So under a contract to fill an order for potatoes "immediately," delay is not excused by the fact that it took eight days to collect the potatoes.⁶

The fact that the contractor is personally unable to perform the contract is not a discharge.⁷ A physician who has agreed to furnish medical services to A is not discharged because of the fact that when such services were necessary such physician was attending B and that it was impracticable for him to leave B.⁸ A dealer who has agreed to purchase automobiles and to resell them is not discharged because of the fact that he is unable to sell such cars and that it is accordingly impracticable for him to pay for the cars which he has ordered.⁹ Under a contract containing a proviso "unless providentially hindered," a mere breakage of machinery does not operate as a discharge.¹⁰ Whether a strike which in fact makes it impracticable for one of the parties to a contract to perform it, operates as a discharge of such contract on the ground of impossibility, or whether it is merely an added difficulty or expense in performance which does not operate as a discharge, is a question

⁴ *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.

⁵ *Matthews v. Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627, 39 L. R. A. 433, 48 N. E. 751.

⁶ *Woods v. Miller*, 55 Ia. 168, 39 Am. Rep. 170, 7 N. W. 484.

⁷ *Alabama. Louisville & Nashville Railroad Company v. Fuqua*, 187 Ala. 464, 52 L. R. A. (N.S.) 668, 65 So. 396.

Georgia. Day v. Jeffords, 102 Ga. 714, 29 S. E. 591.

Illinois. Summers v. Hibbard, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

Mississippi. Hood v. Moffett, 109 Miss. 757, L. R. A. 1916B, 622, 69 So. 664.

New Jersey. Wood v. Boney (N. J. Eq.), 21 Atl. 574.

New York. Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Wheeler v. Connecticut, etc., Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594.

North Dakota. Gile v. Interstate Motor Car Co., 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

⁸ *Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, 69 So. 664.

⁹ *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

¹⁰ *Day v. Jeffords*, 102 Ga. 714, 29 S. E. 591.

upon which there has been a conflict of authority.¹¹ A agreed to furnish water to B. The pressure was not kept up, and B's building was lost by fire by reason thereof. A's excuse for failing to keep up pressure was that without his fault a water-pipe had broken under a river in which the tide ebbed and flowed, and that the pipe could be repaired only when the tide was out. These facts were not held to discharge A.¹² If a railroad company sells a ticket to a certain station, it is bound to stop at that station, and it is liable even if the train reaches such station before the conductor had had an opportunity of getting through the train.¹³

The effect of the shortage of dyes during the early part of the war of 1914, as impossibility of performance, has been discussed,¹⁴

¹¹In some cases special emphasis has been laid upon the fact that one of the parties to the contract was free, under the terms thereof, to use any means of performance that he might see fit; and that accordingly the fact that a strike makes it impracticable for him to perform in the way in which he had expected, does not operate as a discharge of the contract. *Barry v. United States*, 229 U. S. 47, 57 L. ed. 1060; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

In other jurisdictions a distinction has been drawn between peaceable strikes and strikes accompanied by violence. It has been held that a peaceable strike is not an excuse for delay in performance. *Blackstock v. New York & Erie Ry.*, 20 N. Y. 48, 75 Am. Dec. 372. While a strike accompanied by violence which renders it impossible for one of the parties to perform by the means required in the contract operates as a discharge. *Empire Transportation Co. v. Philadelphia & Reading Coal & Iron Co.*, 77 Fed. 919, 35 L. R. A. 623; *Geisner v. Lake Shore & Michigan Southern Ry.*, 102 N. Y. 563, 55 Am. Rep. 837, 7 N. E. 828.

In other jurisdictions, however, the distinction between peaceable strikes and strikes accompanied by violence

has been repudiated; and the distinction which is made is between strikes which the employer can not prevent by any reasonable means, and those which he might have prevented by the use of reasonable means. *The Richland Queen*, 254 Fed. 668.

A contract to repair a vessel in a certain dry dock has been held to be discharged so as to excuse the contractor from damages due to delay, if such delay was due to a strike among his employes for shorter working hours, although such strike was not accompanied by violence. *The Richland Queen*, 254 Fed. 668.

An express provision to the effect that a contract is "subject to strikes beyond the control" of one of the parties, does not excuse performance where the only effect of the strike has been to increase the cost of the production of such article. *Cottrell v. Smokeless Fuel Co.*, 148 Fed. 594, 9 L. R. A. (N.S.) 1187.

¹²*Middlesex Water Co. v. Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 49 L. R. A. 572, 45 Atl. 692.

¹³*Louisville & Nashville Railroad Co. v. Fuqua*, 187 Ala. 464, 52 L. R. A. (N.S.) 668, 65 So. 396.

¹⁴*Ess-Arr Knitting Mills v. Fischer*, 132 Md. 1, 103 Atl. 91.

but in the particular case the dyer had made no specific promise as to the amount of dyeing which he would do, but he had in effect only promised to do the best that he could.¹⁵

The act of law which merely makes the performance of the contract more difficult and expensive than had been anticipated does not operate as a discharge.¹⁶ Thus a foreign corporation which operates a railroad is not discharged by a subsequent change of statute forbidding a foreign corporation to operate a railroad without first becoming "a body corporate under the laws of this commonwealth," since such corporation can reincorporate in such state.¹⁷ So a contract whereby A agrees to furnish a certain sum of money to compromise with B's creditors in consideration of B's transferring to A B's stock of goods, is not discharged because A is unable to obtain the dissolution of an attachment theretofore levied on such goods.¹⁸

Under a contract which provides for performance except in case of "unavoidable cause," the fact that part of the machinery by means of which the promisor had expected to perform had broken down, or the fact that there was an extraordinary demand for this material, is not an unavoidable cause.¹⁹

§ 2706. Expense of performance as impossibility. The fact that performance proves to be more expensive than was anticipated does not constitute impossibility so as to avoid the contract.¹ The fact

¹⁵ *Ess-Arr Knitting Mills v. Fischer*, 132 Md. 1, 103 Atl. 91.

¹⁶ *Newport News, etc., Co. v. Brick Co.*, 109 Ky. 408, 59 S. W. 332.

¹⁷ *Newport News, etc., Co. v. Brick Co.*, 109 Ky. 408, 59 S. W. 332.

¹⁸ *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.

¹⁹ *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 204.

¹ *United States. Columbus Railway Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499]; *Cottrell v. Smokeless Fuel Co.*, 148 Fed. 504, 9 L. R. A. (N.S.) 1187.

Illinois. Ptacek v. Pisa, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

Indiana. St. Joseph County v. South Bend & M. St. Ry., 118 Ind. 68, 20 N. E. 499.

Iowa. Cornell v. Rodabaugh, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599.

New York. Baker v. Johnson, 42 N. Y. 126.

Oregon. Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209.

Tennessee. Fourth Nat. Bank v. Stahiman, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

Washington. Brown v. Ehlinger, 90 Wash. 585, 156 Pac. 544.

"Courts can not set aside contracts because the performance of them becomes more difficult or more expensive than when they were entered into. If it were so, few contracts would survive the seasons of depression that periodically recur in the business world." *Brown v. Ehlinger*, 90 Wash. 585, 156 Pac. 544.

that the contract has proved to be unprofitable does not of itself amount to a discharge.² A contract by a street railway company to furnish transportation at a specified fare is not discharged by the fact that owing to the outbreak of the war and to the wage award of the War Labor Board the expense of furnishing such service exceeds the income therefrom,³ at least if it is not shown that such contract is unremunerative for the entire period for which such contract was to run.⁴ The fact that a mill can not be operated profitably at the agreed location unless a street is vacated, does not operate as a discharge of a contract to construct a mill upon such realty.⁵ A contract to deliver goods for export is not discharged by the fact that the operation of an internal revenue law increasing the taxes upon such article is postponed by competent authority, so that no tax is levied, and there is no tax to refund, while, on the other hand, the price of such article has gone up in anticipation of such tax, so that an unforeseen loss results.⁶ A contract to mine coal is not discharged by the fact that the condition of the market is such that the expense of mining the coal is greater than the price for which it can be sold.⁷ A contract to deliver wood is held not to be discharged by reason of the fact that owing to unforeseen circumstances the cost of securing such wood for delivery will be almost four times the contract price to be paid therefor.⁸ A contract to furnish water for irrigation is not discharged by the fact that the stage of the water is such that water can be furnished only by pumping, and that such method is

² Kentucky. *Bates Machine Co. v. Iron Works*, 113 Ky. 372, 68 S. W. 423.

Minnesota. *Steas v. Leonard*, 20 Minn. 494.

New Hampshire. *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156.

New York. *Prospect Park, etc., R. R. v. R. R.*, 114 N. Y. 152, 26 L. R. A. 61, 39 N. E. 17.

Oregon. *Pengra v. Wheeler*, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817; *Learned v. Holbrook*, 87 Or. 576, 170 Pac. 530 [judgment affirmed on petition for rehearing, 87 Or. 576, 171 Pac. 222].

Pennsylvania. *Beecher v. Stein*, 139 Pa. St. 570, 21 Atl. 79.

³ *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499].

⁴ *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499].

⁵ *Learned v. Holbrook*, 87 Or. 576, 170 Pac. 530 [judgment affirmed on petition for rehearing, 87 Or. 576, 171 Pac. 222].

⁶ *Baker v. Johnson*, 42 N. Y. 126.

⁷ *Walker v. Tucker*, 70 Ill. 527.

⁸ *International Paper Co. v. Rockefeller*, 146 N. Y. Supp. 371.

far more expensive than that which was anticipated.⁹ A contract to furnish water for purposes of irrigation is not discharged by the fact that, because of a drought, water will not flow through the ditches which the promisor has constructed, at least if any other available means of furnishing water could have been used.¹⁰ A contract by which A agrees to care for B is not discharged by the fact that B's condition makes performance more difficult than was anticipated,¹¹ and A can not ignore such contract and recover reasonable compensation for such services.¹² A contract to transport goods is not discharged by the fact that the available means of transportation proves to be far more expensive than was anticipated;¹³ as where the carrier anticipated transportation by water and the only available means of transportation proved to be by wagon and by rail.¹⁴ A contract by which one who has sold preferred stock guarantees the payment of dividends, is not discharged by the failure of the corporation to declare dividends.¹⁵ A contract to manufacture and sell certain patented articles and to pay the patentee a royalty therefor, a certain amount being guaranteed to him, is not discharged by the fact that none of such articles have been sold, and that none can be sold except at a loss.¹⁶ A contract between a steam railroad running to Coney Island and a street railroad whose motive power then was horses, and which could not then run to Coney Island in competition with the steam railroad, by which on consideration of the right to use the tracks of the steam railroad the street railroad is to run its cars to the other's depot, is not discharged by the fact that the street railroad subsequently adopts electricity as a motive power and is able to compete with the steam railroad.¹⁷ A contract giving to A the right to maintain an outside stairway from his building over B's land is not discharged by the fact that such land since then has greatly increased in value.¹⁸ A contract to procure a right of way excepting

⁹ *Hunter Canal Co. v. Robertson*, 113 La. 834, 37 So. 771.

¹⁰ *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215.

¹¹ *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

¹² *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

¹³ *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209.

¹⁴ *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209.

¹⁵ *Fourth Nat. Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 492.

¹⁶ *Beecher v. Stein*, 139 Pa. St. 570, 21 Atl. 79.

¹⁷ *Prospect Park, etc., R. R. v. R. R.*, 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

¹⁸ *Jacobson v. Wells*, 176 Ill. 219, 45 N. E. 467.

the right to maintain a drawbridge is not discharged by the fact that the railroad company is unable to obtain a charter for such drawbridge, and that the entire road must therefore be abandoned. The party who has obtained the right of way is entitled to the compensation agreed upon.¹⁹

The fact that it proves to have been imprudent to enter into the contract does not operate as a discharge.²⁰ A contract to furnish good pasture for cattle and an abundant supply of fresh water is not discharged because imprudent.²¹ If A agrees to sell to B machines to cut wire nails, A is not discharged from such contract because he finds that the machines made by him for that purpose, which he had expected to deliver in performance of the contract, would not make nails rapidly enough to be profitable, and that such defect can not be remedied. He can perform the contract by delivering machines of another make.²² Subsequent facts which make performance less profitable than was anticipated do not operate as a discharge.²³ A contract to furnish a book for publication by a corporation is not discharged by the fact that public disgrace has attached to the name of the former president and manager of the corporation, whose name the corporation bears.²⁴

Whether there is any limit to the doctrine that unexpected expense does not operate as a discharge is a matter upon which there is comparatively little authority. It has been said that the increase in cost of performance may be so out of all proportion to the benefits which would result from performance that the contract may fairly be said to be impossible.²⁵ It has been said, discussing another question, that "a man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible by some very expensive contrivance to recover it."²⁶ In this case, however, the question which was decided was the extent of injury to a vessel which would justify the owners in abandoning

¹⁹ *Stanton v. Ry.*, 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300.

²⁰ *Ware Cattle Co. v. Anderson*, 107 Ia. 231, 77 N. W. 1026.

See also, *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

²¹ *Ware Cattle Co. v. Anderson*, 107 Ia. 231, 77 N. W. 1026; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

²² *Bates Machine Co. v. Iron Works*, 113 Ky. 372, 68 S. W. 423.

²³ *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517, 22 L. R. A. 253, 34 N. E. 1087; *Prospect Park, etc., Ry. v. Ry.*, 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

²⁴ *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517, 22 L. R. A. 253, 34 N. E. 1087.

²⁵ *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 150 Pac. 458.

²⁶ *Moss v. Smith*, 9 C. B. 94 (103).

it as a total loss.²⁷ A contract to remove gravel necessary for certain work has been held to be discharged if the gravel, although present upon the land, could not be taken by ordinary means or expense at a prohibitive cost.²⁸ Whether a contract to mine a minimum quantity of coal unless "it shall be impossible" to mine such amount by reason of causes beyond the control of the party who agreed to mine such amount, is discharged by the fact that a part of the mine is so dangerous that the coal can not be removed without resorting to unreasonable and extraordinary expense, has been presented for consideration; but decision of this question was made unnecessary by the fact that the lessee remained in possession of the entire mine and that he was attempting to show such impossibility as an excuse for avoiding payment of the minimum royalty without surrendering possession.²⁹

While the cases in which it is sought to treat an unexpected expense of performance as discharge are far more common than those in which it is sought to treat an unexpected profit, an unexpected profit is governed by the same principles as those which apply to unexpected expenses; and the fact that conditions have changed so that one of the parties is benefited by the performance of the contract more than was anticipated is not a discharge of which the adversary party may take advantage.³⁰ A lease of a telegraph line at a stipulated rate is not discharged by the fact that, owing to an increase in population and business, the profit which is earned by the lessees of such line is far greater than was anticipated when the contract was made.³¹

§ 2707. Insolvency as discharge. Insolvency of a party to a contract does not operate as a discharge of the insolvent,¹ nor of the adversary party.²

²⁷ *Moss v. Smith*, 9 C. B. 94.

²⁸ *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 438.

In this case the gravel that was left was below water level, and could be taken only by a steam dredger; and it would have been necessary to have dried it before it was used. To have removed this gravel in this way and to have used it, would have cost from ten to twelve times the ordinary cost of removing gravel.

²⁹ *New York Coal Co. v. New Pittsburgh Coal Co.*, 86 O. S. 140.

³⁰ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

³¹ *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

¹ Contract between life insurance company and agent. *Lewis v. Ins. Co.*, 61 Mo. 534.

Compare the different principle involved under facts partially similar in §§ 2687 et seq.

Building contract. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

For dissolution of corporations, see §§ 2687 et seq.

² *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

A lack of funds is not such impossibility as discharges a contract which provides for the payment of money.³ A contract by which A agreed to buy land for B, and B agreed to furnish the money to pay for such land, was not discharged by the fact that a panic followed after such contract was made, and that it was impossible for B to obtain such money.⁴ The fact that the contractor is unable to complete his contract through lack of funds is no discharge. This is true even if the contractor is unable to raise funds upon stocks and bonds of the company for which he is working, which he has taken under his contract as his sole compensation, even if his inability to raise such funds is due to the failure of such company to keep its credit good by meeting its obligations.⁵ Insolvency proceedings against a trust company do not discharge a contract where it has agreed to pay the expenses of a certain trust, but when the trust company is disabled from carrying out its contract by such proceedings the contract is broken.⁶ A agreed to build a steamboat for B. Before the time for completing the boat A became insolvent and made an assignment for the benefit of his creditors. This was held not to discharge B, and B's act in taking possession of the uncompleted boat was held to be either a trespass or an acceptance of the boat, making him liable for the contract price, at the election of A's assignee.⁷ A husband and wife entered into a contract adjusting their property rights. This contract was by consent carried into a decree for alimony. It was held that a subsequent unfavorable change in the husband's financial condition could not discharge the contract, and hence under such circumstances the court could not modify the decree awarding a certain sum per month.⁸ The bankruptcy of the insured does not render it impossible for him to prepare and transmit proofs of loss

See also, on the question of the insolvency of the adversary party. *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216.

See ch. LXXXIV.

³ *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139; *Pratt v. McCoy*, 128 La. 570, 54 So. 1012; *McCreery v. Green*, 38 Mich. 172.

⁴ *McCreery v. Green*, 38 Mich. 172.

See to the same effect, *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S.

W. 139; *Pratt v. McCoy*, 128 La. 570, 54 So. 1012.

⁵ *Wood v. Boney* (N. J. Eq.) 21 Atl. 574.

⁶ *Bank Commissioners v. Trust Co.*, 69 N. H. 621, 44 Atl. 130.

⁷ *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

⁸ *Henderson v. Henderson*, 37 Or. 141, 82 Am. St. Rep. 741, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136.

and hence does not discharge a covenant on his part so to do.⁹ If a contract provides for extending credit to one of the parties and such party subsequently becomes insolvent or his insolvency is discovered, the party who had agreed to extend credit is discharged from such covenant. While analogous to impossibility, this is not, however, a true case of impossibility, but rather a case of breach by anticipation.¹⁰ The party who has agreed to give credit is no longer bound to perform the contract unless, perhaps, the party to whom credit was to be given or his legal representatives tender cash instead of asking credit.¹¹

A different principle applies to contracts for payment out of a specific fund. If the fund is insufficient, the contract is fully performed by paying the entire fund. Thus if the fund raised for the payment of teachers is insufficient, the school district is not liable.¹²

While mere insolvency of one party does not discharge the other, the fact of his giving notice of his insolvency to the other may be equivalent to a notice that he will not perform¹³ and may amount to breach.¹⁴

§ 2708. Impossibility of one of several methods of performance as discharge. One who agrees to do a specific act which can, without violating the terms of the contract, be performed in one of two ways, is not discharged from his contract because one of the two methods of performance becomes impossible if the primary object of the contract is to secure such performance without regard to the means by which such performance is to be accomplished.¹

⁹ *Fuller v. Ins. Co.*, 184 Mass. 12, 67 N. E. 879.

¹⁰ See ch. LXXXIV.

¹¹ See ch. LXXXIV.

¹² *Morley v. Powers*, 78 Tenn. (10 Lea) 219.

Compare *Rudy v. School District*, 30 Mo. App. 113, where it was held that the defense that not enough had been paid into the treasury was insufficient as the only defense was that not enough funds were provided.

¹³ Notice by vendee in an executory contract to vendor. *Hobbs v. Brick Co.*, 157 Mass. 109, 31 N. E. 756.

¹⁴ See ch. LXXXIV.

¹ *England. Barkworth v. Young*, 4 Drew 1.

Louisiana. Hunter Canal Co. v. Robertson, 113 La. 834, 37 So. 771.

Massachusetts. Drake v. White, 117 Mass. 10; *Frothingham v. Seymour*, 121 Mass. 409.

New Mexico. Chappell v. McMillan, 15 N. M. 686, 113 Pac. 611.

Ohio. Board of Education v. Townsend, 63 O. S. 514, 52 L. R. A. 868, 59 N. E. 223 [reversing, 15 Ohio C. C. 674].

Oregon. Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209.

Washington. Adams v. Ames, 19 Wash. 425, 53 Pac. 546.

The fact that the only possible method of performance is more expensive to the promisor than would have been the method which does become impossible, does not operate as performance.² A promise to deliver a specific chattel or its equivalent in money is not discharged by the destruction of the chattel, since its equivalent in money can be paid.³ A contract to return an animal in as good condition as when received or to pay therefor, is not discharged by the death of the animal without the fault of the bailee, since the bailee can make such payment.⁴ A contract to carry goods which can be performed by transportation by water, on the one hand, or by wagon and railway, on the other, is not discharged by the fact that transportation by water has become impossible.⁵ One who agrees to remove goods within a certain time is not discharged by the fact that it is impossible to remove them by boat where they could have been removed in some other way.⁶ Where A agrees to remove, reconstruct and rebuild a schoolhouse, and under the terms of the contract the house can be removed, either as a complete building or can be torn down and the materials used to rebuild another schoolhouse, the fact that the house is blown down by a storm and can not be removed as a complete building does not discharge the contract.⁷ A contract to convey realty or to pay money is not discharged, as against the personal representatives of the promisor, by his death without making such conveyance, since they can at least make such payment.⁸ A promise by A to convey to B land on which C had an option, if C did not exercise such option, while if C did exercise such option A was to

² See § 2706.

³ *Drake v. White*, 117 Mass. 10.

⁴ *Grady v. Schweinler*, 16 N. D. 452, 125 Am. St. Rep. 674, 14 L. R. A. (N.S.) 1089, 113 N. W. 1031.

See, however, where inability to return the animal was due to a disease existing when possession of the animal was originally delivered. *Rosenthal v. Rambo*, 165 Ind. 584, 3 L. R. A. (N.S.) 678, 76 N. E. 404.

⁵ *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209.

⁶ *Adams v. Ames*, 19 Wash. 425, 53 Pac. 546 (where the contract contained a proviso "wind, tide and other acts of God permitting").

⁷ *Board of Education v. Townsend*, 63 O. S. 614, 52 L. R. A. 868, 59 N. E. 223 [reversing, 15 Ohio C. C. 674].

⁸ *State v. Worthington*, 7 Ohio 171.

A agreed to pay money or convey land in consideration of the construction of a canal through a specified town. A's death made it impossible for his executors to convey the land, but it did not operate as a discharge of the covenant to pay money and assumpsit will lie against them as executors to recover such amount of money. *State v. Worthington*, 7 Ohio 171.

pay to B a certain sum, does not become impossible of performance if C exercises such option, since A can perform the alternative covenant.⁹ A contract by which a father agrees to leave to a daughter a share equal with his other children is not discharged by reason of impossibility on the death of the father without making a will, since it may be enforced against the father's estate.¹⁰ A contract to furnish water for irrigation which can be performed either by furnishing water flowing through ditches by gravity, or by pumping water, is not discharged by the fact that the stage of water is such that it is necessary to pump it.¹¹

If, on the other hand, a primary object of the contract is to secure to the promisor the right to choose between two methods of performance, the impossibility of one method of performance defeats such primary object, and accordingly it is held to operate as a discharge of the entire contract.¹² If a bond is conditioned upon the payment of the debt by the judgment debtor or upon his surrendering his body in execution, and arrest and imprisonment for debt is subsequently forbidden by law, the sureties upon such bond are thereby discharged.¹³

§ 2709. Impossibility of accomplishing purpose of contract. If the alleged impossibility has the characteristics which are necessary to make it operative,¹ and if it is of such a sort as to prevent performance of the contract itself,² it operates as a discharge of such contract.³ If, however, the impossibility does not affect the performance of the contract itself, but merely prevents one of the parties from accomplishing the purpose with which he entered into the contract, such impossibility does not operate as a discharge.⁴ The practical difficulties in the application of this principle consists

⁹ *Chappell v. McMillan*, 15 N. M. 686, 113 Pac. 611.

¹⁰ *Barkworth v. Young*, 4 Drew. 1.

¹¹ *Hunter Canal Co. v. Robertson*, 113 La. 834, 37 So. 771.

¹² *Smith v. Durell*, 16 N. H. 344, 41 Am. Dec. 732.

¹³ *Brown v. Dillahunt*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499.

¹ See §§ 2676 et seq.

² See §§ 2781 et seq.

³ See §§ 2711 et seq.

⁴ *England. Herne Bay Steamboat Co. v. Hutton* [1903], 2 K. B. 683; *Civil*

Service Co-operative Society v. General Steam Navigation Co. [1903], 2 K. B. 756.

Alabama. *O'Byrne v. Henley*, 161 Ala. 620, 23 L. R. A. (N.S.) 496, 50 So. 83.

Georgia. *Lawrence v. White*, 131 Ga. 840, 15 Am. & Eng. Ann. Cas. 1097, 19 L. R. A. (N.S.) 966, 63 S. E. 631; *J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 26 L. R. A. (N.S.) 498, 66 S. E. 1081.

Kentucky. *Baughman v. Portman*, (Ky.), 14 S. W. 342, 12 Ky. L. Rep. 342.

in determining whether the purpose, the accomplishment of which is prevented by the impossibility, is a term of the contract or whether it is merely the inducement to one of the parties to enter into it. If property is leased for a certain purpose, and such purpose becomes legally impossible, it is ordinarily held that such impossibility operates as a discharge of such contract if by the terms of the contract the property could be used only for such purpose; while if the purpose for which the property was to be used was not expressed or if such use was permissive only, and if the lessee was free by the terms of the contract to use the property for other purposes, such impossibility does not discharge the contract.⁵ A number of cases in which the purpose became impossible by reason of subsequent facts arose out of the postponement of the coronation of Edward VII of England. Rooms had been rented from which to view the coronation procession, and vessels had been chartered for the purpose of seeing the fleet and the naval review, and a number of questions were presented as to the effect of the postponement of the coronation on these contracts. It was held that if such purpose was not the "basis and foundation" of the contract, the postponement of the coronation did not operate as a discharge,⁶ while if such purpose was the basis and foundation of the contract, the postponement of the coronation operated as a discharge.⁷ A contract by which a vessel was to be at the disposal of the adversary party for two specified days "for the purpose of viewing the naval review and for a day's cruise around the fleet," was held not to be discharged by the postponement of the naval review, since the vessel could have been used for the purpose of cruising around the fleet.⁸ A similar contract for the use of a vessel for "the term of three days from the hour she is placed at the charterer's disposal in London on the day preceding that of

Louisiana. Shreveport Ice & Brewing Co. v. Mandel, 128 La. 314, 54 So. 831.

Maryland. Standard Brewing Co. v. Weil, 129 Md. 487, L. R. A. 1917C, 929, 90 Atl. 661.

Massachusetts. Gaston v. Gordon, 208 Mass. 265, 94 N. E. 307.

Texas. Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; San Antonio Brewing Assn. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368.

Wyoming. Hecht v. Acme Coal Co., 19 Wyom. 18, Ann. Cas. 1913E, 258, 34 L. R. A. (N.S.) 773, 113 Pac. 788, 117 Pac. 132.

⁵ See § 2698.

⁶ Herne Bay Steamboat Co. v. Hutton [1903], 2 K. B. 683; Civil Service Co-operative Society v. General Steam Navigation Co. [1903], 2 K. B. 756.

⁷ Krell v. Henry [1903], 2 K. B. 740.

⁸ Herne Bay Steamboat Co. v. Hutton [1903], 2 K. B. 683.

the naval review," was held not to be discharged by the postponement of the naval review.⁹ On the other hand, a license for the entire use of certain rooms during the days, but not the nights, of two specified days, which, in fact, were the days on which the procession was to be held, was held to be a license for a particular purpose, and no other, namely, the purpose of viewing the procession from such rooms; and accordingly the contract was held to be discharged by the postponement of the procession.¹⁰

⁹ *Civil Service Co-operative Society v. General Steam Navigation Co.* [1903], 2 K. B. 756.

¹⁰ *Krell v. Henry* [1903], 2 K. B. 740.

"The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor v. Caldwell* (3 B. & S. 826). That case at least makes it clear that 'where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law, the

case of *Nickoll v. Ashton* ([1901] 2 K. B. 126), makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfillment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it can not reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting

§ 2710. Positive contract to do certain act or pay damages.

If a party to a contract enters into a positive and absolute undertaking to do certain things, in which, by express terms or necessary implication, he binds himself to pay damages in the event that he does not do what he agreed to do, subsequent impossibility of performance does not operate as a discharge.¹ Thus if A makes a

parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited." *Krell v. Henry* [1903], 2 K. B. 740.

¹ *England. Ashmore v. Cox* [1899], 1 Q. B. 436.

Connecticut. School Dist. v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

Illinois. Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60; *Summers v. Hibbard*,

153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

Minnesota. Cowley v. Davidson, 13 Minn. 92; *Anderson v. May*, 50 Minn. 280, 36 Am. St. Rep. 642, 17 L. R. A. 555, 52 N. W. 530.

New York. Wilkinson v. Insurance Co., 72 N. Y. 499, 28 Am. Rep. 166.

North Dakota. Grady v. Schweinler, 16 N. D. 452, 125 Am. St. Rep. 674, 14 L. R. A. (N.S.) 1089, 113 N. W. 1031.

Ohio. State v. Worthington, 7 Ohio 171; *Board of Education v. Townsend*, 63 O. S. 514, 52 L. R. A. 868, 59 N. E. 223.

"A party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it can not be supposed to have been in contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include were not used with reference to the possibility of the particular contingency which afterwards happens." *Chicago, etc., Ry. v. Hoyt*, 149 U. S. 1, 14, 37 L. ed. 630.

"Where a party has expressly undertaken without qualification to do anything not naturally or necessarily im-

positive and unqualified contract to remove and rebuild a school-house, the fact that such house is blown down by a windstorm does not discharge A from liability.² So a contract to construct a windmill and dig a well, which the contractor agrees shall furnish a good water supply for stock, is not discharged by the fact that the season in which the breach occurred was an unusually dry one.³ A contract by which a bank which holds certain stock as collateral for a note agrees to secure an assignment of such stock as security for another note, is not discharged by the fact that the conditions which attached to the original deposit of the stock, but were not disclosed by the bank, prevent the performance of such contract.⁴ A sold to B some land in which a building was situated, and agreed to keep the building insured to protect B's interest. B was to pay for the land in instalments, and to have a deed when the land was paid for. Subsequently the building was destroyed by fire, and A collected the insurance, the amount of which exceeded the amount then due from B. B demanded a deed for the property and the payment of the difference between the amount of the insurance received by A and the amount still due from B to A. It was held that inasmuch as the contract provided for the contingency of the destruction that the destruction of the building did not operate as a discharge.⁵ If A contracts with B to do certain things, the fact that A has a contract with X, which he expects X to perform, and by means of which he expects to be able to perform his contract with B, and the further fact that thereafter X breaks his contract with A, do not amount to such impossibility as to discharge A from his contract with B.⁶ Thus A, a contractor, agreed to build a house for B, and by the terms of the contract B was to supply all the materials as needed. A employed X to do certain work upon such building, and X knew of A's contract with B. B's failure to per-

possible under all circumstances and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which he had no control but against which he might have provided in his contract." *Wilmington Transportation Co. v. O'Neil*, 98 Cal. 1, 5, 32 Pac. 705 [quoted in *Sample v. Irrigation Co.*, 129 Cal. 222, 228, 61 Pac. 1065].

² *Board of Education v. Townsend*, 63 O. S. 514, 52 L. R. A. 868, 59 N. E. 223.

³ *Wernli v. Collins*, 87 Ia. 548, 54 N. W. 365.

⁴ *First National Bank v. Park*, 117 Ia. 552, 91 N. W. 828.

⁵ *Allyn v. Allyn*, 154 Mass. 570, 28 N. E. 779.

⁶ *Perine v. Standfield*, 107 Mich. 553, 65 N. W. 541.

form, causing A to break his contract with X, does not operate as a discharge.⁷ A contractor who has an opportunity to examine specifications, and who makes an absolute contract to perform certain work under them, at a certain price, is not discharged from liability because he is unable to perform the contract by reason of some defect in the specifications.⁸ Thus a contract to construct a wooden sewer is not discharged because the specifications require a turn which it is impracticable for the contractor to make.⁹ One who agrees to construct a well according to certain specifications can not recover for damages caused by the caving in of the well, due to an inherent defect in the curb specified by the contract.¹⁰

IV

EFFECT OF IMPOSSIBILITY

§ 2711. Effect of discharge by subsequent impossibility—Liability on contract. Where the doctrine of subsequent impossibility is recognized, such impossibility acts as a discharge of the contract, but is by no means the same thing as a performance of it. The promisor may invoke the subsequent impossibility as a defense in an action against him for breach of the contract,¹ but he can not enforce the contract against the promisee as if he had performed it.² If A employs B as an attorney upon a contingent fee, and B dies before such services are completed, B's death discharges the

⁷ *Perine v. Standfield*, 107 Mich. 553, 65 N. W. 541.

⁸ *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156.

⁹ *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014.

¹⁰ *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156.

¹ *United States. Moller v. Herring*, 255 Fed. 670, 3 A. L. R. 624.

Connecticut. Hanford v. Connecticut Fair Association, 92 Conn. 621, 103 Atl. 839.

Indiana. Krause v. Board of Trustees, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

Massachusetts. Browne v. Fairhall, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556.

West Virginia. Bell v. Kanawha

Traction & Electric Co., — W. Va. —, 98 S. E. 885.

The party who wishes to set up the defense of impossibility must plead the facts which show that performance was discharged thereby. *McCormick v. Jordan*, 65 W. Va. 86, 63 S. E. 778.

² *England. The Jack Park*, 4 C. Rob. 308; *Melville v. De Wolfe*, 4 El. & Bl. 844.

United States. Moller v. Herring, 255 Fed. 670, 3 A. L. R. 624.

California. Remy v. Olds, 88 Cal. 537, 21 L. R. A. 645, 26 Pac. 355.

Connecticut. Leahy v. Cheney, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

Oklahoma. Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

contract; and even if B's services resulted in A's collection of such claim, B's estate can collect only reasonable compensation for the services rendered and not the contract price.³ One who is prevented by sickness from rendering substantial performance of a contract for personal services can not recover the contract price to which he would have been entitled if he had performed.⁴ If A has agreed to pay B for his services and to bequeath an additional amount to him if he remains in A's service until A's death, B's executor can not recover such additional compensation provided for in the contract if B dies before A.⁵

One of the parties to the contract can not, by reason of impossibility of performing the contract according to its terms, insist on a different method of performance in order that he may obtain substantially the same result that he would have obtained if the contract had been performed instead of being discharged.⁶

Under a contract to construct a tunnel, which proves impossible of performance on account of the nature of the ground, the contractors can not be required to construct a tunnel upon different plans and specifications.⁷ If a contract to build an annex to a building is discharged by the destruction of the building when the annex is almost completed, the owner can not, by reconstructing the original building, compel the contractor to rebuild such annex.⁸ The fact that the owner refuses to reconstruct a building which has been destroyed by fire, does not entitle a contractor, who has partially performed a contract to construct a part of such building, to treat such refusal as a breach.⁹ A sailor who has been imprisoned and who has been detained involuntarily, can not, in either case, recover wages for the time for which he was thus prevented from rendering services.¹⁰

³ *Sargent v. McLeod*, 200 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164.

⁴ *Davidson v. Gaskill*, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

⁵ *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917D, 809, 98 Atl. 132.

⁶ *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264; *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

⁷ *Milwaukee v. Shailer*, 84 Fed. 106, 28 C. C. A. 286.

⁸ *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

⁹ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

¹⁰ *Melville v. De Wolfe*, 4 El. & Bl. 844; *The Jack Park*, 4 C. Rob. 308.

§ 2712. Impossibility of acceptance of unilateral contract, or of performance of express condition. If the act, the performance of which is prevented by impossibility, is not one, the performance of which has been promised by one of the parties to the contract, but it is merely an act the performance of which will operate as an acceptance of an offer for a unilateral contract, or if such act is an express condition precedent to the right of the party by whom such act is to be performed to demand performance on the part of the adversary party, impossibility of performing such act has no effect upon the liability of the party from whom performance was due, since such party was not bound to perform in the first instance. The question which arises in cases of this sort, in which performance is prevented by impossibility, is whether such impossibility excuses non-performance and whether it enables the party who omitted to perform for one of these reasons, to enforce the contract as if he had performed in accordance with its terms. In cases of this sort the great weight of authority is in favor of the view that, as in the case of contracts which consist of mutual promises,¹ impossibility does not amount to performance, whatever other effect it may have; and accordingly the party who has failed to perform by reason of impossibility can not enforce the contract as if he had performed.² If the contract of insurance does not bind the insured to pay a premium in the future, but merely gives to him the option of paying the premiums at certain periods of time in order to keep the policy in force, or if it is provided in express terms that failure to pay the premium shall prevent the policy from continuing in force, the fact that the insured has been prevented from

¹ See § 566.

² United States. *Klein v. New York Life Ins. Co.*, 104 U. S. 88, 28 L. ed. 662; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 28 L. ed. 765.

Connecticut. *Pitts v. Hartford Life & Annuity Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95.

Georgia. *Hipp v. Fidelity Mutual Life Ins. Co.*, 128 Ga. 491, 12 L. R. A. (N.S.) 319, 57 S. E. 892.

Illinois. *Hansen v. Supreme Lodge*, 140 Ill. 301, 29 N. E. 1121.

Iowa. *Sleight v. Supreme Council*

Mystic Toilers, 121 Ia. 724, 96 N. W. 1100.

Maryland. *McCann v. Supreme Conclave, Improved Order Heptasophs*, 119 Md. 655, 46 L. R. A. (N.S.) 537, 87 Md. 383.

New York. *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594.

Texas. *Brotherhood of Railway Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396.

Washington. *Sheridan v. Modern Woodmen*, 44 Wash. 230, 7 L. R. A. (N.S.) 973, 87 Pac. 127.

paying premiums by reason of his sickness,³ or by reason of his insanity,⁴ does not justify his beneficiaries or his estate in treating such excuse as equivalent to a performance of such condition. The policy, accordingly, is no longer in force upon default in paying the premiums in accordance with its terms, notwithstanding such excuse. While this principle occasionally leads to very harsh results, and while legislation seems to be necessary to cover cases of this sort, the matter seems to be one for the legislature rather than for the courts.

The courts, however, have occasionally attempted to meet the situation by insisting that in case of sickness, insanity, and the like, by reason of which notice to the insured would be ineffective, notice ought to be given to the beneficiary before the insurance company can forfeit the policy for non-payment of premium at least if the beneficiary has notified the insurance company of the condition of the insured, and has requested that notice of premiums and assessments be given to the beneficiary.⁵ If property has been delivered under a contract which provides that the adversary party may terminate it at his election, or under certain circumstances,⁶ a question arises as to the effect of the impossibility of performing such condition in case of the destruction of such property without the fault of either party, upon which there is a conflict of authority. In some jurisdictions it is held that the destruction of such property without the fault of either party operates as a discharge of a provision which requires the return of such property in order to enable the party to whom it has been delivered to exercise his option to terminate the contract.⁷ In other juris-

³ *Hipp v. Fidelity Mutual Life Ins. Co.*, 128 Ga. 491, 12 L. R. A. (N.S.) 319, 57 S. E. 892; *Hansen v. Supreme Lodge*, 140 Ill. 301, 29 N. E. 1121; *Sleight v. Supreme Council*, 121 Ia. 724, 96 N. W. 1100; *Brotherhood of Railway Trainmen v. Dee*, 101 Tex. 507, 111 S. W. 396.

⁴ *United States*. *Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. ed. 662; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. ed. 765.

Connecticut. *Pitts v. Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95.

Maryland. *McCann v. Supreme Conclave, Improved Order of Heptasophs*, 119 Md. 655, 46 L. R. A. (N.S.) 537, 87 Md. 383.

New York. *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594.

Washington. *Sheridan v. Modern Woodmen*, 44 Wash. 230, 7 L. R. A. (N.S.) 973, 87 Pac. 127.

⁵ *Buchanan v. Supreme Conclave*, 178 Pa. St. 465, 56 Am. St. Rep. 774, 34 L. R. A. 436, 35 Atl. 873.

⁶ See § 2639.

⁷ *Gottlieb v. Rinaldo*, 78 Ark. 123, 6 L. R. A. (N.S.) 273, 93 S. W. 750.

dictions it is held that the fact that performance becomes impossible prevents the party to whom such property has been delivered from exercising his option to terminate the contract.⁸

§ 2713. Recognition of personal contract after death of party.

If the heirs or personal representatives of one of the parties to a contract which is personal in its character, treats such contract as in existence after the death of one of the parties thereto, they are bound by such contract.¹ A contract by which A agreed to render personal services to B, in consideration of which B agreed to devise certain realty to A, is discharged by A's death, but if B accepts performance of such services from A's heirs, under such contract, and elects to treat the contract as in effect, A's heirs may have specific performance against B's heirs upon B's death.² Whether the court regarded such conduct as continuing the original contract in effect, or whether it regarded the transaction as amounting to a new contract between the heirs of A, after A's death, and B, is not clear.³ Since the contract was fully performed by B's heirs, and they were in possession of the realty, the Statute of Frauds did not require a written contract; and for this reason it is not easy to determine from the opinion which view of the case the court took. If a contract to collect rents is discharged by the death of the principal, the recognition of such contract by the representatives of the deceased, so as to give it validity, is said to be "virtually the making of a new contract."⁴ The fact that the executor of a

⁸ *Nutting v. Watson*, 84 Neb. 464, 25 L. R. A. (N.S.) 823, 121 N. W. 582.

¹ *Soper v. Galloway* (Ia.), 105 N. W. 399.

² *Soper v. Galloway*, (Ia.), 105 N. W. 399.

³ "It is a contention of defendants, made in argument, that the contract, if made, was purely personal in character, and for that reason terminated at once upon the death of the parents of plaintiffs. There is no merit in this contention. We need not determine what the rights of the parties would have been had Van Ausdol refused to accept a continuation of services at the hands of plaintiffs. He did accept of such service, and in view thereof, and of the relation of the parties,

we think it must be said that within the understanding of each, such substituted performance was in compliance with the contract requirements, and to be followed by the same measure of rights which, had their death not intervened, would have accrued to the parents of plaintiffs. This conclusion has support in the following cases: *Gray v. Murray*, 3 Johns. Ch. 167; *Francois v. Oeks*, 2 E. D. Smith, 417; *Long v. Hartwell*, 34 N. J. Law, 124; *Lawrence v. Dole*, 11 Vt. 555; *Dana v. Hancock*, 30 Vt. 620; *Serfass v. Dreisbach*, 141 Pa. 142, 21 Atl. 523." *Soper v. Galloway*, (Ia.), 105 N. W. 399.

⁴ *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915C, 601, 149 N. W. 782.

deceased principal permits an agent, who is employed to collect rents, to continue to collect such rents for a period of four months after the death of the principal, is said not to amount to a so-called ratification or adoption of such contract.⁵

§ 2714. Quasi-contractual rights arising on discharge by subsequent impossibility—Risk assumed by one party. If the parties to the contract have agreed in express or implied terms that the risk of loss shall fall upon one or the other of the parties, full effect is given to such provision.¹ If a contract for the transportation of goods provides that the freight earned is to be retained, whether the vessel is lost or not, the fact that the vessel is detained by the government because of the existence of war, discharges the contract, but the shipper can not recover payments which he has made.² If a building contract provides for payment in instalments, but it also provides that the risk of loss is upon the contractor, the owner is entitled to recover instalments paid by

⁵ *Homan v. Redick*, 97 Neb. 209, L. R. A. 1915C, 601, 149 N. W. 782.

¹ *United States v. Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 17 L. ed. 762; *Simpson v. United States*, 172 U. S. 372, 43 L. ed. 482; *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. ed. 696; *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183; *International Paper Co. v. "Gracie D. Chambers,"* 248 U. S. 387, 63 L. ed. — [citing, *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183; and affirming, 253 Fed. 182]; *Standard Varnish Works v. "Bris,"* 248 U. S. 392, 63 L. ed. — [citing, *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183, and *International Paper Co. v. "Gracie D. Chambers,"* 248 U. S. 387, 63 L. ed. —].

Louisiana. Lapleau v. Succession of Lapleau, 144 La. 988, 81 So. 597.

Michigan. More v. Luther, 153 Mich. 206, 18 L. R. A. (N.S.) 149, 116 N. W. 986.

Minnesota. Stees v. Leonard, 20 Minn. 448.

Nebraska. Wood v. School Dist. No. 32, 80 Neb. 722, 15 L. R. A. (N.S.) 478, 115 N. W. 308.

Tennessee. Crouch v. Southern Surety Co., 131 Tenn. 260, L. R. A. 1915D, 966, 174 S. W. 1116.

Texas. Lonergan v. San Antonio Loan & T. Co., 101 Tex. 63, 22 L. R. A. (N.S.) 364, 104 S. W. 1061.

Vermont. Creamery Package Mfg. Co. v. Russell, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

² *Allanwilde Transport Corporation v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183; *International Paper Co. v. "Gracie D. Chambers,"* 248 U. S. 387, 63 L. ed. — [citing, *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183; and affirming, 253 Fed. 182]; *Standard Varnish Works v. "Bris,"* 248 U. S. 392, 63 L. ed. — [citing, *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. ed. 183, and *International Paper Co. v. "Gracie D. Chambers,"* 248 U. S. 387, 63 L. ed. —].

him under the contract in case the building is destroyed by fire.³ The contractor is ordinarily held to assume liability for defects of the soil which make the construction of the building more difficult than he had anticipated.⁴ The contractor can not, accordingly, recover for extra expense incurred by reason of such defects.⁵ A contractor may assume the risk of plans under which he is to work, although such plans are prepared by another; and if he assumes such risk he can not avoid liability by showing that performance of the contract in accordance with such plans was impossible.⁶ One who advances money for the education of another, to be repaid out of the earnings of such other in the profession for which he is thus educated, is held to impose the risk of the death of the debtor upon the creditor,⁷ and if the debtor dies before he has engaged in such occupation, the creditor can not recover against his estate for money advanced.⁸ If A renders services for B under a contract by which A is to render services for B during B's life, for which he is to receive certain of B's property upon B's death, it is held that A takes the risk of his outliving B so that A can perform such services for the whole of B's life.⁹ If A dies before B, A's estate

³ *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. ed. 696.

⁴ *Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 17 L. ed. 762; *Simpson v. United States*, 172 U. S. 372, 43 L. ed. 482; *Stees v. Leonard*, 20 Minn. 448; *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

⁵ *Simpson v. United States*, 172 U. S. 372, 43 L. ed. 482; *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

⁶ *Loneragan v. San Antonio Loan & T. Co.*, 101 Tex. 63, 22 L. R. A. (N.S.) 364, 104 S. W. 1061.

⁷ *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597.

⁸ *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597.

⁹ *More v. Luther*, 153 Mich. 206, 18 L. R. A. (N.S.) 149, 116 N. W. 986.

"No obligation rests upon the estate of Reuben to pay the reasonable worth of the services of Andrew, unless that

obligation arises from their agreement, for outside of that agreement there is no such obligation. From that agreement, may it be inferred that Reuben was under obligation to pay the reasonable worth of Andrew's services in the event of his surviving Andrew? The agreement, as already stated, is that Reuben will give Andrew his farm at the death of himself and wife, if Andrew will work for him until that event occurs. According to this agreement, the compensation of Andrew is not based upon the reasonable worth of his services. Reuben and his wife might die in a few days. In that event Andrew would receive much more than the value of his services. They might live for many years, and in that event Andrew would receive less than the value of his services. For the contingency which actually occurred, viz., Andrew's death before Reuben's, no provision whatever was made. May it be inferred that it was the intention of the parties that in such a contin-

can not recover the value of such services.¹⁰ One who takes fidelity insurance assumes the risk of the death of the person whose fidelity is insured during the period of insurance,¹¹ and if such person dies during such period, the insurer can not be compelled to return the unearned premium on the bond.¹² One who pays for liquor licenses takes the risk of his death during the period for which such license was granted,¹³ and his personal representatives

agency Reuben should pay Andrew's estate what his services were reasonably worth? In that event, though payment might be postponed until his death, Reuben would hold his property burdened with the obligation to pay this claim. To the extent of this claim, he would be prevented from using that property for the maintenance of himself and wife during their remaining years. This would prevent his making the agreement he did make, viz., to convey the farm to his other children in consideration of their supporting and maintaining himself the remainder of his life. This would lead to very serious consequences, as shown by this case, for, as heretofore indicated, the testimony offered by contestants and excluded by the trial-court would have shown that all this property was necessary for the maintenance of Reuben and his wife during their remaining years. It is scarcely necessary to say that neither Reuben nor Andrew intended that their agreement should apply in such a contingency, for the terms of that agreement clearly indicate that the right of Andrew in the farm should be subordinate to its use for the maintenance of his father and mother. I think it may also be stated that from their agreement it may not be inferred that either Reuben or Andrew intended, in the contingency of the former outliving the latter, the estate of the former should be fettered or burdened in any way by the claim

of the latter. If they had had any such intention, it is to be presumed that they would have expressed it in some way and made some equitable provision for a mutual protection of their rights. In the absence of an agreement, Andrew was entitled to no compensation for his services. The agreement provided for compensation in a certain contingency and in that contingency only. That contingency did not occur, but another and an altogether different one occurred. No principle of law or equity will permit the agreement to be applied to such a contingency, and it may not be presumed that the parties intended it to apply. It follows from this reasoning that there was no testimony in the case tending to show an obligation on the part of the estate to compensate Andrew for his services." *More v. Luther*, 153 Mich. 206, 18 L. R. A. (N.S.) 149, 116 N. W. 986.

¹⁰ *More v. Luther*, 153 Mich. 206, 18 L. R. A. (N.S.) 149, 116 N. W. 986.

The opposite result as to assumption of risk was reached in *Preble v. Preble*, 115 Me. 26, 97 Atl. 9.

¹¹ *Crouch v. Southern Surety Co.*, 131 Tenn. 260, L. R. A. 1915D, 966, 174 S. W. 1116.

¹² *Crouch v. Southern Surety Co.*, 131 Tenn. 260, L. R. A. 1915D, 966, 174 S. W. 1116.

¹³ *Wood v. School District*, 80 Neb. 722, 15 L. R. A. (N.S.) 478, 115 N. W. 308.

can not recover a part of such license fee on account of his death during such period.¹⁴

In order to operate as an assumption of risk, the contract must provide therefor either expressly or by fair implication.¹⁵ A building contract which by fair implication imposes the risk upon the builder, is not modified by a provision in a bond given to secure performance of such contract relieving the contractor from any damage resulting from an act of God.¹⁶

§ 2715. Apportionment of loss by special contract. If the contract contains an express provision as to the apportionment of loss in case of impossibility, full effect is given to such provision.¹ A contract for supplying meals on board a steamer which was used to inspect the proposed naval review at the coronation of Edward VII, contained a provision that if the review was canceled before any liability was incurred by the caterer, no liability should attach to the adversary party. Under this contract it was held that if the review was canceled before the caterer had incurred any expense for refreshments, and had incurred only a small expense for articles such as knives, the adversary party was liable only for the expense thus incurred;² and if he had given a check for an advance payment and such check was stopped before it was cashed, no additional liability was incurred thereby.³ Effect is given to a contract between a property owner and a builder, apportioning the loss in case of fire.⁴

§ 2716. Risk not assumed—Theory that loss lies where it falls. If the parties to the contract have not entered into any agreement as to the assumption of a risk by either, it is held in England and in some of the states of the United States, that the loss lies where

¹⁴ Wood v. School District, 80 Neb. 722, 15 L. R. A. (N.S.) 478, 115 N. W. 308.

¹⁵ Milske v. Steiner Mantel Co., 103 Md. 235, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

¹⁶ Milske v. Steiner Mantel Co., 103 Md. 235, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

¹ Elliott v. Crutchley [1906] A. C. 7 [affirming, Elliott v. Crutchley (1904), 1 K. B. 565; which affirmed, Elliott v.

Crutchley (1903), 2 K. B. 476]; Savage v. Smith, 170 Cal. 472, 150 Pac. 353.

² Elliott v. Crutchley [1906], A. C. 7 [affirming, Elliott v. Crutchley (1904), 1 K. B. 565; which affirmed, Elliott v. Crutchley (1903), 2 K. B. 476].

³ Elliott v. Crutchley [1906], A. C. 7 [affirming, Elliott v. Crutchley (1904), 1 K. B. 565; which affirmed, Elliott v. Crutchley (1903), 2 K. B. 476].

⁴ Savage v. Smith, 170 Cal. 472, 150 Pac. 353.

it falls.¹ Where this view prevails, one who has agreed to do work upon a building or to construct an addition thereto, can not recover in quasi-contract for the value of the work which he has done up to the time at which the building was destroyed.² Under this theory no recovery can be had for the value of property which has been transferred in consideration of a promise which has subse-

¹England. *Appleby v. Meyers*, L. R. 2 C. P. 651; *Civil Service Co-operative Society v. General Steam Navigation Co.* [1903], 2 K. B. 756; *Blakeley v. Muller* [1903], 2 K. B. 760, note; *Chandler v. Webster* [1904], 1 K. B. 493.

Alabama. *Brumby v. Smith*, 3 Ala. 123.

Illinois. *Siegel v. Eaton & P. Co.*, 165 Ill. 550, 46 N. E. 449.

Indiana. *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

Michigan. *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278.

New Hampshire. *Dame v. Woods*, 73 N. H. 222, 70 L. R. A. 133, 60 Atl. 744.

Washington. *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

"The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does, no doubt, raise a question of some difficulty, and one which has perplexed the courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in *Taylor v. Caldwell* (3 B. & S. 826)—namely, that, where from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the con-

tract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it." *Chandler v. Webster* [1904], 1 K. B. 493.

²*Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

quently become impossible by act of the law.³ If A conveys realty to a railway company in consideration of annual passes, and subsequently the issuing of such passes is made unlawful, it has been held that A can not have rescission in equity and recover the realty thus conveyed and that damages can not be awarded to him.⁴ While the result which is reached under this theory is the same that would have been reached if both parties had each agreed to assume the risk of discharge by impossibility, and to make no claim for compensation in case of such discharge, the result can not be justified upon that ground, since in these cases the parties did not contemplate such discharge and made no provision therefor. The rule which denies compensation to either in such case is a rule of law and not an attempt to give effect to their intention.

§ 2717. Risk not assumed—Theory of mutual restitution—Impossibility of fact. According to the great weight of American authority, subsequent impossibility discharges the contract so that neither party can recover against the other for breach;¹ and instead of their former rights under the contract, the law imposes upon each party the duty of making restitution to the other for the benefits received by him under such contract; so that, as far as possible, the parties will be placed in the position in which they would have been placed if the contract had not been made.² If a contract for personal services is discharged by the sickness or death of the party who is to render such services, he or his personal representatives are entitled to recover a reasonable compen-

³ *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

⁴ *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

¹ See § 2711.

² *Alabama*. *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707.

Connecticut. *Leahy v. Cheney*, 90 Conn. 611, 98 Atl. 132.

Illinois. *Clark v. Busse*, 82 Ill. 515.

Indiana. *Coe v. Smith*, 4 Ind. 70, 58 Am. Dec. 618.

Iowa. *Garretty v. Brazell*, 34 Ia. 100.

Kentucky. *Louisville & N. R. Co. v.*

Crowe, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

Maine. *Preble v. Preble*, 115 Me. 26, 97 Atl. 9.

Massachusetts. *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667; *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 49 L. R. A. 562, 57 N. E. 674.

Mississippi. *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

New Hampshire. *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

New York. *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Dolan v.*

sation for the services rendered by him.³ A contract for the employment of an attorney is discharged by his death, but his estate has a right to a reasonable compensation for services rendered by him up to his death;⁴ and if such attorney was a member of a firm and the surviving partner is permitted to complete the contract, the estate of the deceased partner is entitled to a reasonable amount of the compensation thus earned.⁵ Where a contract to render services for the life of another does not impose upon the person who is to render such services the risk arising out of his death before the death of the person for whom he is to render services, his estate is entitled to reasonable compensation for services thus rendered by him;⁶ and the same result has been reached where performance of such services was prevented by illness.⁷ Under such circumstances recovery may be had during the lifetime of the person for whom such services were to have been rendered.⁸ A sailor

Rodgers, 149 N. Y. 489, 44 N. E. 167;
Sargent v. McLeod, 209 N. Y. 360, 52
L. R. A. (N.S.) 380, 103 N. E. 164.

Ohio. Bailey v. Brown, 9 Ohio C. C.
455, 6 Ohio C. D. 440.

Oklahoma. Allsman v. Oklahoma
City, 21 Okla. 142, 16 L. R. A. (N.S.)
511, 95 Pac. 468.

Rhode Island. Parker v. Macomber,
17 R. I. 674, 16 L. R. A. 858, 24 Atl.
464.

South Dakota. McClellan v. Harris,
7 S. D. 447, 64 N. W. 522.

Texas. Hollis v. Chapman, 36
Tex. 1.

West Virginia. Griffith v. Black-
water B. & L. Co., 55 W. Va. 604, 69
L. R. A. 124, 48 S. E. 442 [for former
opinion, see Griffith v. Lumber Co., 46
W. Va. 56, 33 S. E. 125]; Bell v.
Kanawha Traction & Electric Co., —
W. Va. —, 98 S. E. 885.

Wisconsin. Cook v. McCabe, 53 Wis.
250, 40 Am. Rep. 765, 10 N. W. 507.

England. Chandler v. Grieves, 2
H. Bl. 606.

Connecticut. Ryan v. Dayton, 25
Conn. 188, 65 Am. Dec. 560; Leahy v.
Cheney, 90 Conn. 611, 98 Atl. 132.

Illinois. Leopold v. Salkey, 89 Ill.
412, 31 Am. Rep. 93.

Indiana. Coe v. Smith, 4 Ind. 79,
58 Am. Dec. 618.

Maine. Preble v. Preble, 115 Me.
26, 97 Atl. 9.

Massachusetts. Harrington v. Iron
Works, 119 Mass 82.

Mississippi. Clifton v. Clark, 83
Miss. 446, 102 Am. St. Rep. 458, 36 So.
251; Ganong v. Brown, 88 Miss. 53
117 Am. St. Rep. 731, 40 So. 556.

New Jersey. Hargrave v. Conroy, 19
N. J. Eq. 281.

New York. Clark v. Gilbert, 26 N.
Y. 279, 84 Am. Dec. 189.

South Dakota. McClellan v. Harris,
7 S. D. 447, 64 N. W. 522.

Vermont. Hubbard v. Belden, 27 Vt.
645.

Wisconsin. Green v. Gilbert, 21 Wis.
395.

⁴ Clifton v. Clark, 83 Miss. 446, 102
Am. St. Rep. 458, 36 So. 251.

⁵ Clifton v. Clark, 83 Miss. 446, 102
Am. St. Rep. 458, 36 So. 251.

⁶ Leahy v. Cheney, 90 Conn. 611, 98
Atl. 132.

⁷ Preble v. Preble, 115 Me. 26, 97
Atl. 9.

⁸ Preble v. Preble, 115 Me. 26, 97
Atl. 9.

who has been imprisoned lawfully during his time of employment, may recover wages up to the time at which he was imprisoned.⁹ If a contract for performing work and labor on a house, the house itself belonging to and being under the control of the owner or some one who represents him, is discharged by the destruction of such house without the fault of the contractor who has done work thereon under his contract, such contractor may recover a reasonable compensation for work done by him before such discharge.¹⁰ A contract to do lathing and plastering,¹¹ or painting and papering,¹² to do part of the brick and mason work,¹³ or to construct a heating plant which becomes part of the realty as it is constructed,¹⁴ to do work other than grading, excavating, stone and brick work and plumbing,¹⁵ to put a tin roof on,¹⁶ to place pews in a church,¹⁷ to repair and remodel an existing structure,¹⁸ or to remove an existing building,¹⁹ are each discharged by a destruction of such building without the contractor's fault, before the contract

⁹ *Wiggins v. Ingleton*, 2 Ld. Raym. 1211.

¹⁰ *Illinois*. *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; *Clarke v. Busse*, 82 Ill. 515 (substantial performance on part of sub-contractor).

Indiana. *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

Iowa. *Garretty v. Brazell*, 34 Ia. 100.

Massachusetts. *Cleary v. Sohler*, 120 Mass. 210; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667.

Mississippi. *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

Missouri. *Haynes v. Church*, 88 Mo. 285, 57 Am. Rep. 413.

New Hampshire. *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

New York. *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293.

Ohio. *Bailey v. Brown*, 9 Ohio C. C. 455, 6 Ohio C. D. 440.

Tennessee. *Wilson v. Knott*, 22 Tenn. (3 Humph.) 473.

Texas. *Hollis v. Chapman*, 36 Tex. 1; *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38, 3 S. W. 726.

Virginia. *Clark v. Franklin*, 34 Va. (7 Leigh) 1.

West Virginia. *Hysell v. Sterling, etc., Co.* 46 W. Va. 158, 33 S. E. 95.

Wisconsin. *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507.

¹¹ *Cleary v. Sohler*, 120 Mass. 210.

¹² *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

¹³ *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507.

¹⁴ *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081.

¹⁵ *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667.

¹⁶ *Hysell v. Sterling, etc., Co.*, 46 W. Va. 158, 33 S. E. 95.

¹⁷ *Haynes v. Church*, 88 Mo. 285, 57 Am. Rep. 413.

¹⁸ *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38, 3 S. W. 726.

¹⁹ *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 49 L. R. A. 562, 57 N. E. 674.

is performed, and the contractor may recover on quantum meruit. However, a contract to install a ventilating system has been held not to be discharged by the destruction of the building in which it is being constructed. Accordingly, the contractors can not recover a reasonable compensation for work done.²⁰ Where A agreed to construct an annex to B's building, and building and annex were both burned, it was held that the contract was discharged, and that the owner could recover only the excess of payments made by him to the contractor over payments made by the contractor under the contract.²¹

§ 2718. Theory of mutual restitution—Impossibility of law. If a contract was lawful when made, and its performance is subsequently made legally impossible by a change in legislation, recovery may be had for whatever has been parted with under such contract.¹ If money is paid for a license to sell intoxicating liquors, and such business is lawful when such payment is made, but during the period for which such license issued such business becomes unlawful, the party who made such payment is entitled in most jurisdictions to recover the unearned portion of such fee.² If existing licenses can not be affected by subsequent legislation, during the time for which such license was given, no part of the license fee can be recovered because of such legislation.³ The person who pays for such license is ordinarily not regarded as taking the risk of such legislation.⁴ In jurisdictions in which it is held that the

²⁰ *Huyett, etc., Mfg. Co. v. Edison Co.*, 167 Ill. 233, 59 Am. St. Rep. 272, 47 N. E. 384.

²¹ *Krause v. Crothersville*, 162 Ind. 278, 70 N. E. 264. (In this case the contractor had spent more than he had received and no recovery was allowed.)

¹ *Charles Blum Co. v. Hastings*, — Fla. —, L. R. A. 1918F, 783, 79 So. 442; *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759; *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L. R. A. (N.S.) 511, 95 Pac. 468.

² *Charles Blum Co. v. Hastings*, — Fla. —, L. R. A. 1918F, 783, 79 So. 442; *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L. R. A. (N.S.) 511, 95 Pac.

468; *Bart v. Pierce County*, 60 Wash. 507, 31 L. R. A. (N.S.) 1151, 111 Pac. 582.

³ *Miller v. Central City*, 178 Ky. 602, L. R. A. 1918C, 240, 199 S. W. 611.

⁴ "Specious reasoning which justifies an individual or corporation, municipal or private, in keeping money received for a privilege that, through no fault of either party, the recipient is unable to grant, is of slight weight. It is no answer to this to say that the licensee knew that the people might at any time place it beyond the power of the city to give him the privilege that he had paid for. The city had the same knowledge, and it can be as well said that it took the money, knowing

party who applies for a license takes the risk of subsequent action under a prior local option law, which will render the sale of intoxicating liquors invalid in that district, one who has paid for a license to sell intoxicating liquor can not recover any part thereof, if such sale is subsequently prevented by action under a prior local option statute.⁵ A had permission from the Secretary of the Treasury to search for a boatful of gold which had been sunk in the East River during the War of the Revolution. B advanced to A money to be expended in this search, A promising to pay B ten times as much money as B advanced to him in case the treasures were recovered. The Secretary of the Treasury subsequently canceled A's permission to make such search. A was held bound to refund to B the amount of money remaining in his hands unexpended.⁶ If A has conveyed realty to a railway in consideration of the promise of the railway to issue annual passes to him and it is subsequently made unlawful to issue passes, A is entitled to recover the value of the property thus conveyed less the value of the passes which he has already received.⁷ If an executory contract with a corporation is discharged by the dissolution of the corporation, one who has performed services thereunder and incurred expenses thereunder may recover reasonable compensation.⁸

it might have to return for the unused portion of the license, if, through operation of law, it could not continue the privilege it had agreed to grant to the licensee.

"The defendant in error concludes his brief with a statement of which this is a part, and this seems to be the theory upon which it predicates its defense: 'It took that chance. Having taken the chance, it can not, we submit, be heard to urge an implied obligation for relief against this defendant.'

"It is noticeable that the courts that sustain the contention of defendant in error adopt the same reasoning. We quote from some of these decisions: It is 'one of the risks and chances which he assumes when he procures his license.' *Roberts v. Boise City*, 23 Idaho 716, 45 L. R. A. (N.S.) 593, 132 Pac. 306. 'He takes his chances about "the revocation."' *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210.

"This is the language of the race track and the card table, and is in marked contrast to that used by the courts that hold it to be the duty of the city to refund the unused portion of a liquor license when, through no fault of either party, both are precluded from doing that for which one paid and the other received the money." *Charles Blum Co. v. Hastings*, — Fla. —, L. R. A. 1918F, 783, 70 So. 442.

See § 2717.

⁵ *Peyton v. Hot Springs Co.*, 53 Ark. 236, 13 S. W. 764.

⁶ *Thomas v. Hartshorn*, 45 N. J. Eq. 215, 3 L. R. A. 381, 16 Atl. 916.

⁷ *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

⁸ *Griffith v. Blackwater B. & L. Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 422 [for former opinion, see *Griffith v. Lumber Co.*, 46 W. Va. 56, 33 S. E. 125].

§ 2719. Amount of recovery—Theory of reasonable compensation. The amount which can be recovered by one who has performed in part under a contract which is discharged by impossibility, is generally limited to the value of the property which actually passed to the adversary party by reason of such performance, or to the value of the services of which the adversary party actually had the benefit.¹ If a contract to build a part of a building is discharged by the destruction of the building, the contractor can not recover the value of materials which had not become a part of the building when it was destroyed.² It has been said that the tests for determining whether the materials in place have become a part of the building is whether such materials could be removed for a reasonable sum.³ Recovery can be had for preliminary work which is done upon the building itself,⁴ such as work in removing the part of the building which the contractor is to replace.⁵ No recovery can be had for the expense of preliminary work which is not done upon the building itself,⁶ such as digging trenches,⁷ or furnishing forms which were to be used for the construction of concurrent work, but which were not to remain as part of the building when completed.⁸

On the other hand, where an executory contract for hauling and delivering lumber to a corporation was discharged by the dissolution of the corporation on account of insolvency, the contractor was allowed to recover not only the value of the services rendered to the corporation under the contract, but also expenditures for tools, appliances, construction of roads, and the like, as preparation for the performance of such contract.⁹

¹ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143; *Taulbee v. McCarty*, 144 Ky. 199, 36 L. R. A. (N.S.) 43, 137 S. W. 1045; *Dame v. Woods*, 73 N. H. 222, 70 L. R. A. 133, 60 Atl. 744.

See also, *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

² *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143; *Taulbee v. McCarty*, 144 Ky. 199, 36 L. R. A. (N.S.) 43, 137 S. W. 1045; *Dame v. Woods*, 73 N. H. 222, 70 L. R. A. 133, 60 Atl. 744.

³ *Dame v. Woods*, 73 N. H. 222, 70 L. R. A. 133, 60 Atl. 744.

⁴ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

⁵ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

⁶ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143; *Taulbee v. McCarty*, 144 Ky. 199, 36 L. R. A. (N.S.) 43, 137 S. W. 1045.

⁷ *Taulbee v. McCarty*, 144 Ky. 199, 36 L. R. A. (N.S.) 43, 137 S. W. 1045.

⁸ *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917D, 1006, 164 Pac. 143.

⁹ *Griffith v. Blackwater B. & L. Co.*, 55 W. Va. 604, 60 L. R. A. 124, 48 S. E. 442 [for a former opinion, see *Griffith*

Recovery can be had for the value of partial performance where full performance is prevented by subsequent impossibility, only if the services or property by which recovery is sought were required by the contract between the parties.¹⁰ If A rendered services to B, not under any contract for such services, but because A and B had agreed to intermarry in the future, and such contract is discharged by B's death before the time fixed for such marriage, A can not recover reasonable compensation for such services from B's estate.¹¹

§ 2720. Theory of recovery at contract rate with deduction for damages. A third theory as to the rights of the parties upon discharge by subsequent impossibility recognizes the right of one who has performed in part to recover for such performance; but instead of permitting recovery of reasonable compensation therefor,¹ this theory recognizes his right to recover at the contract rate for the value of the performance.² If work has been done upon an existing building which belongs to another, and such contract becomes impossible because such building is destroyed, the party who has performed such work has been allowed to recover a pro rata amount of the contract price.³

The difficulty which underlies this rule is that it recognizes the contract as in effect for the purpose of determining the amount of compensation, although it treats it as discharged for the purpose of allowing recovery upon such contract by one who has not performed in full, and who in many jurisdictions,⁴ could not have recovered at all if it had been a case of breach on his part instead of impossibility. If the contract price is obtained by fixing a value upon a unit of time or material and multiplying it by the

v. Lumber Co., 46 W. Va. 56, 33 S. E. 425].

¹⁰ Newhall v. Knowles, 28 R. I. 348, 67 Atl. 365.

¹¹ Newhall v. Knowles, 28 R. I. 348, 67 Atl. 365.

¹ See § 2719.

² Alabama. Hunter v. Waldron, 7 Ala. 753; Jones v. Deyer, 16 Ala. 221.

New Hampshire. Dame v. Woods, 75 N. H. 38, 70 Atl. 1081.

New York. Clark v. Gilbert, 26 N. Y. 280.

Vermont. Patrick v. Putnam, 27 Vt. 750.

Wisconsin. Cook v. McCabe, 53 Wis. 250, 10 N. W. 507; Halsey v. Waukesha Springs Sanitarium, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

³ Dame v. Woods, 75 N. H. 38, 70 Atl. 1081; Cook v. McCabe, 53 Wis. 250, 10 N. W. 507; Halsey v. Waukesha Springs Sanitarium, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.

⁴ See ch. LXXXIV and ch. LXXXVIII.

total number of units necessary to full performance, the result which is reached by this rule will not be very different from the result which would have been reached if reasonable compensation had been given, except that it gives the benefit of an advantageous bargain to the party whose performance was prevented by such impossibility. Even in cases of this sort, however, the party for whose benefit performance is to be made, may be willing to pay a higher rate for full performance than he would have agreed to pay for incomplete or partial performance. In cases in which the contract is for the payment of a lump sum, on the one hand, and for the performance, on the other hand, of a number of different kinds of work, and the furnishing of a number of different kinds of material of unequal values, it is impracticable to apply this rule; and an attempt to apply it will ordinarily give a far less accurate result than an attempt to give reasonable compensation. If the contract is one for the performance of a number of different kinds of service or for furnishing a number of different kinds of different material of different values, and the value of each service or material is pro rated by the terms of the contract, there is little difficulty in applying the rule, and the only chance of injustice is that a party may be held to pay a price for incomplete performance which he would have agreed to pay for full performance only.

In some jurisdictions this rule is further modified so as to allow recovery at the contract rate, less damages which the adversary party has sustained by reason of failure to perform.⁵ If a contract for personal services is discharged by the illness of the party by whom such services are to be rendered, it has been held that the proper amount of recovery is the contract rate of compensation less the damages sustained by his failure to perform;⁶ and the amount of such damages is ordinarily the difference between the contract rate and the cost at which it is possible to secure performance of such contract for the remainder of the period.⁷ This rule has been applied where the employer agreed to pay a certain salary, together with a certain share of the profits, and the sickness and death of the employe after about three years prevented full performance.⁸

⁵ *Hunter v. Waldron*, 7 Ala. 753; *Jones v. Deyer*, 16 Ala. 221; *Clark v. Gilbert*, 26 N. Y. 280; *Patrick v. Putnam*, 27 Vt. 759.

⁶ *Clark v. Gilbert*, 26 N. Y. 280; *Patrick v. Putnam*, 27 Vt. 759.

⁷ *Patrick v. Putnam*, 27 Vt. 759.

⁸ *Clark v. Gilbert*, 26 N. Y. 280.

In other jurisdictions an attempt is made to do justice between the parties by ignoring the contract rate for such extra compensation; and by giving to

If the contract of employment is not treated as discharged entirely by reason of the sickness of the employe, and the employe is allowed to resume his employment upon his recovery from such illness, it has been held that the employer is bound to pay the contract rate less the loss sustained by reason of such illness.⁹ It is said that on discharge of a contract by impossibility, the party who is in default may recover reasonable compensation for his services, even in jurisdictions in which he could not have recovered reasonable compensation if his default had been due to a voluntary breach;¹⁰ but that the amount of damages which has been caused to the employer by such default must be deducted from such reasonable compensation.¹¹ The effect of this rule is to adopt the rule in force in some jurisdictions in cases of breach,¹² and to make it apply to impossibility in other jurisdictions in which no recovery in quasi-contract could have been had in case of breach.

the employe reasonable compensation for services rendered less the amount which he has actually received under the contract. See § 2719.

⁹ Hunter v. Waldron, 7 Ala. 753; Jones v. Deyer, 16 Ala. 221.

¹⁰ Walsh v. Fisher, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

¹¹ Walsh v. Fisher, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

¹² See ch. LXXXVII.

CHAPTER LXXIX

WAR AS AFFECTING CONTRACT RIGHTS

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VII. SPECIFIC CONTRACTUAL PROVISIONS WITH REFERENCE TO WAR

- § 2768. Effect of specific contractual provisions with reference to war—Provisions for suspension or discharge of contract.
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VIII. CONTRACTS IN VIOLATION OF WAR RIGHTS OF FRIENDLY
ALIEN NATIONS

- § 2771. Contracts in violation of war rights of friendly nations.

I

NATURE AND EXISTENCE OF WAR

§ 2721. Definition, nature and classes of war. "War has been well defined to be 'that state in which a nation prosecutes its right by force.'"¹ It has also been defined as "a contention by force between nations."² Other definitions of war between inde-

¹ The Prize Cases, 67 U. S. (2 Black) 635, 17 L. ed. 459.

² *Bas v. Tingy*, 4 U. S. (4 Dall.) 371 L. ed. 731.

pendent and recognized nations express the same general ideas in varying terms.³ Wars of this sort have been divided by some authorities into the solemn or perfect war,⁴ and the limited or imperfect war,⁵ in which hostile relations exist for special purposes but not for general purposes. The practical illustration of this sort of imperfect war is found in the relations between the United States and France in the early part of the nineteenth century. The nations were said for some purposes to be at war,⁶ and yet it was said that there was "no public general war, but limited war, in its nature similar to a prolonged series of reprisals."⁷ A more recent example of war in the limited sense has been found by some courts

³ "What is war? 'It is a contest,' says Bynkershoek, 'carried on between independent persons for the sake of asserting their rights.' Where society does not exist—where there is no such institution as that which we call government—there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war can not exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. Bynk. War, p. 128. If war, then, be the act of the nation, whatever is done in the prosecution of it, must either expressly or implicitly be under the national authority. Whatever private benefits result from it must be from a national grant. 'War,' says Vattel (page 368), 'is that state in which a nation prosecutes its right by force.'" *United States v. "Active,"* 24 Fed. Cas. 755.

For a summary of earlier definitions, see *Arce v. State* (Tex. Crim. App.), 202 S. W. 951.

⁴ "It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole na-

tion, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition." *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 1 L. ed. 731.

⁵ "But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power." *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 1 L. ed. 731.

⁶ *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 1 L. ed. 731.

⁷ *Gray v. United States*, 21 Ct. Cl. 340.

in Pershing's invasion of Mexico.⁸ War of the imperfect type affects the contractual relations which exist between citizens of the respective belligerent powers when such war breaks out or which are entered into during such war, only to the extent to which the respective governments recognize their relations as war.

While at the outset of a civil war the parent state usually attempts to deny the existence of war and to treat the part of its community which has revolted as an organization of traitors, it is ordinarily forced to recognize the fact of their insurgency and ultimately of their belligerency if the revolt has sufficient strength and maintains itself for a sufficient period of time. A civil war, accordingly, is recognized as a war for general purposes, as long as that part of the nation which has revolted is able to maintain itself;⁹ and such a war has the same effect upon contracts as a war between independent nations.¹⁰ In addition thereto, contracts which are entered into for the purpose of carrying on such war on behalf of that part of the state which has revolted, may be re-

⁸ *Arce v. State*, (Tex. Crim. App.), 202 S. W. 951.

⁹ "The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be

in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels, who owe allegiance, and who should be punished with death for their treason." *The Prize Cases*, 67 U. S. (2 Black) 635, 17 L. ed. 459.

¹⁰ "A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms." *The Prize Cases*, 67 U. S. (2 Black) 635, 17 L. ed. 459.

"Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend

garded by the parent state as contracts in aid of treason if the revolt proves unsuccessful.¹¹ The Civil War of the United States was recognized by the courts of the United States as a war of this sort;¹² and to a far more limited degree the insurrection in Cuba against Spanish rule was recognized as at least a condition of insurgency.¹³

§ 2722. Commencement and termination of war. In determining the existence and kind of war in which a given state is claimed to be engaged, the courts of that state are bound by the acts of the political departments of the government upon whom the power of making war and of recognizing the existence of war is conferred by the constitution of that state.¹ For general purposes the Civil War was accordingly held to begin with the presidential proclamation of a blockade of the southern ports,² rather than with the

upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships." *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

¹¹ See § 862.

¹² *The Prize Cases*, 67 U. S. (2 Black) 635, 17 L. ed. 459; *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

¹³ *The Three Friends*, 166 U. S. 1, 41 L. ed. 897.

¹ *The Pedro*, 175 U. S. 354, 44 L. ed. 195; *The Buena Ventura*, 175 U. S. 384, 44 L. ed. 206.

"War in its legal sense has been aptly defined to be 'the state of nations among whom there is an interruption of all specific relations, and a general contestation of arms authorized by the sovereign.' It is true, it may and has frequently in latter times been commenced and carried on without either a notice or a declaration. But still, there can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department

of the government clothed with the war-making power. In the Confederate States, congress was invested with this power. Until it acted, however great the provocation, or imminent its probability, the courts could not say that amicable relations might not be restored without actual war. If congress, when it acts, should declare the war to have existed anterior to its declaration, the courts will follow the declaration; and, if the question should be subsequently brought before them, the courts will follow the declaration, and take judicial notice of its existence from the time thus fixed. But for them to attempt to declare its existence as a matter of legal knowledge, before any action has been taken by the war-making power, would be a most flagrant violation of duty. This was not done by the congress of the Confederate states until subsequently to the time when, it is urged, the district court should have said, as a matter of judicial knowledge, that the war had commenced." *Bishop v. Jones*, 28 Tex. 294.

² *The Prize Cases*, 67 U. S. (2 Black) 635, 17 L. ed. 459; *Brown v. Hiatts*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

actual outbreak of hostilities; and it was held to end with the President's proclamation of the restoration of peace,³ rather than with the actual cessation of hostilities.⁴ The courts of a state which adhered to the Confederacy refuse to take judicial notice of the fact that the Civil War existed on the 16th of April, 1861, although the bombardment of Fort Sumter had begun before that time.⁵ For purposes of determining whether a vessel captured on the high seas was lawful prize, retroactive effect was given to a declaration of war which by its terms was retroactive,⁶ although a liberal construction was given to all ambiguous or doubtful terms of such declaration and proclamation.⁷

II

CONTRACTS MADE DURING WAR

§ 2723. General effect of war on contracts. In considering the effect of war upon contracts, at least three different classes of cases must be considered. In one class of cases the contract in question was made before the outbreak of war, and it was a valid and lawful contract when it was made; but its continued validity or its performance is affected by the outbreak of the war, because of the fact that the parties to the contract have become alien enemies, or because the performance of such contract by the citizens of one of the belligerent powers will aid the other belligerent power in some way, or at least will involve trading with the enemy. In contracts of this sort the original validity of the contract is assumed, and the questions which are to be considered involve the effect of war upon the contract either by general rules of international law which have been adopted by our courts as a part of our general law, or by the policy of the state in which it is sought to enforce such contract as expressed by its legislation, valid executive proclamations, and the like.¹

³ *Brown v. Hiatts*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

⁴ *Brown v. Hiatts*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

⁵ *Bishop v. Jones*, 28 Tex. 294.

⁶ *The Pedro*, 175 U. S. 354, 44 L. ed. 195.

⁷ *The Buena Ventura*, 175 U. S. 384, 44 L. ed. 206.

¹ See §§ 2733 et seq.

On the effect of war on contracts generally, see *The Effect of War on Contracts*, by John M. Hall, 18 *Columbia Law Review* 325; *The Effect of War on Contracts*, by Leslie Scott, 30 *Law Quarterly Review* 77; *Some Legal Consequences of the European War*, by Geo. W. Wickersham, 24 *Yale Law Journal* 412, and *The War and Our Patent Laws*, by Wm. Macomber, 25 *Yale Law Journal*, 396.

The second class of cases deals with contracts which are made after the outbreak of war, and which are invalid when made, because of the relation of the parties thereto as being domiciled respectively in the different belligerent countries, or as being citizens of such countries, or which tend to aid the country which is an enemy to that in whose courts it is sought to enforce such contract. In this case, as well as in the former case, the rights of the parties are to be determined by the general rules of international law and by the policy of the state in which it is sought to enforce such contract, as expressed in its legislation and in its executive proclamations. This class of cases differs from the former class in that the state in which it is sought to enforce such contract may in many cases regard it as invalid and illegal from the beginning, so that no rights of any kind can attach thereunder.²

The third class of cases consists of those in which the contract was valid when made and in which the performance of such contract does not involve any violation of ordinary rules of war, such as trading with the enemy, but in which the performance of such contract is made either legally impossible, or practically impossible, as the case may be, by the outbreak of the war. Cases of this sort present questions of impossibility of performance, but the fact that the impossibility is due to the outbreak of the war makes cases of this sort resemble the two preceding cases as much as they resemble the cases of ordinary impossibility.³

§ 2724. Contracts made during war—General principles. In determining the validity of contracts which are made during the war, a number of different factors must be considered, among them the nationality of the adversary parties to the contract, the domicile of the parties to the contract, the effect of such contract as enriching an individual who is an alien subject or is domiciled in the country of the enemy, and the effect of such contract as tending to aid the hostile government in carrying on the war. To which of these different factors the greatest weight will be given, depends in part upon the theory which is adopted by the court as the basis for holding certain of these contracts invalid.

In a number of cases a contract is said to be invalid whenever it involves trading with the enemy;¹ but this general principle

² See §§ 2724 et seq.

³ See §§ 2759 et seq.

¹ *Montgomery v. United States*, 82

U. S. (15 Wall.) 305, 21 L. ed. 97;

United States v. Lapéné, 84 U. S. (17

Wall) 601, 21 L. ed. 693.

gives us but little help, since it affords no means of determining just what trade is or just who an enemy is.

In some of the adjudicated cases, especial stress is laid upon the fact that upon declaration of war all the citizens of any country are, in theory at least, in relations of hostility to all the citizens of the enemy country.² The theory that war makes every subject of one country an enemy of every subject of the enemy country, is, however, abandoned for most purposes, including the right of subjects of the belligerent country who are not actually enrolled in the land or naval forces of that country, to take part in active hostilities. The objection to contracts between citizens of hostile countries during war, arises out of the fact that such contract requires communication across the lines of war and requires for its performance, eventually, the enrichment of one or the other of such parties, rather than out of the fact that by reason of the declaration of war they become in fact enemies to one another, and that accordingly dealings between them are impossible.³ In the absence of special statutory restrictions, a contract between a subject of one state who is lawfully in the territory of the adversary belligerent, and a subject of such adversary belligerent, is valid even though made in time of war.⁴ If a citizen and resident of a state which adhered to the Union was actually sojourning in the South during the Civil War, it was held that he could enter into a valid lease of a plantation in such seceding state,⁵ and that he could be held liable after the termination of war in an action in the courts of a state which adhered to the Union, on such lease for the rent of such plantation, as well as for the value of personal property purchased in connection with such lease.⁶

² "War terminates all friendly intercourse between the citizens of hostile states. There can not be, as has been frequently said, 'a war for arms and a peace for commerce.' To suffer individuals to carry on commercial or friendly intercourse while the two governments are at war, would be placing the act of the government and the acts of individuals in contradiction with each other." *Bishop v. Jones*, 28 Tex. 294.

This theory has also been invoked in cases in which war is held to discharge a contract entered into before

the outbreak of the war. *Griswold v. Waddington*, 16 Johns (N. Y.) 438.

³ *Kershaw v. Kelsey*, 100 Mass. 561.

⁴ *Kershaw v. Kelsey*, 100 Mass. 561.

⁵ *Kershaw v. Kelsey*, 100 Mass. 561.

⁶ *Kershaw v. Kelsey*, 100 Mass. 561.

"The lease now in question was made within the rebel territory where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term. . . . No agreement appears to have been made as part of or contemporaneously with the lease, that the cot-

Contracts with reference to property which is situated in the country of the enemy, are not invalid if they do not involve communications across the lines of war and if they are not intended to defeat the right of the country whose courts are asked to enforce such contract, to confiscate or to forfeit such property.⁷ A contract which is entered into between alien enemies who are resident in the territory of the enemy, for the sale and conveyance of realty, situated in the territory of the enemy, is not rendered invalid by the fact that they are alien enemies.⁸ A contract between two subjects of one of the belligerent powers who are domiciled in the territory of such power, for the sale of personal property which is situated in the territory of the other belligerent power, is not invalid if it does not operate to defeat the right of the country in which they are resident, to confiscate such property under its right in time of war.⁹ These principles were applied in the Civil War, and the courts of the United States upheld sales of realty which were situated within the limits of the Confederacy as between persons who were domiciled in the limits of the Confederacy,¹⁰ and also upheld sales of personalty which was situated within the limits of the Confederacy where the parties to such sale were both domiciled in states which adhered to the Union,¹¹ as long as such

ton crop should be transported, or the rent sent back, across the line between the belligerents, and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one, or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful, but that can not affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the

enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn." *Kershaw v. Kelsey*, 100 Mass. 581.

⁷ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976; *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

⁸ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976.

⁹ *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

¹⁰ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976.

¹¹ *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

sales did not interfere with the right of the United States to confiscate or to forfeit such property.

Furthermore, a resident alien owes only a temporary or local allegiance and owes no duty to take part in the war on behalf of the country in which he is domiciled; but a contract between a resident alien neutral made across the lines of war with an enemy subject, is just as objectionable as if it had been entered into by a subject of the country in which such alien was domiciled.¹²

The real objection to a contract between a resident of one of two hostile countries, and a resident of another is based upon the objection to allowing communication across the lines of war, and to enriching persons who are actually resident in the enemy's country, rather than on any theory of breach of allegiance.¹³

The rule that war renders certain contracts illegal is not confined to contracts the result of which would be to enrich the enemy in the individual transaction.¹⁴ An executory contract made during the war between a subject of the United States, who is a resident in the United States, and an enemy subject who was resident in an enemy country, has been held to be invalid, although such contract was not performed on either side until after the termination of the war.¹⁵ A letter written by a debtor who was a citizen of the state which adhered to the Confederacy, and sent through the lines of war to a citizen of a state which adhered to the Union, will not operate as a new promise to prevent the running of the Statute of Limitations.¹⁶ No action can be maintained on a note which was executed and delivered, during the war, by a citizen of a state which adhered to the Southern Confederacy, to a citizen of a state which adhered to the United States.¹⁷

¹² *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

¹³ *Esposito v. Bowden*, 7 El. & Bl. 763; *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is

illegal." *Esposito v. Bowden*, 7 El. & Bl. 763.

¹⁴ *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793; *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

¹⁵ *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793.

¹⁶ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

¹⁷ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783.

Probably no one of these bases can be taken as the exclusive ground for declaring that trading with the enemy is illegal, and that contracts which amount to trading with the enemy are unenforceable. Probably a combination of the theories of breach of allegiance, of enriching the enemy, and of affording a means of communicating information which might aid the enemy will explain the results reached in the specific case,¹⁸ although the emphasis to be placed upon one or the other of these theories may vary with the individual case.

§ 2725. Contracts which tend to aid the enemy. A contract which is entered into during war, by which one who owes permanent allegiance, and probably by one who owes temporary allegiance, to a country which tends to aid the enemy in prosecuting the war, amounts to an act of treason; and accordingly such contract is illegal and unenforceable.¹ If goods are sold, services performed, and the like, knowing that they are intended to aid a treasonable plan, such knowledge is of itself sufficient to render the contract illegal, and it is not necessary that such illegal purpose shall be a term of the contract in question.²

¹⁸ "It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and 'places every individual of the respective governments, as well as the governments themselves, in a state

of hostility;' and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war, for their continued existence would involve community of interest and mutual dealing between enemies." *Matthews v. McFtee*, 91 U. S. 7, 23 L. ed. 188.

¹ *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439; *Hanauer v. Woodruff*, 82 U. S. (15 Wall.) 439, 21 L. ed. 224; *Shepherd v. Reese*, 42 Ala. 329; *Patton v. Gilmer*, 42 Ala. 548; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Milner v. Patton*, 49 Ala. 423; *Ware v. Jones*, 61 Ala. 288; *Clements v. Yturria*, 14 Hun (N. Y.) 151; *Isaacs v. Richmond*, 90 Va. 30.

² *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439.

"He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, know-

The illegality of such contract is, perhaps, most clear when it is entered into across the lines of war by a subject of the nation whose enemies he is aiding by making such contract.³ A contract by which a citizen of a state which adhered to the Union, agreed knowingly to furnish military stores, including weapons, to the Confederate government during the Civil War, and to take cotton in compensation for such supplies, is illegal.⁴

On the other hand, the fact that such contract is not made through the lines of war, and that the parties thereto are both domiciled in the insurgent territory, and that they both claim allegiance to the insurgent government, does not render such contract valid.⁵ No recovery can be had upon a bond to secure the performance of a contract to make weapons for a seceding state, which are to be used in resisting the authority of the United States.⁶ A contract for the sale of a plant which the buyer in-

ing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He can not be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439.

"When a contract is thus connected by its consideration with an illegal transaction a court of justice will not aid its enforcement. It is sometimes said that the test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires any aid from the illegal transaction to establish his case. This test was given in *Simpson v. Bloss* (7 Taunt. 246), by the courts of Common Pleas, in England. But it is too narrow in its terms and excludes many cases where

the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction. He might, in some instances, establish his case by showing a simple loan of money, or a simple sale of goods, yet the court would hold the contract of loan or sale to be invalid if at the time the money was loaned or the goods were sold he knew they were to be used for an illegal and criminal transaction, and the contract was made to further its execution." *Hanauer v. Woodruff*, 79 U. S. (15 Wall.) 439, 20 L. ed. 439.

³*Clements v. Yturria*, 14 Hun (N. Y.) 151.

⁴*Clements v. Yturria*, 14 Hun (N. Y.) 151.

⁵*Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439; *Hanauer v. Woodruff*, 82 U. S. (15 Wall.) 439, 21 L. ed. 224; *Shepherd v. Reese*, 42 Ala. 320; *Patton v. Gilmer*, 42 Ala. 548; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Milner v. Patton*, 49 Ala. 423; *Ware v. Jones*, 61 Ala. 288; *Isaacs v. Richmond*, 90 Va. 30.

⁶*Patton v. Gilmer*, 42 Ala. 548.

tended, to the knowledge of the seller, to use in making iron for the Confederate government, to assist it in prosecuting war against the United States, is illegal and no recovery can be had thereon.⁷ No recovery can be had upon a note which is given for a horse which by the terms of the contract was to be used in a "mounted company" in the service of the Confederacy, and which was to be paid for as the purchaser "draws his money," that is, his pay from the Confederacy.⁸ If A sold goods to B, knowing that B intended to use such goods for the purpose of clothing soldiers of the Confederate army, it was held that A could not recover therefor.⁹ If A lent money to B, knowing that B intended to use such money to erect iron works and to make iron for the Confederate government, A can not recover upon such loan.¹⁰ No recovery can be had upon a contract by which A hires mules from B, intending, to B's knowledge, to use them in assisting in the manufacture of iron for the Confederate government.¹¹ No recovery can be had for supplies and commissary stores sold to a supply contractor of the Federal government, if the seller knew when he made such sale that such goods were to be used for the Confederate army.¹² No recovery can be had upon a promissory note which was given for bonds of a seceding state which were issued by such state for the purpose of carrying on war against the United States.¹³ A city is not liable upon its notes which were issued for the purpose of aiding in the prosecution of war against the United States.¹⁴

§ 2726. Contracts made or to be performed across the lines of war. A contract which is made in time of war between persons who are subjects of the respective belligerent powers or who are domiciled in the territory of the respective belligerent powers, is illegal.¹ In many of the cases in which this question is presented, the contract is also invalid because it is made between one who is

⁷ *Ware v. Jones*, 61 Ala. 288.

⁸ *Shepherd v. Reese*, 42 Ala. 329.

⁹ *Milner v. Patton*, 40 Ala. 423.

¹⁰ *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

¹¹ *Oxford Iron Co. v. Quinchett*, 44 Ala. 487.

¹² *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439.

¹³ *Hanauer v. Woodruff*, 82 U. S. (15 Wall.) 439, 21 L. ed. 224.

¹⁴ *Isaacs v. Richmond*, 90 Va. 30.

¹ *United States v. United States v. Grossmayer*, 76 U. S. (9 Wall.) 72, 19 L. ed. 627; *United States v. Lap  n  *, 84 U. S. (17 Wall.) 601, 21 L. ed. 693.

Arkansas v. Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783.

Indiana v. Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639.

Louisiana v. Irwin v. Levy, 24 La. Ann. 302.

Tennessee v. Nelson v. Trigg, 3 Tenn. Cas. 733.

a citizen of the country in which it is sought to enforce the contract, and who is domiciled therein, and who has made such contract across the lines of war, and another who is a subject of the belligerent power and who is domiciled within the territory of such power.² While the illegality of such contracts is most clear where they are not only made across the lines of war, but where they are also made with the purpose of aiding the enemy,³ their illegality is not limited to cases in which they aid the enemy. If one who resides within the Union lines advances the purchase price for goods which are to be delivered to him later, in the Union lines, by one who resides within the Confederate lines, and such advance is secured by a mortgage upon the lands of the vendor, such debt and mortgage are illegal and can not be enforced in time of peace.⁴ Even if the contract will enure exclusively to the benefit of the subjects of the state in whose courts an action is brought thereon, the fact that it is made across the lines of war renders it invalid.⁵ No action can be brought upon a note which was given during the war by a citizen of one of the belligerent powers who is domiciled therein, to a citizen of the other belligerent power, who was domiciled therein, even though such note was given for a valid pre-existing debt.⁶ It has, accordingly, been held that no action can be maintained, on a note which was executed and delivered during the war, which was executed by a citizen of a state which adhered to the Southern Confederacy, to a citizen of a state which adhered to the United States.⁷ If such a note is given for a prior valid indebtedness, it has been held that such note might be sufficient consideration for a promise made after the war to pay such note.⁸ In this respect a contract of this sort, although invalid if entered into by a communication across the lines of war, is not treated as

² *United States v. Grossmayer*, 76 U. S. (9 Wall.) 72, 19 L. ed. 627.

Arkansas. Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783.

Indiana. Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639.

Louisiana. Irwin v. Levy, 24 La. Ann. 302.

Tennessee. Nelson v. Trigg, 3 Tenn. Cas. 733.

See *Intercourse with Alien Enemies*, by T. Baty, 31 Law Quarterly Review,

30, and *Trading with the Enemy Amendment Act*, by Frank Evans, 32 Law Quarterly Review, 249.

³ *Clements v. Yturria*, 14 Hun (N. Y.) 151.

⁴ *Nelson v. Trigg*, 3 Tenn. Cas. 733.

⁵ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

⁶ *Wright v. Graham*, 4 W. Va. 430.

⁷ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783.

⁸ *Ledoux v. Buhler*, 21 La. Ann. 130.

the ordinary illegal contract is treated.⁹ The fact that a letter is sent by a citizen of a state which adhered to the United States during the Civil War, to a citizen and resident of a state which adhered to the Confederacy, containing a promise to pay such debt, can not prevent the operation of the Statute of Limitations.¹⁰

The objection in these cases is to communication across the lines of war, rather than of breach of permanent allegiance.¹¹

If the lines of war are advancing or retreating, the question of allegiance possibly enters into the consideration of the validity of the contract.¹² If a note is executed and delivered during war by a citizen of a state which adheres to the Confederacy, to a citizen of a state which adhered to the United States, such note is invalid, although it was dated at a town which at that time was in the actual possession of the forces of the United States.¹³ In this case, however, the court did not insist upon breach of allegiance; and the result which was reached may have been due to the fact that the court declined to take judicial notice of the domicile of the party to the contract with reference to the lines of war at the time of the transaction. If a principal appoints an agent while both are domiciled in enemy territory, and subsequently by an extension of the lines of war the domicile of the principal is in territory which is held in the military occupation of the enemy, the agent has no power to enter into contracts on behalf of his principal for the purchase of goods which are located within the territory of the government in which both originally were domiciled.¹⁴

If the contract is not only made across the lines of war, but it requires performance across the lines of war by its terms, its illegality is even more clear.¹⁵ A contract by which one who resides

⁹ An illegal contract is generally held not to be a sufficient consideration for a subsequent promise (see § 1040), unless the illegal contract is entirely eliminated by the new contract (see § 1041).

¹⁰ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639 (obiter, as the statute of limitations was suspended by reason of the war).

¹¹ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

A contract by which a British subject who was a resident of a city originally in the confederacy, which had

been seized by Union troops, agreed to purchase property which was situated in the Confederate lines, from one who was a resident within such lines, was held to be illegal and to pass no title to such property as against the United States. *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

¹² *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783.

¹³ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783.

¹⁴ *United States v. Lap  n  *, 84 U. S. (17 Wall.) 602, 21 L. ed. 693.

¹⁵ *Nelson v. Trigg*, 3 Tenn. Cas. 733.

within the Confederate lines agrees to sell and deliver goods to one who resides within the Union lines, is illegal.¹⁶

§ 2727. Contracts with the enemy not in aid of the enemy and not involving communication across lines of war. Contracts with reference to property which is situated in the country of the enemy are not invalid if they do not involve communications across the lines of war and if they are not intended to defeat the right of the country, whose courts are asked to enforce such contract, to confiscate or to forfeit such property.¹ A contract which is entered into between alien enemies who are resident in the territory of the enemy, for the sale and conveyance of realty, situated in the territory of the enemy, is not rendered invalid by the fact that they are alien enemies.² A contract between two subjects of one of the belligerent powers, who are domiciled in the territory of such power, for the sale of personal property which is situated in the territory of the other belligerent power, is not invalid if it does not operate to defeat the right of the country in which they are resident, to confiscate such property under its right in time of war.³ These principles were applied in the Civil War, and the courts of the United States upheld sales of realty which were situated within the limits of the Confederacy as between persons who were domiciled in the limits of the Confederacy,⁴ and also upheld sales of personalty which was situated within the limits of the Confederacy where the parties to such sale were both domiciled in states which adhered to the Union,⁵ as long as such sales did not interfere with the right of the United States to confiscate or to forfeit such property.

The contract entered into during the Civil War, between persons who were domiciled within the limits of the Confederacy, is valid, and will be enforced in the courts of the United States after the war, if such contract did not tend to aid the Confederacy in

¹⁶ *Nelson v. Trigg*, 3 Tenn. Cas. 733.

¹ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976; *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

² *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976.

³ *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

⁴ *Conrad v. Waples*, 96 U. S. 279, 24 L. ed. 721.

See also, *Corbett v. Nutt*, 77 U. S. (10 Wall.) 464, 19 L. ed. 976.

⁵ *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180.

carrying on the war.⁶ A bond given pursuant to Confederate stay laws, will be enforced after the war,⁷ and even if such laws are unconstitutional, the parties who have obtained a stay under such laws will not be permitted to take advantage of their unconstitutionality.⁸

§ 2728. Special types of contract. The application of the foregoing principles to the various types of contract ordinarily renders them invalid wherever they involve the formation of the contract by communications across the lines of war, wherever the performance involves crossing the lines of war, or wherever the contract is one which will tend to aid the public enemy; while other types of contract are ordinarily held to be valid. No effect can be given to a recognition of a pre-existing indebtedness by means of a communication across the lines of war.¹ The fact that such communication will be to the advantage of the citizen of the country in which the case is tried, does not alter the general rule as to the invalidity of the contract or the transactions which are formed by communication across the lines of war.² No action can be maintained on a note which was executed and delivered during the war, and which was executed by a citizen of a state which adhered to the Southern Confederacy, to a citizen of a state which adhered to the United States.³ No action can be brought upon a note which was given during the war by a citizen of one of the belligerent powers who is domiciled therein, to a citizen of the other belligerent power, who was domiciled therein, even though such note was given for a valid pre-existing debt.⁴ If such a note is given for a prior valid indebtedness, it has been held that such note might be sufficient consideration for a promise made after the war to pay such note.⁵ In this respect a contract of this sort, although invalid if entered into by a communication across the lines of war, is not treated as the ordinary illegal contract is treated.⁶ No effect can be given to an acknowledgment of a debt by a communication

⁶ *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

⁷ *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

⁸ *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

¹ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

² *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

³ *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783.

⁴ *Wright v. Graham*, 4 W. Va. 430.

⁵ *Ledoux v. Buhler*, 21 La. Ann. 130.

⁶ An illegal contract is generally held not to be a sufficient consideration for

across the lines of war for the purpose of preventing the operation of the Statute of Limitations.⁷

A contract of sale which is made by communications either in person or by agent, between a seller who is domiciled in one of the belligerent countries, and a purchaser who is domiciled in the other of the belligerent countries, is invalid.⁸ A contract by which a debtor who resides within the lines of the Confederacy, agrees to purchase cotton for his creditor, who resides within the Union lines, in satisfaction of a debt which existed when the Civil War began, is illegal and such purchase by the debtor does not pass title to such cotton to the creditor.⁹ If the contract is made by communications across the lines of war between persons who are domiciled respectively in the territory of the belligerent powers, the fact that the goods are not delivered until after the termination of the war does not prevent the contract from being illegal.¹⁰ A contract by which American subjects agree during the time of war to purchase goods from one who is a subject of the hostile power, and who is domiciled in the territory of such power, is illegal even if the goods are not delivered until after the termination of the war, and an agent of the subject of the United States who transmits such order to the purchaser and who advances the money therefor, can not recover against the purchasers.¹¹

If the contract is not only made by communication across the lines of war, but also involves performance by the transportation of goods across the lines of war, such contract is even more clearly

a subsequent promise (see § 1040), unless the illegal contract is entirely eliminated by the new contract (see § 1041).

⁷ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639 (obiter).

⁸ *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793; *United States v. Grossmayer*, 76 U. S. (9 Wall.) 72, 19 L. ed. 627; *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97; *Williams v. Gay*, 21 La. Ann. 110; *Haney v. Manning*, 21 La. Ann. 166; *Irwin v. Levy*, 24 La. Ann. 302; *Nelson v. Trigg*, 3 Tenn. Cas. 733; *Rhodes v. Summerville*, 51 Tenn. (4 Heisk.) 204.

⁹ *United States v. Grossmayer*, 76 U. S. (9 Wall.) 72, 19 L. ed. 627.

¹⁰ *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793.

¹¹ *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793.

"The consideration fatal to the claim of the plaintiffs, that the letter on which these advances were made was in itself a nullity, and could not be made the basis of a contract, on which this court would entertain a suit; the purchases made under it could add nothing to its validity, nor were these goods ever the property of these plaintiffs, for they were purchased for these defendants, and finally shipped to them as their goods, not those of the plaintiffs. The plaintiffs advanced the money; with them the contract was for money paid and expended, but in

illegal.¹² A contract by which one who resides within the Confederate lines agrees to sell and deliver goods to one who resides within the Union lines, is illegal.¹³

No recovery can be had for services which are rendered in the formation or in the performance of such contracts.¹⁴ No recovery can be had for services rendered as agent in purchasing cotton from persons residing within the Confederate lines for persons residing within the Union lines,¹⁵ or for services rendered as an agent in attending to transporting cotton from the Confederacy to the Union lines and for selling it in the Union lines.¹⁶ No recovery can be had for animals which were sold for the purpose of hauling goods across the Union lines during the Civil War.¹⁷ No recovery can be had for services in hauling goods through the Union lines during the Civil War.¹⁸

The fact that one of the parties who is domiciled in the territory of one of the belligerents is not an enemy, but a neutral, does not render such contract valid.¹⁹

One who is domiciled in the territory of one of the belligerent powers, can not appoint an agent to act in the territory of the other belligerent power during the period of the war.²⁰ While such agent has no power to bind his principal by executory contracts, it has been held that if a payment is made to such agent during the time of the war, and such agent pays such money over to his principal after the war, the principal can not collect such indebtedness again from the debtor.²¹

§ 2729. Contracts with the enemy under express or implied authority—Licenses. If a license to trade with the enemy by the

the purchase and sale of the goods they were but the agents, carrying into effect a contract between the seller and these defendants." *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. ed. 793.

¹² *Nelson v. Trigg*, 3 Tenn. Cas. 733.

¹³ *Nelson v. Trigg*, 3 Tenn. Cas. 733.

¹⁴ *Williams v. Gay*, 21 La. Ann. 110; *Haney v. Manning*, 21 La. Ann. 166; *Irwin v. Levy*, 24 La. Ann. 302; *Rhodes v. Summerville*, 51 Tenn. (4 Heisk.) 204.

¹⁵ *Irwin v. Levy*, 24 La. Ann. 302.

¹⁶ *Rhodes v. Summerville*, 51 Tenn. (4 Heisk.) 204.

¹⁷ *Haney v. Manning*, 21 La. Ann. 166.

¹⁸ *Williams v. Gay*, 21 La. Ann. 110; *Haney v. Manning*, 21 La. Ann. 166.

¹⁹ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

²⁰ *United States v. Grossmayer*, 76 U. S. (9 Wall.) 72, 19 L. ed. 627; *United States v. Lap  n  *, 84 U. S. (17 Wall.) 602, 21 L. ed. 693; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

²¹ *Small's Administrator v. Lumpkin's Administrator*, 69 Va. (28 Gratt.) 832.

department of the government which has authority to grant such license is granted, contracts with the enemy which are entered into under such license are valid.¹ Licenses of this sort are construed liberally,² but at the same time substantial performance is necessary.³ A license may be given in general terms or by fair implication, as well as given in specific terms to a definite individual.⁴ The fact that the United States mail service was continued between the states which adhered to the Union and certain of the Southern states after the President's proclamation of the

¹ *Feise v. Bell*, 4 Taunt. 4 (question of construction of license); *Flindt v. Scott*, 5 Taunt. 674; *Hamilton v. Dillin*, 88 U. S. (21 Wall.) 73, 22 L. ed. 528.

"A state of war may exist, and yet commercial intercourse be lawful. They are not necessarily inconsistent with each other. Trading with a public enemy may be authorized by the sovereign, and even to a limited extent by a military commander. Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times they are very common. Bynkershoek, in his *Quaest. Jur. Pub.*, lib. 1, c. 3, while asserting as a universal principle of law that an immediate consequence of the commencement of war is the interdiction of all commercial intercourse between the subjects of the states at war, remarks: 'The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the laws of war as to commerce. Hence it is alternatively permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are prohibited; and sometimes it is prohibited altogether.' Halleck, in his 'Treatise on the Laws

of War,' pages 676 et seq., discusses this subject at considerable length, and remarks: 'That branch of the government to which, from the form of its constitution, the power of declaring or making war is intrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. * * * In England, licenses are granted directly by the crown, or by some subordinate officer to whom the authority of the crown has been delegated either by special instructions or under an act of parliament. In the United States, as a general rule, licenses are issued under the authority of an act of Congress; but in special cases and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States.'" *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

² *Flindt v. Scott*, 5 Taunt. 674.

"These licenses to trade, however they may have been formerly construed strictly, are now in all courts construed more liberally and favorably to trade, in order to effectuate the benefits intended to result from them." *Flindt v. Scott*, 5 Taunt. 674.

³ *Williams v. Marshall*, 6 Taunt. 390; *Camelo v. Britten*, 4 B. & Ald. 184.

⁴ *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

blockade of the ports of seceding states, together with the fact that at a subsequent time commercial intercourse between such states was expressly forbidden, shows by fair implication that up to the later proclamation commercial intercourse between such states was authorized.⁵ A license given to a specific individual is ordinarily personal, and it is therefore non-assignable unless made

⁵ *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

"It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse, may be allowable, we are brought to inquire whether such intercourse was allowed between the loyal citizens of the United States and the citizens of Louisiana until the 23rd of April, 1861, when the acceptance was made upon which this suit was brought. And, in determining this, the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 10th of April; and it then became his duty as well as his right to direct how it should be carried on. In the exercise of this right he was at liberty to allow or license intercourse, and his proclamations, if they did not license it, expressly did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse, except through the ports of the designated states, was intended. The first was that of April 15, 1861. The forts and property of the United States had, prior to that day, been forcibly seized by armed forces. Hostilities had commenced, and, in the light of subsequent events, it must be considered that a state of war then existed. Yet the proclamation, while calling for the militia of the several states and stating what would probably be the first services assigned to

them, expressly declared that, 'in every event, the utmost care would be observed, consistently with the repossession of the forts, places and property which had been seized from the union, to avoid any devastation, destruction of or interference with property or any disturbance of peaceful citizens in any part of the country.' Manifestly this declaration was not a mere military order. It did not contemplate the treatment of the inhabitants of the states in which the unlawful combinations mentioned in the proclamation existed as public enemies. It announced a different mode of treatment—the treatment due to friends. It is to be observed that the proclamation of April 15, 1861, was not a distinct recognition of an existing state of war. The President had power to recognize it, *The Prize Cases* (2 Black, 635); but he did not prior to his second proclamation, that of April 10th, in which he announced the blockade. Even then the war was only inferentially recognized; and the measures proposed were avowed to be 'with a view to * * * the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled' The reference here was plainly to citizens of the insurrectionary states; and the purpose avowed appears to be inconsistent with their being regarded as public enemies, and consequently debarred from intercourse with the inhabitants of states not in insurrection. The only interference with the business rela-

so by its express terms.⁶ If a license to trade with the enemy includes authority to transport property to the country of the enemy and to bring property back therefrom, it ordinarily protects the property of the enemy which is transported under such license from condemnation as prize, by the government which issues such license.⁷ A license which is not given by competent authority is invalid,⁸ even though action has been taken in reliance upon the validity of such license to the detriment of the parties who have thus acted. While a license renders treating with the enemy lawful as between the government which issues such license and the party to whom it is issued, it has, of course, no effect upon the legality of such treating as between the parties to whom the license is issued and the enemy.⁹

§ 2730. Ransom of vessels and support of prisoners. Even in the absence of an express license or of circumstances, other than those of war in general, from which an implied license might be inferred, the courts have in former times been inclined to recognize the validity of certain contracts made in time of war with the enemy across the lines of war on account of the special necessities of the case. At the time when privateering was encouraged, and when the crews of public vessels were allowed a share in prize money arising from the proceeds of captured enemy merchant vessels, it became the custom for the captor to permit the captured vessel to go free on receiving a ransom bill which provided for

tions of citizens in all parts of the country, contemplated by the proclamation, seems to have been such as the blockade might cause. And that it was understood to be an assent by the executive to continue business intercourse may be inferred from the subsequent action of the government (of which we may take judicial notice) in continuing the mail service in Louisiana and the other insurrectionary states long after the blockade was declared. If it was not such an assent or permission, it was well fitted to deceive the public. But in a civil more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse;

for, in a civil war, only the government can know when the insurrection has assumed the character of war." *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188.

⁶ *Feise v. Thompson*, 1 Taunt. 121.

⁷ *Flindt v. Scott*, 5 Taunt. 674. (A policy of insurance on such property is therefore valid by the law of such state.)

⁸ *The Sea Lion*, 72 U. S. (5 Wall.) 630, 18 L. ed. 618; *Coppell v. Hall*, 74 U. S. (7 Wall.) 542, 19 L. ed. 244.

⁹ *The Hiram*, 12 U. S. (8 Cranch.) 444, 3 L. ed. 619; *The Hiram*, 14 U. S. (1 Wheat.) 440, 4 L. ed. 131; *Patton v. Nicholson*, 16 U. S. (3 Wheat.) 204, 4 L. ed. 371.

the payment of a certain amount of money as consideration for such release from capture.¹ This practice was very beneficial to the owners of the captured vessel and cargo, for the amount exacted as ransom was naturally much less than the value of the goods, and it was very beneficial to the captor personally, since it relieved him from the necessity of taking his prize into port and dividing his crew, and made it possible for him to effect many more captures in a given space of time than he could otherwise. For these reasons, and without considering the interests of the government, the courts of admiralty were inclined at a very early period to enforce ransom bills if given to a citizen of an enemy government,² although a ransom effected by pirates was held to be illegal;³ and if paid, could be recovered if the party to whom the payment was made was within the jurisdiction of the court.⁴ The courts of admiralty continued for a long period of time to enforce ransom bills and contracts for ransom,⁵ although the difficulty of distinguishing in all cases between a privateer and a pirate led to the custom of taking hostages to enforce payment of the ransom.

The common law recognized the validity of these contracts when brought before them collaterally.⁶ A contract by which a captain agreed to pay the wages of a seaman if he would consent to act as hostage, was held to be valid.⁷ The common-law courts refused to prohibit the sentence of a court of admiralty against a vessel for ransom.⁸ A draft drawn by the captain of the captured vessel for ransom was held to be enforceable if properly accepted.⁹ The immunity conferred upon the ransom vessel until it had completed its voyage, was held to exist not only against all vessels of the country of the captor, but also against all allies.¹⁰

¹ For a general discussion of this subject, see *Ransom Bills*, by W. Senior, 34 *Law Quarterly Review*, 49.

² *Libels in Admiralty*, File 13, Nos. 83 and 92 (1545 A. D.), 11 *Selden Society* (2 *Select Pleas in Admiralty*), p. lxvi; *Libels in Admiralty*, File 32, No. 30 (1561, 1562), 11 *Selden Society* (2 *Select Pleas in Admiralty*), p. lxviii.

³ *Joliff v. Bawdett*, 11 *Selden Society* (2 *Select Pleas in Admiralty*) 164.

⁴ *Joliff v. Bawdett*, 11 *Selden Society* (2 *Select Pleas in Admiralty*) 164.

⁵ *The Charming Nancy*, Marsden's *Admr.* 398; *The Patrixent*, Marsden's *Admr.* 398.

⁶ *Yates v. Hall*, 1 T. R. 73; *Wilson v. Bird*, 1 Ld. Raym. 22.

⁷ *Yates v. Hall*, 1 T. R. 73.

⁸ *Wilson v. Bird*, 1 Ld. Raym. 22.

⁹ *Goodrich v. Gordon*, 15 Johns. (N. Y.) 6.

¹⁰ *Miller v. The Resolution*, 2 U. S. (2 Dall.) 1, 1 L. ed. 263.

The attempt was finally made to enforce ransom bills in a court of common law by a direct action against the owner of the vessel or of the goods on whose behalf the ransom bill was given, instead of proceeding in admiralty against the vessel on behalf of the hostage. At one time the English courts under Mansfield's influence seemed inclined to receive this bit of admiralty law and to allow such an action;¹¹ and this view was entertained by the courts of the United States.¹² In a subsequent case, however,¹³ some of the judges appear to differ from Lord Mansfield as to the power of the common-law courts to enforce bills of ransom; and a judgment, rendered in form for the plaintiff in order to permit the parties to go to a higher court, was reversed on error on the ground that an alien enemy could not sue in English courts to recover a right which he had claimed to acquire during actual war.¹⁴ While the facts in this case arose before English legislation, the result was possibly influenced by the fact that Parliament had come to the conclusion that the interests of the government should be considered rather than those of the privateer and of the captured vessel; and it had forbidden contracts for the ransom of an English vessel.¹⁵ With the disappearance of privateering, the capture of enemy vessels on the high seas by private enterprise for the purpose of gain ceased, and with it ceased the practice of giving ransom bills.

Considerations of humanity induced the courts to uphold contracts made with alien enemies who were domiciled in an enemy country for the support of prisoners of war.¹⁶

III

EFFECT OF WAR ON PRIOR CONTRACTS

§ 2731. Effect of war on pre-existing contracts—General principles. War affects many prior valid contracts which have been

¹¹ Ricord v. Bettenham, 3 Burr. 1734; Cornu v. Blackburne, 2 Doug. 640.

¹² Miller v. The Resolution, 2 U. S. (2 Dall.) 1, 1 L. ed. 263.

¹³ Anthon v. Fisher, 3 Doug. 166.

See also, Anthon v. Fisher, 2 Doug. 649, note.

¹⁴ Anthon v. Fisher, 3 Doug. 166.

See also, Anthon v. Fisher, 2 Doug. 649, note.

¹⁵ 22 Geo. III, c. 25, § 2, 3.

Subsequently English captors were forbidden to ransom foreign vessels except in cases of extreme necessity. 33 Geo. III, c. 66, § 36.

¹⁶ Antoine v. Morshead, 6 Taunt. 237; Daubuz v. Morshead, 6 Taunt. 332.

entered into by the citizens of the respective belligerents, or which require for their performance commercial intercourse across the lines of war, or the performance of which will tend to aid the country which is the enemy of that in whose courts it is sought to enforce such contract.

While contracts are either dissolved or suspended if they fall within these classes,¹ there has been a marked lack of harmony in judicial expression as to the test or tests which are to be applied for determining what effect, if any, war has upon prior contracts. Occasionally language is used which seems to imply that war terminates all prior contracts between the citizens of the respective belligerents, but this rule is far too sweeping. The very courts which have occasionally expressed such views have enforced many such contracts, at least after the termination of the war. It has been suggested that the only contracts which will be ended by the war are those which tend to aid the enemy or which are contrary to the general policy of the government in whose courts it is sought to enforce such contract.² It has been suggested that the test of the effect of war upon the contract is whether the contract requires commercial intercourse across the lines of war.³

It has been suggested that if the contract is to the disadvantage of the alien enemy, it is not affected by the war;⁴ but if this is to be construed as meaning that contracts which involve commercial intercourse across the lines of war will be enforced if disadvantageous to the alien, the principle is opposed by the great weight of authority.⁵ The rule which forbids dealings of a commercial character with the enemy in time of war, originated in the idea that every subject of one of the belligerent powers was at war with every subject of the other belligerent power, and that

¹ Conley v. Burson, 48 Tenn. (1 Heisk.) 145.

² Sands v. New York Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535.

³ Williams v. Paine, 7 D. C. App. 116.

While the result which was reached in this case was correct, the real point which was decided, that a power of attorney to convey land was not revoked as a matter of law by the fact that the donor of the power who had given such power in the District of Columbia before the outbreak of the Civil War for the purpose of conveying

land in such district, had gone to the Confederacy at the outbreak of the war, and had remained there. The facts of the case, therefore, fall short of authorizing the broad rule that commercial intercourse is the sole test or even the primary test. Williams v. Paine, 160 U. S. 55, 42 L. ed. 658.

See §§ 2747 et seq.

⁴ Compagnie Universelle de Telegraphie v. United States Service Corporation, 84 N. J. Eq. 604, 95 Atl. 187.

⁵ See § 2734.

commercial intercourse involved a breach of his allegiance; while in most of these cases the same result is now justified on the ground that such commercial intercourse may be of advantage to the enemy in enabling it to carry on the war.⁶

§ 2732. Nationality or domicile of parties as test. Whether a natural person is to be regarded as an alien enemy or not, within the meanings of the rule which forbid trading with the enemy, is to be determined by his personal domicile or his business domicile, rather than by his nationality.¹ If the person who has assumed a domicile in the country of the enemy, is in fact a native subject of such country, and if he has assumed a domicile in the country of his nationality in anticipation of the outbreak of war, he is still to be treated as an alien enemy.²

⁶ *Porter v. Freudenberg* [1915], 1 K. B. 857.

"This law was founded in earlier days upon the conception that all subjects owing allegiance to the crown were at war with the subjects of the state at war with the crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state." *Porter v. Freudenberg* [1915], 1 K. B. 857.

¹ *Porter v. Freudenberg* [1915], 1 K. B. 857.

"Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business. *Wells v. Wil-*

liams (1 *Ld. Raym.* 282); *McConnell v. Hector*, per Lord Alvanley C. J. (3 *Bos. & P.* 113); *Janson v. Driefontein Consolidated Mines* [(1902) *A. C.* 505], per Lord Lindley. When considering the enforcement of civil rights a person may be treated as the subject of an enemy state, notwithstanding that he is in fact a subject of the British Crown or of a neutral state. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy state." *Porter v. Freudenberg* [1915], 1 K. B. 857.

The same result is ordinarily reached in prize cases and the property of persons whose business domicile is in the enemy country, is regarded as subject to capture as enemy property, even if the individuals are neutrals. *The Friendschaft*, 17 *U. S.* (4 *Wheat.*) 105, 4 *L. ed.* 525; *The Nayade*, 4 *C. Rob.* 251; *The Vigilantia*, 1 *C. Rob.* 1 (15).

² *Tingley v. Muller* [1917], 2 *Ch.* 144 [following, *Porter v. Freudenberg* (1915), 1 K. B. 857, and applying, *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 *A. C.* 307].

While a corporation is *prima facie* to be regarded as a subject of the country which creates it, and as domiciled therein,³ the courts may inquire as to the actual ownership of the stock of such corporation, and as to the actual control thereof, in case it attempts during the war to enforce obligations which are owing to it.⁴ In like manner the courts may inquire into the actual ownership and control of a corporation which is formed under the laws of a neutral power for the purpose of determining the effect of war upon a contract between such corporation and a corporation which is formed under the laws of the belligerent power in whose courts the question of the effect of war upon such contract is presented for adjudication and which is there controlled.⁵

§ 2733. Discharge or suspension by war of prior contracts—Contracts which will aid the enemy. If the contract is one which is affected by war, the question whether the contract is dissolved or whether its performance is merely suspended, is one which has caused much difficulty, especially when it has been attempted to lay down general principles for determining which effect is reached. It has been said that there is a strong presumption against the dissolution of such contract, and that it will be regarded as dissolved only if it is inconsistent with the successful prosecution of the war by the government in whose courts it is sought to enforce the contract.¹ The result which was actually reached by applying this general principle, is, however, different from that which was reached by other courts upon the same general question, including the supreme court of the United States.² It has been said that the test for determining whether war dissolves or suspends the contract, is whether the contract is one which will give aid to the enemy, or involve commercial intercourse across the lines of war, in which case it will be dissolved, but in other cases it will merely be suspended.³ The result which was reached by the application

³ *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307.

⁴ *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307.

On this subject, see *Companies with Enemy Shareholders*, by James Edward Hogg, 31 *Law Quarterly Review*, 170, and *Alien Enemy Persons, Firms and Corporations in English Law*, by Cyril M. Picciotto, 27 *Yale Law Journal*, 167.

⁵ *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan* [1917], 2 K. B. 639.

¹ *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741.

² See § 2745.

³ *Statham v. New York Life Ins. Co.*, 45 Miss. 581, 7 Am. Rep. 737.

of this theory was, however, the opposite of that which was reached by the supreme court of the United States, in a case growing out of the same transaction and presenting most of the same facts.⁴ It has also been said that the contract will be merely suspended and that it will be revived when the war terminates, unless the effect of revivor is to make a new contract for the parties.⁵ Since the effect of treating the contract as suspended is to defeat the right of one of the other of the parties to demand part performance,⁶ a literal application of this principle would apparently require dissolution in all cases.

The change in the mutual obligations of the parties, which will be caused by holding them bound by a contract the performance of which is suspended for an indefinite time by war, has been regarded as a sufficient reason for treating such contract as dissolved.⁷ Even if an executory contract runs over a long period of time, the courts are inclined to treat such contract as dissolved by the war,⁸ "the end of which can not be foreseen."⁹

It has been said that war will always operate as a dissolution unless a just result can be reached as between the parties, by treating the contract as suspended rather than as dissolved.¹⁰ While this principle is probably the most fair and equitable as between the parties, it is so vague as to give little help in solving questions in advance; and the courts which have endeavored to follow it have reached widely different results in applying so vague a rule to concurrent cases.¹¹

The fact that the allegiance of the respective subjects of the belligerent governments renders them mutually hostile, has been

⁴ *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

See also § 2745.

⁵ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811 (obiter).

⁶ See *Grinnan v. Edwards*, 21 W. Va. 347.

⁷ *Bieber v. Rio Tinto Co.* [1918], A. C. 260.

⁸ *Eposito v. Bowden*, 7 El. & Bl. 792 [quoted in *Zinc Corporation v. Hirsch* (1916), 1 K. B. 541, L. R. A. 1917C, 650]; *Bieber v. Rio Tinto Co.* [1918], A. C. 260; *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650; *Naylor v. Krainische Industrie*

Gesellschaft [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331, and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260]; *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcan* [1917], 2 K. B. 639.

⁹ *Eposito v. Bowden*, 7 El. & Bl. 792 [quoted in *Zinc Corporation v. Hirsch* (1916), 1 K. B. 541, L. R. A. 1917C, 650].

¹⁰ *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Abell v. Penn. Mutual Life Ins. Co.*, 18 W. Va. 400.

¹¹ See §§ 2735 et seq.

suggested as the reason for holding that war terminates or suspends prior contracts;¹² but if this reason were correct, it would, on the one hand, make it necessary to hold that war discharged all contracts the parties to which were respectively citizens of the belligerent governments, which is a result which is by no means in accordance with the weight of authority;¹³ and, on the other hand, it would possibly make it necessary to hold that contracts between persons who are domiciled in the territories of the respective belligerent powers, were not affected by the war unless the parties thereto were subjects of the respective belligerent powers as well as property domiciled in their territory; and this is not the view which is actually taken by the courts.

If the performance of the contract involves a violation of the duty of a citizen to the government in whose courts it is sought to enforce the contract, such contract is undoubtedly discharged by war.¹⁴

If the effect of holding that the contract is suspended rather than discharged would be in any way to augment the resources of the enemy after the war, or to lessen production in the country in whose courts the effect of the war on such contract is presented for adjudication, it will ordinarily be held that such contract is dissolved rather than suspended.¹⁵ Contracts by which English miners had agreed to sell ore to German corporations were held to

¹² *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

¹³ See §§ 2735 et seq.

¹⁴ *Eposito v. Bowden*, 7 El. & Bl. 766; *Avery v. Bowden*, 5 El. & Bl. 714; *Karberg v. Blythe* [1916], 1 K. B. 495.

See also, *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

¹⁵ *Bieber v. Rio Tinto Co.* [1918], A. C. 260; *Naylor v. Krainische Industrie Gesellschaft* [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331, and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260]; *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650; *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan* [1917] 2 K. B. 639.

"There remains, however, another point of view from which the matter

must be considered. The contract of 1910 not only provides that the defendants shall purchase the plaintiffs' whole production, but it also stipulates that the plaintiffs shall not sell their concentrates to any other person. This negative stipulation remains in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident or breakdown of machinery. Again, by clause 5 the defendants have the right to leave as much as 2,200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at plaintiffs' risk for an indefinite period. Thus the position is that the defendants can not take delivery, and yet, according to the contract, the plaintiffs can not sell their production elsewhere, and must keep their floors and

be discharged by the war between England and Germany.¹⁶ A contract by which a vessel is chartered for a period of years to a corporation which is regarded as an alien enemy, will be dissolved

vats and other premises encumbered with concentrates which they are not permitted to dispose of, and thus the whole of this great industry must be brought to an entire standstill. I have in my mind and am fully aware of the letter of the defendants' solicitors of July 20, 1915, but the rights of the parties must be considered with reference to their position under the agreement at the outbreak of war. Moreover, even if the plaintiffs were entitled to sell elsewhere any concentrates produced during the war, it might be a matter of extreme difficulty to the plaintiffs to do so to the best advantage if they are unable to enter into forward contracts for definite periods, and can only dispose of such concentrates as at the moment they have on hand, and with the risk of being called upon, possibly at short notice, to resume deliveries to the defendants. The effect of such an agreement as the present one, dealing with an important commercial product on a very large scale, is to prevent the resources of the country from being developed and labor from being employed, and the value of the mineral from being realized and the proceeds utilized in the best interest of the country. Moreover, the result of preserving intact for the defendants (as the agreement purports to do) all concentrates on the floors, in the vats or otherwise made ready by the plaintiffs, would be to protect the defendants' trade during the war, and enable the defendants, upon the conclusion of peace, to resume their trade as speedily and in as great volume as possible, and so to diminish the effect of war on the commercial prosperity of the enemy country,

which it is the object of this country during the war to destroy. To recognize such a contract during war and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy. 'It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces,' per Lord Lindley in *Janson v. Driefontein Consol. Mines* [1902], A. C. 507. Such an agreement is, in my opinion, void as tending to assist the king's enemies. To carry out such an agreement during the war, and to withdraw goods from commerce and preserve them for the enemy after the war, is little removed from actually trading with the enemy. In *Furtado v. Rogers*, 3 Bos. & P. 191, 198, 127 Eng. Reprint, 105, 14 Eng. Rul. Cas. 125, Lord Alvanley, in delivering the judgment of the court of common pleas, said: 'We are all of opinion that, on the principles of the English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament.'" *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650.

¹⁶ *Bieber v. Rio Tinto Co.* [1918], A. C. 260; *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650; *Naylor v. Krainische Industrie Gesellschaft* [1918], 2 K. B. 486 [affirming] (1918), 1 K. B. 331, and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260].

by the war, and not merely suspended, since the effect of treating such contract as merely suspended will be to strengthen the position of the enemy at the end of the war, and to restrict the use to which the owner of such vessel might put it during the war, and the contracts into which he might enter with reference thereto.¹⁷

§ 2734. Contracts which involve trading with the enemy. If a contract which is entered into before the outbreak of war involves continued commercial intercourse between those who become alien enemies to one another by reason of the outbreak of the war, the outbreak of the war ordinarily terminates such contract,¹ whether such contract is entered into between citizens of the different belligerent powers,² or whether it is entered into between citizens of one of the belligerent powers who are domiciled therein, and who attempt to enforce such contract in its courts.³

§ 2735. Special types of transactions — Debts — Confiscation. A debt arises out of a transaction which is performed on one side; and if such debt is owing from a citizen to an alien enemy, the transaction has been performed by the alien enemy. Debts which are due and owing by a citizen who is domiciled in the country of his nationality, to an alien enemy who is domiciled in the country of his nationality, may be confiscated by the country of the debtor during the war.¹ While such right has not been exercised, at least where the belligerent power was able to discharge all the obligations assumed by the treaty of peace at the end of the war, its existence is still recognized.² After the Revolu-

¹⁷ *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan* [1917], 2 K. B. 639.

¹ *The Hoop*, 1 C. Rob. 196; *Stevenson v. Aktiengesellschaft fur Carton-nagen-Industrie* [1917], 1 K. B. 842; *M'Grath v. Isaacs*, 1 Nott & M'C. (S. Car.) 563 [on subsequent hearing, 2 M'Cord L. 26].

See also, *Esposito v. Bowden*, 7 El. & Bl. 763; *Robson v. Premier Oil & Pipe Line Co.* [1915], 2 Ch. 124.

² *Stevenson v. Aktiengesellschaft fur Carton-nagen-Industrie* [1917], 1 K. B. 842.

³ *M'Grath v. Isaacs*, 1 Nott & M'C. (S. Car.) 563 [on subsequent hearing, 2 M'Cord L. 26].

¹ *Wright v. Nutt*, 1 H. Bl. 137.

For the effect of war on public debts, see *The Effect of War on Public Debts and on Treaties, The Case of the Spanish Indemnity*, by John B. Moore, 1 *Columbia Law Review*, 209.

² "In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened

tionary War, acts of confiscation by Georgia were upheld by the

conscience and judgment of modern times." *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.

"It remains to consider the objection urged on behalf of the plaintiff in error that the acts of congress under which these proceedings to confiscate the stock have been taken are not warranted by the constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offenses against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that congress has disregarded the restrictions of the fifth and sixth amendments of the constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be deprived of his property without due process of law; and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to

have been conceded in the argument. The question, therefore, is, whether the action of congress was a legitimate exercise of the war power. The constitution confers upon congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. It is argued that though there are no express constitutional restrictions upon the power of congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding

English courts,³ although no effect was given to a confiscation under the New York statute between the Declaration of Independence and before the treaty by which the independence of the American colonies was recognized.⁴ However, the courts of a state of which a creditor is a citizen and a resident, have refused to recognize a decree of the government of the enemy state of which the debtor was a citizen and a resident by which such debtor was required to pay such debt into the treasury of the state.⁵

Different considerations, however, apply if an insurgent government has attempted to confiscate debts due from those who are domiciled in its territory to their creditors, especially to their creditors who are domiciled in the territory of the nation from which the insurgent power is endeavoring to separate itself. The permanent effect of the acts of an insurgent government depends upon the success of the insurrection, and if the insurgent government falls, its acts fall, including its attempted confiscations.⁶ No effect will therefore be given to a payment during the Civil War, of a debt due to a resident and citizen of a state which adhered to

against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use,

either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation." *Miller v. United States*, 78 U. S. (11 Wall.) 208, 20 L. ed. 135.

³ *Wright v. Nutt*, 1 H. Bl. 140.

⁴ *Ogden v. Folliott*, 3 T. R. 726 [reversing, *Folliott v. Ogden*, 1 H. Bl. 123, and see discussion in *Barclay v. Russell*, 3 Ves. Jr. 424].

The effect of the act of sequestration passed by the various states of the United States during the Revolutionary War, was abrogated by the provisions in the treaty of peace which secured debts due to English creditors from Americans. *Ware v. Hylton*, 3 U. S. (3 Dall.) 199, 1 L. ed. 568; *Hamilton v. Eaton*, 2 Martin (N. Car.) 83.

⁵ *Wolff v. Oxholm*, 6 M. & S. 92.

⁶ *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

"Whatever de facto character may be ascribed to the Confederate government consists solely in the fact that

the Union, during the Civil War, by a debtor who was a citizen and a resident of a state which adhered to the Confederacy, to the official of the Confederacy to whom such debtor was bound by law to make such payment.⁷ This result was reached on the theory that any alliance of one of the states of the Union was forbidden by the Federal Constitution; that the citizen of each state was, by the terms of the Constitution of the United States, entitled to all the privileges and immunities of citizens in the several states; that such act impaired the obligation of contracts; and that after the fall of the Confederacy, its acts of a public nature for the purpose of carrying on the war would not be recognized.⁸ A public sale of stock in a corporation organized and doing business in the state which adhered to the Confederacy, which stock belonged to citi-

it maintained a contest with the United States for nearly four years, and dominated for that period over a large extent of territory. When its military forces were overthrown, it utterly perished, and with it all its enactments. Whilst it existed, it was regarded, as said in *Thorington v. Smith*, 'as simply the military representative of the insurrection against the authority of the United States.' 8 Wall. 1; *Keppel's Admrs. v. Petersburg Railroad Co.*, Chase's Decisions, 167.

"Whilst thus holding that there was no validity in any legislation of the Confederate states which this court can recognize, it is proper to observe that the legislation of the states stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the states prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the states did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the constitution, they are, in general, to be treated as valid and binding. As we said in *Horn v. Lock-*

hart (17 Wall. 570): 'The existence of a state of insurrection and war did not loosen the bounds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution.' The same doctrine has been asserted in numerous other cases." *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

⁷ *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

See also, to the same effect, *Shortridge v. Macon*, 61 N. Car. (U. S., C. C.) 392, Chase 136, 1 Abl. (U. S.) 53, Fed. Cas. No. 12812.

⁸ *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

zens of states which adhered to the Union, as stock of alien enemies, will not be recognized after the end of the Civil War; no rights be held to pass under such sale; and the original stockholders will be held to be the stockholders in such corporation.⁹ Such a debt, however, is not discharged by the outbreak of the war,¹⁰ and the right of the creditor is said to revive at the termination of the war.¹¹ While language is occasionally used which seems to indicate that the debt is suspended during the war, and that the right of the creditor revives, what is probably meant is that the war itself has no effect upon the validity of the debt, and that its only effect grows out of the fact that one who is domiciled in the territory of a belligerent power can not maintain an action during the war in the courts of the other belligerent power.¹²

⁹ *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 654.

¹⁰ *England*. *Coarg v. East India Co.*, 20 Beav. 300; *Du Belloix v. Waterpark*, 1 Dowl. & R. 16.

United States. *Foxcraft v. Nagle*, 2 U. S. (2 Dall.) 132, 1 L. ed. 319; *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939; *Semmes v. Hartford Ins. Co.*, 80 U. S. (13 Wall.) 158, 20 L. ed. 490; *Brown v. Hiatt*, 82 U. S. (13 Wall.) 177, 21 L. ed. 128.

Kentucky. *Selden v. Preston*, 74 Ky. (11 Bush.) 191.

Maryland. *Bordley v. Eden*, 3 Harr. & McH. (Md.) 167.

New Jersey. *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741.

North Carolina. *Hamilton v. Eaton*, 1 N. Car. (pt. 1) 83.

The court divided on this question in *Griffith v. Lovell*, 26 Ia. 226.

"Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, a *persona standi in judicio* *Flint v. Waters*, 15 East. 260" [Quoted in *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.]

¹¹ *Coarg v. East India Co.*, 29 Beav. 300; *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939; *Semmes v. Hartford Ins. Co.*, 80 U. S. (13 Wall.) 158, 20 L. ed. 490.

"Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux v. Webber*, 1 Levinz 31, there is much doubt. *Miller v. Prideaux*, 1 Keble 157; *Lee v. Rogers*, 1 Levinz 110; *Hall v. Wybourne*, 2 Salkeld, 420; *Aubrey v. Fortescue*, 10 Modern 205, are of the same class and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace." *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.

¹² See § 2751.

§ 2736. Debts—Rights of parties in absence of confiscation. If a debt owing by a subject of one of the belligerent powers to a subject of the other of the belligerent powers is not confiscated, such debt can not be paid during the war if the debtor and creditor are domiciled in the respective territories of the belligerent powers.¹ The creditor can not maintain an action in the courts of the state of the debtor to recover such debt during the continuance of the war;² but after the war has ended, he may bring an action in the courts of the state of the debtor to recover such debt.³

§ 2737. Interest—Payment of principal forbidden. If the debtor and creditor are domiciled in the respective belligerent countries, interest upon the debt is suspended during the continuance of the war.¹ The reason which is given for this rule is that payment is forbidden during the war, and that since the debtor is forbidden from making payment, he ought not to be compelled to pay interest during that time.² With one exception, the results which are

¹ *Grinnan v. Edwards*, 21 W. Va. 347.

² See § 2751.

³ *Cruden v. Neale*, 2 N. Car. (1 Hayw.) 338.

¹ *England. Du Belloix v. Waterpark*, 1 Dowl. & R. 16.

United States. Foxcraft v. Nagle, 2 U. S. (2 Dall.) 132, 1 L. ed. 319; *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

Alabama. Bean v. Chapman, 62 Ala. 58 (obiter).

Kentucky. Selden v. Preston, 74 Ky. (11 Bush.) 191.

Maryland. Bordley v. Eden, 3 Harr. & McH. (Md.) 167.

West Virginia. Hutchinson v. Landcraft, 4 W. Va. 312.

² *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128; *Tracey v. Shumate*, 22 W. Va. 474.

"As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance

of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted. The question whether interest should be allowed on such contracts during the period of war was much considered soon after the Revolution. In the case of *Hoare v. Allen* (2 Dall. 102), decided in 1780 by the supreme court of Pennsylvania, it was held that interest did not run during the war on a debt owing to an enemy, contracted previously. 'Where a person,' said the court, 'is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition.' The legislation of congress after the commencement of the War of the Revolution, like the legislation of 1861, prohibited commercial intercourse with the inhabitants of the enemies' country, and the court observed that the defendant could not have paid the debt to the plaintiff, who was an alien enemy, without a violation of the positive law of the

reached on this question are in harmony with this reason. The rule that interest is suspended during war has been applied where the creditor has left the country before the outbreak of the war,³ and also where the debtor has left the country prior to the outbreak of the war.⁴ It has been held, however, that the rule that war suspended interest did not apply during the Civil War to cases in which the debtor was domiciled in the lines of the Confederacy, and the creditor was domiciled in a state which adhered to the Union.⁵

The treaty of peace between the United States and England at the end of the Revolutionary War, which secured debts due from American debtors to English creditors, was usually held not to impose upon the debtor the duty of paying interest during the period of the war,⁶ although in South Carolina, it was suggested that the terms of the treaty which secured the debts were broad enough to secure the interest as well.⁷ In this case, however, it was not necessary to invoke the treaty, since it was shown that the creditor had a resident agent "on the spot" to whom the debt might have been paid.⁸

A statute which forbids recovery of interest for the period of the war, from resident debtors, in favor of creditors, resident in the country of the enemy, is therefore constitutional.⁹

§ 2738. Interest—Effect of time of maturity with reference to war. Whether the rule that war suspends interest is modified in any way by the date of the maturity of the obligation, is a question upon which there has been some divergence of authority. If the debt is due before the war begins, the commencement of the war renders the payment of the debt legally impossible, and it is

country and of the law of nations, and that parties ought not to suffer for their moral conduct and their submission to the laws. The decision was followed by the same court in *Foxcraft v. Nagle* (2 Dall. 132, 1 L. ed. 319), 1791. Similar decisions were rendered by the court of appeals of Virginia and the court of appeals of Maryland." *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

³ *Blake v. Quash*, 3 McCord L. (S. Car.) 340.

⁴ *Fred v. Dixon*, 68 Va. (27 Gratt.) 541.

⁵ *Shortridge v. Mason*, 61 N. Car. (U. S., C. C.) 392, Chase 136, 1 Abl. (U. S.) 58, Fed Cas. No. 12812.

⁶ *Hoare v. Allen*, 2 U. S. (2 Dall.) 102, 1 L. ed. 307; *Foxcraft v. Nagle*, 2 U. S. (2 Dall.) 132, 1 L. ed. 319.

⁷ *Neilson v. Rutledge*, 1 Desauss. Eq. (S. Car.) 194.

⁸ *Neilson v. Rutledge*, 1 Desauss. Eq. (S. Car.) 194.

⁹ *Hutchinson v. Landcraft*, 4 W. Va. 312.

held that interest does not run during the period of the war,¹ even though under the rules in force the creditor was not allowed to bring an action until a certain period after maturity and though war had broken out before the creditor could have brought such action.² Since the reason for the rule that interest is suspended during the war is that the debtor can not pay such debt if he complies with the law, and since it is not intended to impose a penalty upon the creditor, as is shown by the cases in which interest is not suspended wherever the debtor could have paid the debt in compliance with the law,³ the rule that the outbreak of war stops interest upon debts due to alien enemies is correct, even though the alien enemy would not have been permitted to sue before the outbreak of the war.

At the other extreme of cases of this class, the debt may, by its terms, not be due until after the war, and while the debtor may not be permitted to pay the instalments of interest as they come due, he would have had no legal right in time of peace to have paid the debt at any time and stopped interest. In such a case, war should not suspend interest, and there is some authority for this view.⁴ Where the debt is not due until after the war, the fact that interest is payable semi-annually does not cause a suspension of interest upon the principal during the war,⁵ although it might suspend the payment of interest upon the overdue instalments of interest.

The intervening case is the case in which the debt falls due during the war. A logical application of the foregoing principles would result in the rule that interest was not suspended until the maturity of the debt, since the debtor had no legal right even in time of peace to pay such debt before maturity and to stop interest thereon. On the other hand, after maturity, interest should be suspended, since the debtor would be prevented by the war from exercising the legal right, since otherwise he would have had to pay the debt and to stop interest. This view, however, has not been taken by the supreme court of the United States.⁶ If a debt falls due during war and the creditor is a resident and a citizen

¹ *Hoare v. Allen*, 2 U. S. (2 Dall.) 102, 1 L. ed. 307.

² *Hoare v. Allen*, 2 U. S. (2 Dall.) 102, 1 L. ed. 307

³ See § 2740.

⁴ *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142.

⁵ *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142.

⁶ *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

of the enemy country, it is held that war suspends interest from the outbreak of war to the conclusion thereof, both for the period before maturity and for the period after maturity.¹

§ 2739. Effect of express covenant to pay interest. It has been suggested that a distinction should be made between cases in which there is an express covenant for the payment of interest, and cases in which there is no express covenant to pay interest, and interest is merely allowed as damages for non-payment. Since the same reasons which forbid a debtor to pay his debt in one case, forbid him to pay it in the other, the same protection should be accorded in one case as in the other. Even if the debtor has entered into an express covenant to pay interest, such covenant can not be performed by reason of the war. As a matter of fact, the cases in which it has been suggested that interest is not suspended because of an express covenant to pay interest, are cases in which such suggestion was an obiter, as the fact that the debtor could have paid his debt to a resident agent or to a resident creditor, was the real reason for holding that interest was not suspended.¹ Where the only ground for contending that an express covenant to pay interest prevents the application of the rule suspending interest during war on debts due to alien enemies, it has been held that the fact that the contract by which a debt is incurred contains an express covenant for the payment of interest, does not prevent the existence of war between the country of which the creditor is a resident and citizen, and the country of which the debtor is a resident and citizen, from suspending interest.²

¹ *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

¹ The cases in which this distinction is suggested are cases in which the question was not involved, as the principal could have been paid lawfully. See *Yeaton v. Berney*, 62 Ill. 61, and *Neilson v. Rutledge*, 1 Desauss. Eq. (S. Car.) 194.

² *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

"The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends

that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war. In the first case cited, from Pennsylvania, interest was stipulated in the contract. 'A prohibition,' says Mr. Justice Washington, in *Conn. v. Penn* (Pet. Cir. Ct. 524), 'of all intercourse with an enemy during the war, and the legal consequence resulting

§ 2740. Interest—Payment of principal not forbidden. The rule that interest is suspended during war is based on the theory that the principal can not be paid lawfully. If the circumstances are such that the principal can be paid lawfully, interest will not be suspended by reason of the war.¹ In accordance with this theory, interest is not suspended as against a resident debtor,² such as a surety,³ although his joint debtors are domiciled in the territory of the enemy.⁴ If the obligation is payable in the country of the debtor, interest is not suspended by reason of the fact that the payee is an alien enemy,⁵ since the debtor can make such payment in accordance with the terms of the contract without violating the rules against holding commercial intercourse with the enemy. If an obligation which was due to one who, by the outbreak of war, has become an alien enemy, is transferred for value to one who is domiciled in the country of the debtor, interest is not suspended;⁶ and if such debt is transferred in good faith to the original holder after the war, he may recover during such period.⁷ If the debtor and the creditor reside in the same country, interest is not suspended by reason of the fact that the debt is made payable in the territory of the enemy.⁸ If some of the debtors were domiciled within the limits of the Confederacy, and others were domiciled in states which adhered to the Union, and the note was made payable within the limits of a state which adhered to the Union, while the creditor was domiciled within the limits of the Confederacy, each of the debtors could have paid the debt either to the creditor or at the place of payment without dealing with the enemy; and accord-

therefrom, as it respects debtors on either side, furnish a sound, if not in all respects a just, reason for the abatement of interest until the return of peace. As a general rule it may be safely laid down that wherever the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable." *Brown v. Hiatt*, 82 U. S. (15 Wall) 177, 21 L. ed. 128.

¹ *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 L. ed. 207; *Bean v. Chapman*, 62 Ala. 58; *Williams v. State*, 37 Ark. 463; *Yeaton v. Berney*, 62 Ill. 61; *Thomas v. Hunter*, 20 Md. 406.

² *Paul v. Christie*, 4 Harr. & McH. (Md) 101.

Interest runs if the parties are domiciled in the same country, although by reason of the war the Statute of Limitations may not run. *Williams v. State*, 37 Ark. 463.

See, however, when interest was apparently not exacted, *Kirby v. Goodykoontz*, 67 Va. (26 Gratt) 298.

³ *Bean v. Chapman*, 62 Ala. 58.

⁴ *Bean v. Chapman*, 62 Ala. 58.

⁵ *Yeaton v. Berney*, 62 Ill. 61.

⁶ *Thomas v. Hunter*, 29 Md 206.

⁷ *Thomas v. Hunter*, 20 Md. 206.

⁸ *Yeaton v. Berney*, 62 Ill. 61.

ingly interest was not suspended by the Civil War.⁹ For the same reason interest is not suspended if the creditor has an agent who is domiciled in the same country as the debtor to whom the debt in question could be paid lawfully.¹⁰ If the creditor has in fact been allowed to maintain an action during the war for the enforcement of the debt, and such debt could therefore have been paid, interest will not be suspended by the war.¹¹

The fact that the debtor could have paid the debt as a matter of fact, if he had been willing to violate the rules which forbid dealing with the enemy, does not render him liable to pay interest.¹² It was held that the fact that a debtor who resided within the lines held by the United States troops, during the Revolutionary War, could readily have gone into the British lines and paid his debt to his creditor, does not charge him with the duty of paying interest as a penalty for obeying the rules which prevented him from dealing with the enemy.¹³

§ 2741. Contracts for chartering vessels, transportation, and the like. The outbreak of war is ordinarily held to discharge contracts between alien enemies for transportation, chartering vessels, and the like,¹ rather than to suspend such contracts temporarily. In the cases in which this question has been presented, the result which was reached was undoubtedly correct. The contracts could not be performed without aiding the enemy; and, accordingly, performance could not be insisted on during the war. To have treated these contracts as suspended rather than as discharged, would, on the one hand, have inflicted an intolerable hardship upon the parties who had agreed to furnish the transportation or the vessel, since the termination of the war could not be foreseen, and accordingly they could not have entered into a contract for the use of the vessel during the war, without the risk of becoming liable for damages for breach of the original contract, if it had been held to

⁹ *Yeaton v. Berney*, 62 Ill. 61.

¹⁰ *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 L. ed. 207; *Neilson v. Rutledge*, 1 Desauss. Eq. (S. Car.) 194; *King v. Hanson*, 8 Va. (4 Call.) 259.

¹¹ *Greenlaw v. Williams*, 70 Tenn. (2 Lea) 533.

¹² *Foxcraft v. Nagle*, 2 U. S. (2 Dall.) 132, 1 L. ed. 319.

¹³ *Foxcraft v. Nagle*, 2 U. S. (2 Dall.) 132, 1 L. ed. 319.

¹ *Reid v. Hoskins*, 4 El. & Bl. 979; *Avery v. Bowden*, 5 El. & Bl. 714; *Esposito v. Bowden*, 7 El. & Bl. 766; *Karberg v. Blyther* [1916], 1 K. B. 495; *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan* [1917], 2 K. B. 639.

revive after the war.² In addition to these reasons, it would, in some cases, have strengthened the commercial position of the enemy if it had been permitted to regain control of the vessel after the termination of the war.³ It is likely that such a result would not be reached if the contract could be held to be suspended without inflicting such hardship on the one hand, or without aiding the enemy on the other; but it is also unlikely that cases of this sort can arise, which will not present one or both of these objections to treating the contract as merely suspended.

§ 2742. Leases. A lease made before the outbreak of the war to an alien enemy, is not dissolved or suspended by the war,¹ and he remains liable for the rent according to his covenant in such lease. While this question has been discussed in a case in which the alien had assigned the lease, it would probably have been reached if the alien had not assigned the lease, and if he had been prevented by the war from taking possession of the leased property.² The same result was reached in an earlier case,³ in which the lessee was ousted during civil war and in which it was held that such ouster was not such an impossibility as to excuse him from an express covenant on his part to pay rent.⁴

§ 2743. Contracts of sale. An executory contract, the performance of which does not involve trading with the enemy, or assistance to the enemy during the war, or after the war, or injury to his own government, is not discharged by war.¹ A contract for

² Reid v. Hoskins, 4 El. & Bl. 979; Avery v. Bowden, 5 El. & Bl. 714; Esposito v. Bowden, 7 El. & Bl. 766; Karberg v. Blyther [1916], 1 K. B. 495; Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan [1917], 2 K. B. 639.

³ Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan [1917], 2 K. B. 639.

¹ Halkey v. Lowenfeld [1916], 2 K. B. 707. L. R. A. 1917C 644.

² See on this question, Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124.

³ Paradine v. Jane, Alogy 26.

⁴ See § 2673.

¹ Smith v. Becker [1916], 2 Ch. 86; Grinnan v. Edwards, 21 W. Va. 347. A contract between two British subjects for the sale by one to the other of sugar f. o. b. at Hamburg, for export from Germany, which contains a covenant for arbitration, is not entirely discharged by the outbreak of the war, and by an embargo, placed by the German government on the export of sugar; and the parties may resort to arbitration in accordance with such covenant. Smith v. Becker [1916], 2 Ch. 86.

the sale of land which was entered into before the war, is not discharged by the fact that the vendor and the vendee are domiciled respectively in the territory of the belligerent powers.² It has been held, however, that such contract is suspended so that a clause providing for forfeiture for nonpayment of instalments, can not be enforced.³ On the other hand, a contract of sale the performance of which will aid the enemy in time of war, or will hamper the military operations of the government of the country in whose courts it is sought to enforce such contract, will be held to be discharged by the war, rather than dissolved.⁴ Contracts for the sale of ores and the like, even though running over a long period of time, were accordingly held to be discharged by the outbreak of war between England and Germany.⁵ After the outbreak of the war between England and Germany, the United States courts refused specific performance of a contract by which the interests of an American corporation were to be transferred to a German firm which was to do business in part in London; but as a condition of such refusal, a creditor, domiciled in England, who had advanced money on the credit of the new organization, was permitted to enforce his claims as against the property which, by the contract, would have been transferred to such new organization.⁶

§ 2744. Life insurance—Premiums paid. If the insurer is domiciled in the territory of one of the belligerents and the insured is domiciled in the territory of the other belligerent power, the outbreak of war is said not to operate as a dissolution of the contract of insurance of itself, and if the premiums are paid, the contract of life insurance remains in force in spite of the fact that the insured has become an alien enemy,¹ although it has been said that this rule applies only if the insured is a non-combatant.² While

² *Grinnan v. Edwards*, 21 W. Va. 347.

³ *Grinnan v. Edwards*, 21 W. Va. 347.

⁴ *Bieber v. Rio Tinto Co.* [1918], A. C. 260; *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650; *Naylor v. Krainische Industrie Gesellschaft* [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331; and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260].

⁵ *Bieber v. Rio Tinto Co.* [1918], A. C. 260; *Zinc Corporation v. Hirsch*

[1916], 1 K. B. 541, L. R. A. 1917C, 650; *Naylor v. Krainische Industrie Gesellschaft* [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331; and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260].

⁶ *Lindenberger Cold Storage & Canning Co. v. Lindenberger*, 235 Fed. 542.

¹ *Sands v. New York Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535.

² *New York Life Ins. Co. v. Clopton*, 70 Ky. (7 Bush.) 179, 3 Am. Rep. 290.

was entitled to recover from the insurer the so-called equitable value of his policy, by which the supreme court apparently meant the difference between the amount of premiums which the insured would have to pay over his original policy, and the amount which he would have to pay if he had taken out a new policy for the first time when the original policy lapsed.⁶

⁶*New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

"The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control

of either party—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex aequo et bono*, be returned to him. This would clearly be demanded by justice and right.

"And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of nonpayment, they can not with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

"As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge

The fourth theory resembles the third in that it regards the war as operating as a discharge of the contract for the purpose of preventing an absolute forfeiture; but it differs from the third theory with reference to the amount which is due under such policy on

that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. Indeed, some life insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to a value on which the holder often realizes money by borrowing. The

careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy—or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

"We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the nonpayment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

"Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex aequo et bono* to recover the equitable value of the policies with interest from the close of the war." *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

the theory of quasi-contract. Under the fourth theory, the insurer has the option between reinstating the policy upon payment of the premiums which are in arrears with interest thereon, or paying the equitable value of the policy,⁷ and the amount of such equitable value is said to be the amount of the premiums actually paid in by the insured, less the actual value of such insurance for each year.⁸ The criticism of the third theory advanced where the fourth theory is adopted, is that the amount of recovery under the third theory is too favorable to the insurance company, since it gives to them the profit for the time during which the policy was in force, which profit it ought not to retain if it elects to treat the policy as terminated.⁹

⁷ *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 400.

⁸ *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 400.

⁹ In speaking of the opinion in the case of *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. ed. 780, the court said: "The views of Justice Bradley are in the main in my judgment sound, but are too favorable to the insurance company. Thus when he lays down, that the fundamental basis of life insurance is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick or dying would apply), and therefore it would be unjust to compel a revival against the company, he reaches a correct conclusion, but his reasoning is not altogether sound; for it is not true that none but the sick or dying would apply. On the contrary, it would generally be to the interest of the assured to apply after the war, though he were then in good health, because if the policy was permitted to remain forfeited, he would forfeit all that he had paid prior to the war, and if he had paid his premiums for a considerable length of time the company would be profited, not injured, by his not applying. It is true that if he had paid his pre-

miums for a short time only, the company might be injured by his not applying, as the forfeiture of all the premiums he had paid might not compensate the company for the loss of the profits which would accrue to it from a continuance of the policy. In one important respect I think the views of the supreme court are untenable. When carefully analyzed, and especially when the mode of ascertaining what *ex aequo et bono* ought to be repaid by the company to the insured is considered, it will appear that when the company elects to annul the contract, the parties are not, as in my judgment they should be, placed in exactly the position in which they were before the policy was taken out, excepting only that as the assured had been insured for a number of years the company should be allowed to retain of the money paid to it by assured a sum just sufficient to compensate it for the actual risk it had run; but by this opinion of the supreme court the company after being fully compensated for the risk it had run is on such annulling of the policy in a decidedly better position than it would have been in had it never issued the policy. It is permitted to retain in effect more than a sum sufficient to compensate it for the risk it had run. It is really per-

§ 2746. Marine, fire, theft and robbery insurance. If a policy of marine insurance is issued, and a war subsequently breaks out during the life of such policy, between the country in which the insurer is domiciled and the country in which the insured is domiciled, such policy does not protect the insured against loss due to

mitted to retain not only this, but a large additional sum for profits, which it appears the court thought it was entitled to for carrying the risk prior to the war. This is the necessary result which follows from the court holding that the assured is entitled, when the contract is annulled, to be paid only the then market value of the policy.

"If the company elects to annul the contract and policy, I can not see how it is justly entitled to retain anything as profits on a policy which it has chosen to annul. The court is careful to say that it can retain nothing for profits which in the future would have been made by the company out of the contract; and it seems to me that it is equally clear that it can retain nothing for profits made under the policy in the past. It can retain only such sum as would actually pay it without any profit for the risk it had run before the annulment of the policy and while it was in force. If it elects to annul the policy, it must annul it as from the beginning after being paid for the actual risk it had run, and can not rightfully claim to be paid anything as profits on the policy. It can not rightfully repudiate its obligations under the contract and claim still to be allowed profits under such contract. The assured agreed to pay the company for a certain sum to be paid in the case before us to his family after his death, a sum not only sufficient to compensate it for the risk it ran, but a large additional sum as profits in the transaction. This he did that his family might on his death have something on which they could certainly rely, no

matter when he might die. When the company elect to take from him the only consideration which, induced him to agree to give it this large profit, is it equitable that he should still be required to pay any part of this profit? Is it not just that he should receive back all he has paid, except what is sufficient to compensate the company for the risk it had run while the policy was in force? Can he be justly called upon to pay a further sum for profits? It seems to me that it would be obviously inequitable to require this of him. He never was willing to pay any profits to the company for insuring his life for a certain number of years before the war, and yet this he is now required to do. He was only willing to pay such profit upon his being insured for his entire life, and when the company decline to carry out such insurance for his entire life, it must surrender the entire profits of the insurance contract and be content to retain only what will compensate it for the risk it has run.

"Of course, after the deduction from the amount actually received in any year from the assured of the amount necessary to just compensate the company for the risk it ran that year, the balance should bear interest from the time when it was paid to the company. These balances should bear interest till the time when the company may elect to annul the policy, when it should be paid to the assured. And I can see no reason why this interest should stop during the pendency of the war. It is true that if a creditor lived in Virginia and his debtor in Pennsylvania, the interest on the debt would

the naval operations of the state in which the insurer is domiciled;¹ nor does it protect the insured against loss due to the naval operations of a belligerent power with which his own government is at war,² probably without regard to the existence of an alliance between such power and the government in which the insurer is domiciled.³

This rule has been upheld on the ground that to permit a contract of insurance to protect against the acts of the government of the insurer would be to nullify the effects of the war by paying to the insured, out of the treasury of the insurer, after the war, what the government of the insurer was attempting to take from the subjects of the enemy during the war. As far as the interests of the insurer and the insured are to be considered, it may be assumed that the insurer has so adjusted the amount of the premiums that the amount paid in as premiums by all who take such insurance, will exceed the amount of losses upon such policies, unless the past experience on which the insurer is basing his premiums has been made futile by new devices for capturing or destroying property on the high seas, which the insurer has not taken into account in fixing the amount of premiums.

not have run during the continuance of the war, because the law itself in such a case forbids the debtor to pay either principal or interest to the creditor during the war, they being then alien enemies. See, *McVeigh v. The Bank of the Old Dominion*, 26 Gratt. 188; *Brown v. Hiatts*, 15 Wall. 177. But in the case before us the defendant did not owe the plaintiff any debt either before or during the war on which interest could be stopped. The debt was contracted for the first time after the war closed, when the defendant elected to annul the policy. When it did so, it imposed on itself the obligation of placing the plaintiff in the position in which he would have been, had no policy ever been issued, after the payment to it of a sum sufficient to compensate it for the risk it had run. The sum necessary to do this can be properly ascertained only by refunding the money which it had received on the policy, with interest

for the whole time after deducting the amount which would compensate the company for the risk it ran while the policy was in force, or, as it is called, the cost of the insurance. This is not allowing interest on a debt during the war. What is here called interest is really not interest on a debt, but is simply a mode of ascertaining what is the amount of the principal, which became due from the defendant to the plaintiff for the first time after the close of the war." *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 400.

¹ *Furtado v. Rogers*, 3 Bos. & Pull. 191; *Gamba v. Le Mesurier*, 4 East 407.

On this subject generally, see *Insurance of Foreign Property in War Time*, by W. R. Wilson, 32 Law Quarterly Review, 373; 33 Law Quarterly Review, 15.

² *Brandon v. Cushing*, 4 East 410.

³ *Brandon v. Cushing*, 4 East 410.

A better justification for the rule is to be found probably in the interest of the government itself. It is entitled to demand that none of its subjects shall have an active interest in preventing the capture of enemy property on the high seas, and that the government shall not be hampered in working out new and more effective devices for capturing property by the fact that absolute success in their naval operations may be followed by the bankruptcy of some of their own insurance companies. Whether the outbreak of the war dissolves or suspends the contract of reinsurance, on the one hand, or whether it leaves it in force except as against loss due to the naval operations of the government in which the insurer is domiciled, is a question upon which there is little authority outside of dicta. Since the insurer has received premiums as consideration for undertaking the risk, it would seem that he ought not to be allowed to take advantage of the existence of war if his own government does not forbid the continuance of such contracts or attempt to confiscate the right of the alien enemy therein. The act of presenting a claim upon a loss which has been sustained after the outbreak of war on a policy which was issued before the outbreak of war, against a local branch of an alien enemy insurance company, is said not to be a transaction with the enemy within the meaning of the fifth clause of the Trading with the Enemy Proclamation, issued by the English government on October 8, 1914.⁴ If an alien enemy insurer pays a loss caused by the seizure of neutral goods, and the insured transfers his interest in such goods to the insurer, the goods are for most purposes to be regarded as enemy property.⁵

The outbreak of war between the country of the insurer and the country of the insured, would seem not to operate as a discharge of a policy of fire insurance, at least if the loss is not due to the military or naval operations of the government in which the insurer is domiciled. Probably, in analogy to the rules which apply to marine insurance, such a policy would be held not to include losses due to the action of the government of the country in which the insured is domiciled. As in other cases,⁶ the insured can not maintain an action in the courts of the country in which the insurer is domiciled, as long as such war continues, and he is a

⁴ *Ingle v. Mannheim Continental Ins. Co.* [1915], 1 K. B. 227.

⁵ On this question, see *The Palm Branch* [1919], A. C. 272.

⁶ See § 2751.

nonresident alien enemy to such country.⁷ A policy against theft and robbery, which was issued by an English insurance company to a mining company which operated in the Transvaal, was held to protect the insured against seizure by the Transvaal government just before the war and in anticipation thereof.⁸ The result which was reached in this case may have been influenced by the fact that the financial interests in the mining company were the interests of English subjects, although the corporation itself was formed under the laws of the Transvaal.

§ 2747. Agency—Interests of state as affecting continuance. The effect of the outbreak of a war between the country of the principal and the country of the agency, upon the prior authority of the agent, depends in part upon the interest of the country in which it is sought to enforce transactions growing out of such agency, and in part on the interest of the respective parties to the agency. As far as the interests of the state are concerned, the question whether the outbreak of war terminates an agency in cases in which the principal is domiciled in one of the belligerent countries, and the agent is domiciled in another, depends upon the nature of the agency, and the purpose which it is sought to accomplish thereby. If the authority of the agent can be exercised without communicating with his principal across the lines of war, without transferring property or money to the principal, and without engaging in trading with the enemy on behalf of the principal, the agency is not discharged by the outbreak of the war.¹ As long as the agency can be performed without communicating with the enemy, the outbreak of war between the countries in which the principal and the agent are domiciled respectively, is said not to terminate the agency as long as such agency is not contrary to the policy of the country in whose courts it is sought to enforce trans-

⁷ See § 2751.

⁸ *Janson v. Driefontein Consolidated Mines* [1902], A. C. 484 [affirming, *Driefontein Consolidated Mines v. Janson* (1901), 2 K. B. 419].

¹ *United States v. Ward v. Smith*, 74 U. S. (7 Wall.) 447, 10 L. ed. 207; *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

Kansas v. Fisher v. Krutz, 9 Kan. 501. *New York v. Robinson v. Society*, 42 N. Y. 54, 1 Am. Rep. 490; *Hubbard v.*

Matthews, 54 N. Y. 43, 13 Am. Rep. 562.

Tennessee v. Darling v. Lewis, 58 Tenn. (11 Heisk.) 125; *Maloney v. Stephens*, 58 Tenn. (11 Heisk.) 738.

Texas v. McCormick v. Arnsperger, 38 Tex. 569.

Virginia v. Manhattan, etc., Co. v. Warwick, 61 Va. (20 Gratt.) 614, 3 Am. Rep. 218.

Contra, Howell v. Gordon, 40 Ga. 302.

actions growing out of such agency, and as long as it is to the interest of the adversary belligerent.² An agent appointed to care for his principal's property, having money on hand to pay taxes, can not buy the property at a tax sale and thus acquire an interest adverse to his principal.³

If the agency is of such a nature that the exercise thereof requires communication with the principal who has become an alien enemy, or that such performance amounts in legal effect to trading with the enemy, war between the country in which the principal is domiciled and the country in which the agent is domiciled operates as a revocation of such authority.⁴ War ordinarily operates as a revocation of authority to buy or to sell property on behalf of an alien enemy principal who is domiciled in the territory of the adversary belligerent power.⁵ In cases of this sort it is the domicile of the party and not the nationality that renders the contract objectionable as trading with the enemy.⁶ If a loyal citizen of the United States, who remained domiciled during the war within the territory of a state which adhered to the Confederacy, and who had acted before the war and during the war as the agent of a principal who is also domiciled in Confederate lines, such agent could not represent his principal in making a sale of personal property after the Union lines had been extended so as to include the territory in which the agent was domiciled,⁷ even if he undertakes to make such contract on behalf of his principal with a subject of a neutral power, whose domicile has also been included in the Union lines.⁸ War operates as a termination of the authority of a sales agent in the country of the adversary belligerent,⁹ and not merely as a suspension of such authority.¹⁰

² *Fisher v. Krutz*, 9 Kan. 501; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

Contra, *Howell v. Gordon*, 40 Ga. 302.

³ *Fisher v. Krutz*, 9 Kan. 501.

⁴ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811; *Stevenson v. Aktiengesellschaft für Cartonnagen Industrie* [1916], 1 K. B. 763; *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97; *Conley v. Burson*, 48 Tenn. (1 Heisk.) 145.

⁵ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

It is said that the agent may, however, sell the property as his own, and that he must then account to his prin-

cipal after the war. *McCormick v. Arnsperger*, 38 Tex. 569.

⁶ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

⁷ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

⁸ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97.

⁹ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811; *Stevenson v. Aktiengesellschaft für Cartonnagen Industrie* [1916], 1 K. B. 763.

¹⁰ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811; *Stevenson v. Aktiengesellschaft für Cartonnagen Industrie* [1916], 1 K. B. 763.

A sale of realty situated in the country of a belligerent power seems to be regarded as a transaction which does not amount to a trading with the enemy;¹¹ and, accordingly, a power of attorney to effect a sale of realty or the transfer of an interest therein, is not revoked by the outbreak of war between the country in which the donor of the power is domiciled and the country in which the attorney in fact is domiciled.¹² If A, while domiciled in one of the United States, which subsequently adhered to the Union in the Civil War, left such state when the war broke out, and entered the Confederate lines and resided there until the end of the war, such removal did not revoke a power of attorney which was executed before the Civil War, in such state which subsequently adhered to the Union and which authorized the conveyance of property in the District of Columbia.¹³ A power of attorney to sell land which by its terms was irrevocable for a year, has been held not to be avoided by the fact that war broke out within the year between the country in which such land was situated, and such attorney in fact was domiciled, and the country of which the donor of the power was a natural-born subject, and to which he returned at the

¹¹ *Tingley v. Muller* [1917], 2 Ch. 144 [following, *Porter v. Freudenberg* (1915), 1 K. B. 857; and applying, *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 A. C. 307]; *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

Contra, *Conley v. Burson*, 48 Tenn. (1 Heisk.) 145.

¹² *Tingley v. Muller* [1917], 2 Ch. 144 [following, *Porter v. Freudenberg* (1915), 1 K. B. 857; and applying, *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 A. C. 307]; *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

Contra, *Conley v. Burson*, 48 Tenn. (1 Heisk.) 145.

¹³ *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

"It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends

upon the circumstances surrounding the case and the nature and character of the agency. This case shows that in 1859, at the time when the power of attorney was executed, Lieutenant Ransom and his wife were desirous of realizing their share of the value of the land in controversy. It was vacant, unimproved land in the city of Washington, and the charge for taxes was quite burdensome. The parties desired to realize the money. No sale of the property was effected from that time until the latter part of 1864, or early part of 1865. There is no evidence of any such change of circumstances as would naturally suggest a revocation of the authority to sell, but on the contrary the testimony is otherwise. It appears to have been to the interest of all parties to sell and thus to free themselves from a constant source of expense." *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658.

outbreak of the war.¹⁴ Since a power of attorney to sell land is not ordinarily affected by the fact that the donor of the power has become an alien enemy domiciled in the territory of the adversary belligerent, it is not affected by the fact that the donor of the power has become a prisoner of war.¹⁵

During a civil war, at least, the extension of the military lines of the original government operates as a revocation of the authority of an agent who remains domiciled in such territory, while his principal remains domiciled in territory which continues to adhere to the insurgent cause.¹⁶

If an agent has in fact received property during the war on behalf of an alien enemy principal, and such property has not been confiscated by the government of the country in which such agent is domiciled, such agent must, at the end of the war, account to his principal for the value of the property thus received.¹⁷ The agency may be such that its exercise would hinder the country in whose courts it is sought to enforce such transaction, in prosecuting the war, or it may be of such a nature as to aid the adversary belligerent in the prosecution of the war. In cases of this sort, the courts of the country, whose interests are injuriously affected, would undoubtedly hold that war operates as a revocation of such agency.

§ 2748. Agency—Interests of principal, agent and third parties as affecting continuance. If the agency is of such a nature that the exercise of authority thereunder is not prejudicial to the interests of the country in whose courts it is sought to enforce such transactions, the respective interests of the principal and the agent will be considered. Since communication between the principal and agent has become impossible by reason of the outbreak of war between the countries in which they are respectively domiciled, it is legally impossible, on the one hand, for the principal to revoke the powers of his agent or to modify them, since to do so he must give notice to the agent, and in some cases he must also give notice to third parties of such revocation or modification of authority.¹

¹⁴ *Tingley v. Muller* [1917], 2 Ch. 144 [following, *Porter v. Freudenberg* (1915), 1 K. B. 857; and applying, *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 A. C. 307].

¹⁵ *Pope v. Chafee*, 14 Rich. Eq. (S. Car.) 69.

¹⁶ *Montgomery v. United States*, 82 U. S. (15 Wall.) 395, 21 L. ed. 97; *United States v. Lapéné*, 84 U. S. (17 Wall.) 602, 21 L. ed. 693.

¹⁷ *Stiles v. Easley*, 51 Ill. 275; *McCormick v. Arnspiger*, 38 Tex. 569.

¹ See § 1743.

Since such notice can not be given legally after the outbreak of the war, the courts are obliged to consider the nature of the agency and the presumed intention of the principal to continue such agency on the one hand, or to discontinue it on the other, as his own interests may require, and to give effect to such presumed intention. If the continuance of the agency will be clearly beneficial to the principal who has become an alien enemy, and if it will not be detrimental to the interests of the state in which it is sought to enforce the contract, such agency will be regarded as continuing,² at least if the agent is willing to exercise his former authority.

The outbreak of war does not terminate the authority of an agent whose principal has become an alien enemy, if such authority is to collect and to preserve the money or property of his principal, but not to transmit it, and if the exercise of such authority will not prejudice the interests of his principal.³ The authority of the agent to collect and to preserve the property of his principal, is presumed to survive the outbreak of war, only if the manifest interest of the principal requires that it should survive.⁴ If it is

² **United States.** *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 L. ed. 207; *Douglas v. United States*, 14 Ct. Cl. 1.

New Jersey. *Keppelmann v. Keppelmann*, 80 N. J. Eq. 390, 105 Atl. 140.

New York. *Buchanan v. Curry*, 19 Johns. (N. Y.) 136.

Tennessee. *Maloney v. Stephens*, 58 Tenn. (11 Heisk.) 738.

Virginia. *Manhattan Life Ins. Co. v. Warwick*, 61 Va. (20 Gratt.) 614; *Hale v. Wall*, 63 Va. (22 Gratt.) 424; *Mutual Benefit Life Ins. Co. v. Atwood's Admx.*, 65 Va. (24 Gratt.) 497; *Small's Administrator v. Lumpkin's Administrator*, 69 Va. (28 Gratt.) 832.

³ **United States.** *Ward v. Smith*, 74 U. S. (7 Wall.) 447, 19 L. ed. 209; *Douglas v. United States*, 14 Ct. Cl. 1.

New Jersey. *Keppelmann v. Keppelmann*, 80 N. J. Eq. 390, 105 Atl. 140.

New York. *Buchanan v. Curry*, 19 Johns. (N. Y.) 136.

Tennessee. *Maloney v. Stephens*, 58 Tenn. (11 Heisk.) 738.

Virginia. *Manhattan Life Ins. Co.*

v. Warwick, 61 Va. (20 Gratt.) 614; *Hale v. Wall*, 63 Va. (22 Gratt.) 424; *Mutual Benefit Life Ins. Co. v. Atwood's Admx.*, 65 Va. (24 Gratt.) 497; *Small's Administrator v. Lumpkin's Administrator*, 69 Va. (28 Gratt.) 832.

⁴ *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. ed. 453; *Keppelmann v. Keppelmann*, 89 N. J. Eq. 390, 105 Atl. 140.

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule

not shown that an insurance company, which is created by a state which adhered to the Union during the Civil War, requested an agent, who was a citizen of a state which adhered to the Confederacy and who was domiciled therein, to continue to act as its agent during the Civil War, and if it is shown that such person refused to continue to act as such agent, a tender of premiums to such agent by a policyholder who was a citizen of such state which adhered to the Confederacy and who was domiciled therein, is inoperative to keep the policy of insurance in effect.⁵ In cases of this sort, the presumed interest of the principal seems to outweigh the interest of the policyholder. At the same time, the refusal of the agent to continue to act would be sufficient to terminate his authority as against a third person in time of peace, whether or

recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it. *Washington, J., in Conn. v. Penn. Pet. C. Ct.* 496; *Buchanan v. Curry*, 19 Johns. (N. Y.) 141. In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory, nor can it be made so, on either side, to subserve the ends of third parties. If the agent con-

tinues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands, but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. This is all." *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. ed. 453.

⁵ *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. ed. 453.

not his refusal rendered him liable to his principal; and accordingly as against a third person his refusal should have the same effect in time of war. Power to collect a prior debt is said not to be terminated by the outbreak of the war between the country of the principal and the country of the agent.⁶

The authority of an agent appointed before the war to care for the property of his principal who has become an alien enemy, is ordinarily not revoked by the outbreak of the war as a matter of law.⁷ If the interests of a principal who has become an alien enemy are subserved by regarding his appointment of an attorney in fact to represent him in a proceeding to obtain an accounting of an estate in which such alien enemy is a beneficiary, and to determine and to compel a distribution of such estate, such power of attorney will be presumed to continue.⁸ It has been said that the interests of an alien enemy principal will be injured by treating a power of attorney to collect a legacy and to give a refunding bond as continuing in spite of the outbreak of the war, at least if such legacy, when collected, is to be paid over to the custodian of alien property;⁹ and accordingly it will be presumed that such power of attorney is revoked by the outbreak of the war.¹⁰ The fact that the alien enemy who has been served by publication does not elect to take advantage of his statutory privilege of being represented by counsel, is not sufficient to show an election on his part to treat, as still in effect, a power of attorney given before the outbreak of the war, to collect legacies and to give refunding bonds.¹¹

Whether the outbreak of the war revokes the power of an attorney-at-law to represent the interests of his client who has become an alien enemy, is a question upon which there is a conflict of authority. In some jurisdictions it is held that such authority is revoked by the outbreak of the war;¹² while on similar

⁶ *Rodgers v. Bass*, 46 Tex. 505.

⁷ *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171; *Hale v. Wall*, 63 Va. (22 Gratt.) 424.

Contra, *Howell v. Gordon*, 40 Ga. 302 (obiter, as real question was as to power of such agent to confess judgment in an attachment proceeding).

⁸ *Keppelmann v. Keppelmann*, 89 N. J. Eq. 390, 105 Atl. 140.

⁹ *Keppelmann v. Keppelmann*, 89 N. J. Eq. 390, 105 Atl. 140.

¹⁰ *Keppelmann v. Keppelmann*, 89 N. J. Eq. 390, 105 Atl. 140.

¹¹ *Keppelmann v. Keppelmann*, 89 N. J. Eq. 390, 105 Atl. 140.

¹² *Blackwell v. Willard*, 65 N. Car. 555, 6 Am. Rep. 749.

facts the opposite result has been reached, and it has been held that such authority is not revoked.¹³

If a creditor is a citizen of a state which adheres to the Union during the Civil War, and he resides therein, his agent, who, together with the debtor, resides in a state which adheres to the Confederacy, has no authority to accept payment of such debt in anything except lawful money of the United States;¹⁴ and the fact that such agent has, without authority, accepted payment in Confederate money or in notes of state banks which were secured by Confederate bonds, does not operate as a payment of such debt.¹⁵

While as a rule the interests of the state demand that the authority of the agent to enter into new obligations on behalf of his principal should cease when the principal becomes an alien enemy, by reason of the outbreak of war, since such new obligations constitute trading with the enemy,¹⁶ it has been held that the continuing authority of the agent to protect the property of the principal, includes the power to include obligations to the principal for legal services in protecting such property.¹⁷

In some cases the interests of third parties are considered as well as the interests of the state on the one hand, and the principal and agent on the other; and if the revocation of agency by the outbreak of the war would work an injustice to such third persons, the agency has been held to continue, notwithstanding the outbreak of the war, if the continuance of the agency is not prejudicial to the interests of the state in whose court it is sought to enforce the transaction.¹⁸ Even if the interests of the principal might be subserved by treating the agency as revoked, such effect will not be given to the outbreak of the war if the interests of third persons who have dealt with the principal through the agent would be prejudiced much more seriously by such revocation.¹⁹ If an agent authorized before the outbreak of the war to bid in land on behalf of his principal at an execution sale, the outbreak of the war does not end his authority to receive money paid in for the redemption

¹³ *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 20 L. ed. 80; *Cocks v. Izard*, Fed. Cas. 2034; *Riddell v. Fuhrman*, — Mass. —, 123 N. E. 237.

¹⁴ *Fretz v. Stover*, 89 U. S. (22 Wall.) 198, 22 L. ed. 769.

¹⁵ *Fretz v. Stover*, 89 U. S. (22 Wall.) 198, 22 L. ed. 769.

Contra, *Rodgers v. Bass*, 46 Tex. 505.

¹⁶ See § 2726.

¹⁷ *Buford v. Speed*, 74 Ky. 338.

¹⁸ *Darling v. Lewis*, 58 Tenn. (11 Heisk.) 125.

¹⁹ *Darling v. Lewis*, 58 Tenn. (11 Heisk.) 125.

of such realty.²⁰ War does not terminate the power of a resident agent to receive notice of the dishonor of a negotiable instrument.²¹

§ 2740. Partnerships. Since the continuation of a partnership involves the power of each partner to make contracts within the scope of the partnership business which will bind the other partners,¹ and since the continuance of a partnership between partners who have become alien enemies would therefore involve the continuation of a mutual agency so that each would be in effect trading with the enemy through his partner, a partnership is dissolved as far as concerns the power of each partner to make future contracts on behalf of the other partner, by the outbreak of a war between the countries in which the partners are respectively domiciled.² One of the chief reasons originally assigned for holding that war between the countries in which two or more partners are domiciled, and of which they are citizens, operates as a dissolution of the partnership, is said to be the fact that each partner owes allegiance to his own government, and that accordingly there must be a relation of mutual hostility in theory at least, between the partners, which is inconsistent with the continuance of the partnership.³ It has also been suggested that a partnership is dissolved by a war because of the incompatibility between the duties of the partners to one another as partners, and their duties to one another as subjects of hostile belligerent powers.⁴ The true reason for holding that the partnership is dissolved by war as suggested in

²⁰ *Darling v. Lewis*, 58 Tenn. (11 Heisk.) 125.

²¹ *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

¹ See §§ 1700 et seq.

² *Stevenson v. Aktiengesellschaft für Carton-Nagen-Industrie* [1918], A. C. 230 [affirming (1917), 1 K. B. 842]; *Rodriguez v. Speyer* [1919], A. C. 59; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684; *Taylor v. Hutchison*, 66 Va. (25 Gratt.) 536, 18 Am. Rep. 699.

³ *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

⁴ "But how can the partners have any unity of interest, or any joint object

that is lawful, when their pursuits, in consequence of the war, and in consequence of the separate allegiance which each owes to his own government must be mutually hostile?" *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

⁴ "Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties." *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.

earlier cases,⁵ and as held in later ones,⁶ is that the continuance of the partnership involves dealing with the enemy, and that accordingly war operates as a dissolution of such a partnership. A partner who is a citizen of one belligerent and a resident therein, can not incur obligations in the name of the firm during war which can be enforced after the war against a partner who is a citizen of the other belligerent and who is domiciled therein.⁷ A partner who is domiciled in the territory of one of the belligerents, can not incur liability on behalf of the partnership as an indorser, so as to impose liability upon the partner who is domiciled in the territory

⁵ "It appears to me that the declaration of war did of itself work a dissolution of all commercial partnerships existing at the time between British subjects and American citizens.

"By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy can not, in that capacity, make a private contract binding upon the other. This conclusion would seem to be an inevitable result from the new relations created by the war. It is a necessary consequence of the other proposition, that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law has severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation or dealing between the partners was prohibited as unlawful? Why preserve the skeleton of the firm when the sense and spirit of it has fled, and when the execution of any one article of it by either would be a breach of his allegiance to his country? In short, it must be obvious to every one that a state of war creates disabilities, im-

poses restraints and exacts duties altogether inconsistent with the continuance of that relation. Why does war dissolve a charter-party, or a commercial contract for a particular voyage? Because, says Valin (tom. 1, p. 626), the war interposes an insurmountable obstacle to the accomplishment of the contract; and this obstacle arising from a cause beyond the control of the party, it is very natural, he observes, that the charter-party should be dissolved, as of course. Why should the contract of partnership continue by law when equally invincible obstacles are created by law to defeat it? If one alien enemy can go and bind his hostile partner by contracts in time of war, when the other can have no agency, consultation or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject is the rule prescribed by the Roman law, that a copartnership in any business ceased when there was an end put to the business itself. Item si alicujus rei societas sit, et finis negotio impositus est, finitur societas (Inst. 3, 26, 6)." *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

⁶ *Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie* [1917], 1 K. B. 842 [affirmed (1918), A. C. 239]

⁷ *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

of the other belligerent.⁸ For similar reasons, a partner who leaves the partnership property in the hands of his partner in enemy country, during the war, can not object to the capture and confiscation of such property in time of war as enemy property.⁹

Since the true reason for holding that war dissolves a partnership between alien enemies, is, at modern law, the desire to stop unlawful trading with the enemy, it follows that if commercial intercourse between the two belligerents is licensed either expressly or impliedly, the courts of the government which has given such license will not regard the war as discharging the partnership.¹⁰ If commercial intercourse was authorized between the states which adhered to the Union and the seceding states either expressly or impliedly, the outbreak of the Civil War did not dissolve a partnership between a citizen of a state which adhered to the Union, and a citizen of a state which seceded.¹¹

Notice of dishonor of a negotiable instrument may be given to a resident partner, so as to bind the partnership, including the partner who is an alien enemy domiciled in the enemy's country.¹²

IV

EFFECT OF WAR ON ENFORCEMENT OF PRIOR RIGHTS

§ 2750. Alien enemy as party to litigation—Resident plaintiff.

As in cases which involve the validity of contracts between alien enemies and citizens of the state in whose courts it is sought to enforce the contract,¹ the question of the right of an alien to maintain an action depends on his domicile, rather than upon his nationality.² In the case of natural persons, the personal or business

⁸ *Bank v Matthews*, 49 N. Y. 12.

⁹ *The William Bagaley*, 72 U. S. (5 Wall.) 377, 18 L. ed. 583.

¹⁰ *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188; *McStea v. Matthews*, 50 N. Y. 160.

¹¹ *Matthews v. McStea*, 91 U. S. 7, 23 L. ed. 188; *McStea v. Matthews*, 50 N. Y. 160.

¹² *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

¹ See §§ 2727 and 2732.

On this subject generally, see *Alien Enemy Litigants*, by Arnold McNair,

31 Law Quarterly Review, 154; 34 Law Quarterly Review, 134.

See also, *Treatment of Enemy Aliens*, by Amos S. Hershey, 12 American Journal of International Law, 156; *Treatment of Enemy Aliens*, by James W. Garner, 12 American Journal of International Law, 27.

² *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307; *Heiler v. Goodman's Motor Express, Van & Storage Co.*, 92 N. J. L. 415, 3 A. L. R. 336, 105 Atl. 233.

domicile controls.³ At common law a resident alien enemy may maintain an action,⁴ at least if he has a license, either express or implied, from the government to remain in the country, and he may assert such right unless it is taken away from him by legislation or by lawful executive proclamation. If he is remaining in the country without a license, express or implied, he can not maintain an action.⁵ In the case of corporations, the country in which the corporation is formed *prima facie* controls,⁶ but the question of the control of the corporation may be considered, and if it is shown that a domestic corporation is really controlled by alien enemies, it may apparently itself be treated as an alien enemy.⁷ The fact that a company incorporated in England has done business in Germany through a local agent, is held not to make it an alien enemy in England,⁸ so as to prevent it from prosecuting an action against a German to enforce a judgment for causes which had been rendered by a German court before the outbreak of the war, in an action which had been brought in the German courts by such defendant against such plaintiff.⁹ A corporation which was incorporated in England, which was controlled by English directors and officers, and the majority of whose stock was held by English subjects, was treated as English for the purpose of permit-

³ *Heiler v. Goodman's Motor Express, Van & Storage Co.*, 92 N. J. L. 415, 3 A. L. R. 336, 105 Atl. 233.

⁴ *England*. *Wells v. Williams*, 1 Ld. Raym. 282; *Thurn and Taxis (Princess of) v. Moffitt* [1915], 1 Ch. 58; *Schaffenuis v. Goldberg* [1916], 1 K. B. 284.

United States. *The Oropa*, 255 Fed. 132.

Kansas. *Wolf v. Cudahy Packing Co.*, — Kan. —, 182 Pac. 395 (not an "alien enemy" within the Trading with the Enemy Act, since resident of the United States).

Michigan. *Mittelstadt v. Kelly*, 202 Mich. 524, 168 N. W. 501.

New Jersey. *Posselt v. D'Espard*, 87 N. J. Eq. 571, 100 Atl. 893; *Heiler v. Goodman's Motor Express, Van & Storage Co.*, 92 N. J. L. 415, 3 A. L. R. 336, 105 Atl. 233.

New York. *Fritz Schultz, Jr., Co. v. Raimes*, 164 N. Y. Supp. 454, 99 Misc.

626 [affirmed, *Fritz Schultz, Jr., Co. v. Raimes*, 166 N. Y. Supp. 567, 100 Misc. 697]; *Arndt-Ober v. Metropolitan Opera Co.*, 169 N. Y. Supp. 304, 102 Misc. 320 [affirmed, 182 App. Div. 513, 169 N. Y. Supp. 944].

North Carolina. *Krachanake v. Acme Manufacturing Co.*, 175 N. Car. 435, L. R. A. 1918F, 801, 95 S. E. 851.

Pennsylvania. *Russell v. Skipwith*, 6 Binn. (Pa.) 241.

Washington. *Constanti v. Darwin*, — Wash. —, L. R. A. 1918F, 1012, 173 Pac. 29.

⁵ *Alcinous v. Nigreu*, 4 El. & Bl. 217.

⁶ *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307 (decided by a divided court).

⁷ *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307.

⁸ *In re Hilckes* [1917], 1 K. B. 48.

⁹ *In re Hilckes* [1917], 1 K. B. 48.

ting it to bring an action in the English courts during the war, although much of the stock was held by nonresident alien enemies.¹⁰ A corporation formed under the laws of one of the states of the Union the majority of whose directors are domiciled in the United States, and whose managing officer is domiciled in the United States, has been regarded as a citizen for the purpose of litigation during the war, although the majority of the stock is owned by nonresident alien enemies.¹¹ A citizen of the United States, who was also a citizen of a state which adhered to the Union, but was actually present in a state which adhered to the Confederacy, could maintain an action in the courts of the latter state against a resident debtor.¹² An additional reason for permitting a resident alien minor to bring an action is the fact that the profits of the fund will be under the control of his guardian, and that the court can prevent the removal of such fund from the country.¹³

During the war between the United States and Germany, resident alien enemies were allowed to maintain actions in the courts of this country.¹⁴ The presidential proclamation was construed as

¹⁰ *In re Hilckes* [1917], 1 K. B. 48.

¹¹ *Fritz Schultz, Jr., Co. v. Raimes*, 164 N. Y. Supp. 454, 99 Misc. 626 [affirmed], *Fritz Schultz, Jr., Co. v. Raimes*, 166 N. Y. Supp. 567, 100 Misc. 697].

¹² *Bishop v. Jones*, 28 Tex. 294.

¹³ "It may be insisted that, as the beneficiaries in this suit are alleged to have been resident citizens of the United States, it is to be presumed they were not at that time in the Confederacy, and therefore they are not protected by the proclamation, which applied only to such persons as were within its jurisdiction. To this it is sufficient to say that the parties by whom the suit is brought were here. They did not come in violation of belligerent obligations into the country after the commencement of war. The reason why a suit can not be sustained by a citizen for the benefit of an alien enemy is to prevent fraud upon the court, because what can not be done directly should not be permitted indirectly. If, then, the principal might have recovered the property to which he was entitled by

suit in his own name, for the purpose of removing it from the country, we see no reason why this could not be done by his agent." *Bishop v. Jones*, 28 Tex. 294.

¹³ *Krchanake v. Acme Mfg. Co.*, 175 N. Car. 435, L. R. A. 1918E, 801, 95 S. E. 851.

¹⁴ *United States. The Oropa*, 255 Fed. 132.

Arizona. Superior & Pittsburg Copper Co. v. Davidovitch, 19 Ariz. 402, 171 Pac. 127.

Kansas. Wolf v. Cudahy Packing Co., — Kan. —, 182 Pac. 395.

Michigan. Mittelstadt v. Kelly, 202 Mich. 524, 168 N. W. 501.

New Jersey. Posselt v. D'Espard, 87 N. J. Eq. 571, 100 Atl. 893; *Heiler v. Goodman's Motor Express, Van & Storage Co.*, 92 N. J. L. 415, 3 A. L. R. 336, 105 Atl. 233.

North Carolina. Krchanake v. Acme Mfg. Co., 175 N. Car. 435, L. R. A. 1918E, 801, 95 S. E. 851.

Washington. Washington v. Darwin, — Wash. —, L. R. A. 1918F, 1012, 173 Pac. 29.

permitting resident alien enemies to prosecute actions in the courts of this country.¹⁵

The provisions of the treaty between Prussia and the United States provided expressly that the merchants of either country residing in the other, should be allowed to remain for nine months to settle their affairs and collect their debts, and that they should then be permitted to depart freely, taking all their effects with them. This provision was also regarded as conclusive of the right of an alien enemy domiciled in this country, to maintain an action in the courts, during the war, between the United States and Germany.¹⁶

If a resident alien enemy has been interned, it has been said that as far as his right to prosecute an action is concerned, he is to be regarded as if he were an alien enemy domiciled in the country of the enemy.¹⁷

Where a resident alien enemy who has been interned has applied for a continuance, it has been held that it is not an abuse of dis-

¹⁵ *Posselt v. D'Espard*, 87 N. J. Eq. 571, 100 Atl. 803; *Heiler v. Goodman's Motor Express Van & Storage Co.*, 92 N. J. L. 415, 3 A. L. R. 336, 106 Atl. 233; *Washington v. Darwin*, — Wash. —, L. R. A. 1918F, 1012, 173 Pac. 29.

¹⁶ *Fritz Schultz, Jr., Co. v. Raimes*, 164 N. Y. Supp. 453, 99 Misc. 626 [affirmed, *Fritz Schultz, Jr., Co. v. Raimes*, 166 N. Y. Supp. 567, 100 Misc. 697].

¹⁷ "As affecting civil rights and liabilities, it is said to be clear law that it is not his nationality, but the fact that he carries on business or voluntarily resides in an enemy country, that makes an alien enemy. *Porter v. Freudenberg*, 1 L. R. K. B. Div. [1915] 857. Therefore plaintiff was not to be considered as an alien enemy prior to his internment; but consideration of the causes for which such internment may have been ordered (U. S. Comp. Stat. 1918, West Pub. Co. Ed., § 7615) lead to the conclusion that plaintiff's internment reduced him substantially to the status of an alien enemy as defined above. In *Caperton v. Bowyer* (14

Wall.) 216, 20 L. ed. 882, the supreme court of the United States stated the rule to be universal and peremptory that, subsequent to the commencement of hostilities, enemy creditors were incapable of prosecuting any action in the tribunals of the other belligerent until after the restoration of peace. In a number of cases, however, which have arisen in England and in this country during the present war, it appears to have been held uniformly that actions instituted by plaintiffs, who subsequently became alien enemies, must be suspended until peace is declared. *Porter v. Freudenberg*, supra; *Plettenberg v. Kalmon* (D. C.), 241 Fed. 605; and *Stumpf v. Shreiber Brewing Co.* (D. C.), 242 Fed. 80, where is cited another English case to which we have not access. In those cases it was so ordered on the motion of the defendants. The reason and policy of such judicial action is that, if an alien enemy obtains judgment, he thereby adds to the resources of the power of which he is a subject." *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 80 So. 72.

cretion for the trial court to deny such application, at least if it is shown that such plaintiff is not a necessary witness.¹⁸

18. "In the present case, it has been observed, an alien enemy plaintiff invokes the power of the court to order a suspension for the duration of the war. Plaintiff, by reason of his nationality, apprehends a serious handicap in the prosecution of his suit, and suggests on appeal that the policy which allows him to further maintain an action begun before a state of war was declared should in fairness grant his motion for a suspension, and this suggestion he seeks to reinforce by reference to the generally unsatisfactory nature of a showing for an absent witness and the necessity for his personal presence at the trial. This statement of plaintiff's contention and the adjudications to which we have referred suffice to show that the policy with which those adjudications were concerned has no application to the question raised by plaintiff's motion in the case under consideration. That peculiar policy laid thus out of view, we do not perceive any sufficient reason for holding that the trial-court in its action upon plaintiff's motion should have treated it differently from the motion of any other plaintiff who, pending the trial of his suit, is so unfortunate—we speak not of the fortune of the government, whether good or bad—as to subject himself to confinement in a 'penitentiary, prison, jail, military camp or other place of detention' We can not assume that upon a trial the court or any of its agencies in the administration of justice would have discriminated against plaintiff on account of his nationality, nor is any intimation to that effect to be found in the motion. We have, then the case of a plaintiff who asks for a continuance—the trial-court and the parties appear to have considered plaintiff's motion as one for

a continuance for the term as well as for a stay for the duration of the war—on the grounds stated above, separate and apart from the prejudice which plaintiff feared on account of his nationality. The rule was long established in this state that the grant or refusal of a continuance rested in the sound discretion of the trial-court, and was not reviewable on error. *White v. State*, 86 Ala. 69, 5 South. 674. It seems now that the appellate courts will reverse where an obvious abuse of discretion is shown (*Kelly v. State*, 160 Ala. 48, 49 South. 535), and this rule or some more liberal adaptation of it is the law of the states generally. 9 Cyc 159. It is no small advantage to the just cause to have the personal presence of a witness, and, unquestionably, it is an important privilege of a party to be present at the trial of his cause, which should not be denied unless for weighty reason; but neither of these considerations is indispensable to a fair trial, and the rule with respect to the discretion of the court must be observed. Considered from this viewpoint, we are unable to say that there was an abuse of discretion. Plaintiff had been present at a former trial of the cause. It then appeared that the contract for breach of which he was suing had been negotiated by his agents; it did not appear that plaintiff knew much of the facts upon which he relied. His testimony had been preserved and was accessible. The convenience of other parties was to be considered as well as that of plaintiff. Upon the whole we are unable, as we have said, to declare an abuse of discretion, and the action of the trial-court must be affirmed." *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 80 So. 72.

§ 2751. Alien enemy resident in enemy country. The courts are closed in ordinary cases to an alien enemy who is resident in enemy country.¹ Such a nonresident alien enemy can not commence an action as against the objection of the defendant if properly made;² and he can not prosecute an action which he commenced before the outbreak of the war as against the objection of the defendant.³

This principle applies to transactions which are in no way connected with the prosecution of the war,⁴ since the reason for the rule is said to be the desire of the law to prevent the alien enemy from removing funds from the country in whose courts such action is prosecuted to the country of which he is a subject and a resident. A nonresident alien enemy can not bring an action upon a beneficial certificate of which he is a beneficiary;⁵ nor can a nonresident lessee who has made an assignment of his lease, enforce payment by the assignee.⁶ If a judgment to which a nonresident alien enemy is plaintiff, is reversed on a proceeding in error, and the cause is remanded to the trial court, the defendant may be given leave to set up the fact that the plaintiff is a nonresident

¹ **England.** *Halsey v. Lowenfeld* [1916], 2 K. B. 707, L. R. A. 1917C, 644; *Le Bret v. Papillon*, 4 East 502; *Brandon v. Nesbit*, 6 T. R. 23; *De Wahl v. Braune*, 1 H. & N. 178 (the wife of such alien enemy could not sue alone, therefore); *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307.

United States. *Wilcox v. Henry*, 1 U. S. (1 Dall.) 69, 1 L. ed. 41 (obiter); *Plettenberg-Holthaus Co. v. Kalmon*, 241 Fed. 605; *Speidel v. N. Barstow Co.*, 243 Fed. 621.

Iowa. *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

New York. *Bell v. Chapman*, 10 Johns. (N. Y.) 183; *Burnside v. Matthews*, 54 N. Y. 78; *Panne v. Soler*, 167 N. Y. Supp. 901, 101 Misc. 693.

West Virginia. *Peerce v. Carskadon*, 4 W. Va. 234, 6 Am. Rep. 281.

² **England.** *Robinson v. Continental Ins. Co* [1915], 1 K. B. 155 (obiter); *Brandon v. Nesbit*, 6 T. R. 23; *De Wahl v. Braune*, 1 H. & N. 178 (wife of non-

resident alien enemy can not sue); *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307; *Halsey v. Lowenfeld* [1916], 2 K. B. 707, L. R. A. 1917C, 644.

United States. *Speidel v. N. Barstow Co.*, 243 Fed. 621.

Iowa. *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

New York. *Burnside v. Matthews*, 54 N. Y. 78; *Panne v. Soler*, 167 N. Y. Supp. 901, 101 Misc. 693.

West Virginia. *Peerce v. Carskadon*, 4 W. Va. 234, 6 Am. Rep. 281.

³ *Le Bret v. Papillon*, 4 East 502; *Plettenberg v. Kalmon*, 241 Fed. 605; *Bell v. Chapman*, 10 Johns. (N. Y.) 183.

⁴ *Halsey v. Lowenfeld* [1916], 2 K. B. 707, L. R. A. 1917C, 644; *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

⁵ *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

⁶ *Halsey v. Lowenfeld* [1916], 2 K. B. 707, L. R. A. 1917C, 644.

alien enemy, as a bar to such cause of action, or as a ground for a continuance thereof.⁷ It has been held, however, that this rule does not prevent an action for the purpose of winding up a partnership, and has been dissolved at the outbreak of the war by reason of the fact that one or more of the partners is an alien enemy.⁸

These rules may be modified by valid legislative or executive action.⁹ Under the proclamation of the President, at the outbreak of war between the United States and Germany, a German subject, resident in Germany, was permitted to maintain a suit to prevent the wrecking of a corporation of which he was a stockholder.¹⁰

§ 2752. Continuance or dismissal of action brought by non-resident alien plaintiff. The present policy of the courts seems to be in favor of continuing an action which has been brought by an alien enemy plaintiff who is domiciled in enemy country, rather than of dismissing such action and requiring such plaintiff to commence a new action at the end of the war.¹ It has been suggested that such an action should be stayed or continued unless the custodian of alien enemy property wishes the case to proceed for his benefit.² The duty of the court to continue the action rather than to dismiss it is especially clear where the effect of dismissing the action or the alien enemy application therein will be in effect to deny his right forever.³ If an alien enemy claims an interest in the distribution of a fund, his application for the fund should not be dismissed, and, on the other hand, the fund should not be paid over to him; but the amount due to him should be retained for distribution after the termination of the war.⁴ Such an order will be made if an interest in a policy of life insurance or a beneficial certificate is claimed by a nonresident alien enemy.⁵ In a proceed-

⁷ *Taylor v. Albion Lumber Co.*, 176 Cal. 347, 168 Pac. 348.

⁸ *Rodriguez v. Speyer* [1919], A. C. 59.

⁹ *Posselt v. D'Espard*, 87 N. J. Eq. 571, 100 Atl. 893.

¹⁰ *Posselt v. D'Espard*, 87 N. J. Eq. 571, 100 Atl. 893.

¹ *Speidel v. N. Barstow Co.*, 243 Fed. 621; *The Oropa*, 255 Fed. 132; *Plettenberg-Holthaus Co. v. Kalmon*, 241 Fed. 605.

² *Nord Deutsche Ins. Co. v. John L.*

Dudley, Jr., Co., 169 N. Y. Supp. 303 [affirmed, 169 Supp. 1106].

³ *Ex parte Boussmaker*, 13 Ves. 71; *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300; *In re Thiede's Estate*, 102 Neb. 747, 169 N. W. 435.

⁴ *Ex parte Boussmaker*, 13 Ves. 71; *In re Henrichs' Estate*, — Cal. —, 179 Pac. 883; *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

⁵ *Weiditschka v. Supreme Tent*, — Ia. —, 170 N. W. 300.

ing in bankruptcy, a claim by an alien enemy creditor will be allowed and the dividend will be reserved for payment after the termination of the war, unless the legislative or executive makes some other provision.⁶ If a nonresident alien enemy claims the estate of the decedent as the heir or next of kin, the proper procedure is to continue the case until after the war, rather than to dismiss the application of the alien, on the one hand, and award the estate to adverse claimants or to order the estate paid over to the alien enemy, on the other hand.⁷ If an action or proceeding has been adjudicated by the trial court, an appeal therefrom will not be dismissed,⁸ especially if the effect of dismissing the appeal of a nonresident alien enemy would be to terminate his right of action.⁹ If a judgment has been rendered before the outbreak of the war in favor of one who becomes a nonresident alien enemy on the outbreak of the war, a proceeding in error to review such judgment need not be continued,¹⁰ and the court, on affirming the judgment, may order that the amount of such judgment be paid to the clerk of the court, to be transferred to the custodian of alien property without prejudice to the rights of persons other than nonresident alien enemies, to show a right to the fund or to some portion thereof.¹¹

Whether the rule that an action in which a nonresident alien enemy seeks relief during war, will be continued until the termination of the war, is the proper solution of the problem which is thus presented, is doubtful. When this question was first decided by the courts, their decision was influenced largely by the theory that every subject of a belligerent power was at war with every subject of the adversary belligerent power; and the result which was reached under this theory looked solely to the respective interests of the two parties. At modern law the theory of personal hostility between the subjects of the belligerents has been abandoned and the interests of the state are primarily to be considered in determining the right of nonresident alien enemies. It may be doubted whether the rights of the state in the courts of which a nonresident

⁶ *Ex parte Boussmaker*, 13 Ves. 71. Cal. 347, L. R. A. 1918B, 185, 168 Pac.

⁷ *In re Henrichs' Estate*, — Cal. —, 348.
179 Pac. 883.

⁸ *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *In re Thiede's Estate*, 102 Neb. 747, 169 N. W. 435.

⁹ *Taylor v. Albion Lumber Co.*, 176

¹⁰ *Birge-Forbes Co. v. Heye*, 248 Fed. 636 [certiorari granted, 246 U. S. 676, 62 L. ed. 933].

¹¹ *Birge-Forbes Co. v. Heye*, 248 Fed. 636 [certiorari granted, 246 U. S. 676, 62 L. ed. 933].

alien enemy attempts to prosecute an action against one who is domiciled in such state require either a dismissal or continuance of such action. The rule which forbids an alien enemy to sue is not intended for the benefit of the debtor, to enable him to appropriate to his own use money or other property which belongs to an alien enemy; but it is intended solely to benefit the state by preventing commercial intercourse and by preventing the withdrawal of funds which may directly or indirectly aid the hostile power. In many cases the effect of a continuance for the period of a protracted war will be the loss of the debt, and if the state wishes to confiscate such debt, the loss will eventually fall upon the state and not upon the alien enemy. The appointment of a custodian of alien enemy property would seem to make it possible that in these cases the action might be prosecuted to final judgment, and the judgment itself might be collected; the funds then being held subject to the order of such custodian.¹² Unless such provision can be made so that the funds can not be withdrawn by the nonresident alien enemy, the present solution is probably the best available.

§ 2753. Necessity of plea that plaintiff is alien enemy. The defense that the plaintiff is an alien enemy must be pleaded in order to induce the court to take action thereon.¹ The plea that the plaintiff is an alien enemy is "an odious plea,"² and it must negative "every presumption that could arise in favor of plaintiff's right to sue."³

§ 2754. Rights which nonresident enemy plaintiff may assert during war. There are certain exceptions to the rule that a nonresident alien enemy can not prosecute an action during the continuance of the war. These exceptions are based on the general theory that where a right is secured to an alien enemy which from its nature ought to be recognized at any time, the courts should not be closed to him.¹ Since a valid contract may be made during

¹² For such an order in a proceeding in error, see *Birge-Forbes Co. v. Heye*, — U. S. —, 40 Sup. Ct. Rep. 160, 6 U. S. Sup. Ct. Adv. Op. [1919-1920], 188.

¹ *McNair v. Toler*, 21 Minn. 175; *Heiler v. Goodman's Motor Express, Van & Storage Co.*, 92 N. J. L. 415, 105 Atl. 233; *Burnside v. Matthews*, 54 N.

Y. 78; *Barns v. Gleason Coal & Coke Co.*, — W. Va. —, 98 S. E. 158.

² *Casseres v. Bell*, 8 T. R. 166.

³ *Casseres v. Bell*, 8 T. R. 166.

See to the same effect, *Openheimer v. Levy*, 2 Strange, 1082; *Derrier v. Arnaud*, 4 Mod. 405; *Wells v. Williams*, 1 Ld. Raym. 282.

¹ *Crawford v. William Penn*, *Peters C. C.* 106; *The Mowe* [1915], Prob. 1.

war, with an alien enemy for the repair of a vessel which is sent to bring home exchanged prisoners and the like, and since repairs of this sort ordinarily could not be obtained on credit if the party who furnished them could not recover during the continuation of the war, a nonresident alien enemy may maintain an action of this sort during the war.² If a right is secured to an alien enemy by international agreement which by its terms is intended to be operative in war, as by one of the Hague conventions,³ the nonresident alien enemy may be heard in court for the purpose of enabling him to assert such right.

§ 2755. Nonresident alien enemy as defendant. The reasons which have led the court to deny the right of a nonresident alien enemy to maintain an action as plaintiff, have no application to cases for which relief is sought by a resident subject against a nonresident alien enemy. It is, of course, impossible to obtain personal services upon a nonresident alien enemy except in the rare cases in which he is brought into the country as a prisoner of war or comes on some special mission. It is possible that in these cases the circumstances under which he enters the country might prevent legal process from being served upon him. In many cases, however, property which belongs to the alien enemy is situated in the country of a belligerent power in whose courts it is sought to enforce a mortgage or lien upon such property or to seize it by attachment and the like. It is held by practically all the courts that such relief will not be denied to the resident plaintiff merely because the defendant is a nonresident alien enemy.⁴ Even if the

² *Crawford v. William Penn, Peters* C. C. 106.

³ *The Mowe* [1915], Prob. 1.

This question was raised but not decided in *The Chile* [1914], Prob. 212.

⁴ *England.* *Porter v. Freudenberg* [1915], 1 K. B. 857.

United States. *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 20 L. ed. 80; *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581, 20 L. ed. 216; *Washington University v. Finch*, 85 U. S. (18 Wall.) 106, 21 L. ed. 818; *Watts v. Unione Austriaca Di Navigazione, etc.*, 248 U. S. 9, 63 L. ed. — [reversing, 229 Fed. 136]; *The Kaiser Wilhelm II*, 246

Fed. 786, L. R. A. 1918C, 795 [reversing decree, 230 Fed. 717].

Florida. *Russ v. Mitchell*, 11 Fla. 80.

Illinois. *Harper v. Ely*, 56 Ill. 179; *Seymour v. Bailey*, 66 Ill. 288.

Kentucky. *Buford v. Speed*, 74 Ky. (11 Bush.) 338.

Maryland. *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617.

Massachusetts. *Riddell v. Fuhrman*, — Mass. —, 123 N. E. 237.

Minnesota. *McNair v. Toler*, 21 Minn. 175.

Missouri. *De Jarnette v. De Giverville*, 56 Mo. 440.

alien enemy was domiciled in the country before the outbreak of the war, and returned to his own country in anticipation of hostili-

"The authorities are clear and unanimous, so far as we are aware, to the effect that the utmost extent of the inhibition against the appearance of alien enemies in courts is that they can not be parties plaintiff. They are thus prohibited on the grounds shortly stated that our courts will give no assistance to proceedings which, if successful, would lead to the enrichment or profit of an alien enemy and hence be an aid and comfort to his country in the prosecution of its war; and also that one confessing himself hostile to our country and in a state of war with it can not be heard if he sues in our courts to invoke in aid of his rights the benefit and protection of the laws of our nation, which in another field he is seeking to overthrow. As was said in *Daimler Co. v. Continental Tyre & Rubber Co.* [1916], 2 A. C. 307, 344, this in common with other rules against trading with the enemy 'is a belligerent's weapon of self-protection' It is at bottom a principle of public policy. Even that principle has been somewhat relaxed recently in England, where for the benefit of British subjects it seemed necessary to join with them as plaintiffs an alien enemy. *Rodaiguez v. Speyer Brothers* [1919], A. C. 59. This principle and the grounds upon which it rests fail utterly of application when the enemy alien is a defendant and not an active petitioner in our courts. Therefore it was said in *Watts, Watts & Co., Ltd., v. Unione Austriaca Di Navigazione*, 248 U. S. 21, 39 Sup. Ct. 1, 2 (63 L. ed. —): 'A suit may be brought in our courts against an alien enemy.'

"That statement is rested on the authority of *McVeigh v. United States* (11 Wall.), 259, 267, 20 L. ed. 80, and of *Dorsey v. Kyle*, 30 Md. 512, 96 Am.

Dec. 617, in both of which decisions the question was discussed and definitively settled. The matter was reviewed at length in a comprehensive and exhaustive judgment by Lord Chief Justice Reading, speaking for the court of appeal in *Porter v. Freudenberg* [1915], 1 K. B. 857. The history of the common law on the subject there is treated fully, as well as in *Rodaiguez v. Speyer Brothers* [1919], A. C. 59. It would be superfluous to go over the older decisions in view of the complete analysis of them in these recent judgments. There is not a shred of authority to support the contention that in general an alien enemy can not be a party defendant or respondent in our courts in time of war. This conclusion is in harmony with *Hutchinson v. Brock*, 11 Mass. 119, where an enemy alien was demandant in a writ of right and was therefore in the position of a party plaintiff." *Riddell v. Fuhrman*, — Mass. —, 123 N. E. 237.

"The law of nations, as judicially declared, prohibits all intercourse between citizens of the belligerents which is inconsistent with the state of war between their countries. No transaction injurious to their own government may be entered into or continued by them. Ordinary commercial intercourse is therefore incompatible with a state of war, since every act and contract which tends to increase the enemies' resources is absolutely interdicted, and this includes every kind of trading or commercial dealing, whether by transmission of money or goods, or order for the delivery of either, directly or indirectly, or by contracts in any form looking to or involving such transmission. Every such contract made during war is illegal and void. Since, however, aid to the enemy is the touchstone of illegality, dis-

ties, an action may be brought against him if jurisdiction can be obtained as by seizure of his property and the like.²

It has been held that the reasons which justify a court in permitting a resident plaintiff to maintain such an action against a nonresident alien enemy, including one who has voluntarily left the country in whose courts such relief is sought, do not apply to a case in which the defendant has been forcibly expelled from the country; and in such a case it has been held that a decree which is rendered while such persons are forcibly prevented from returning is void.³

While it has been said that the same rule should apply to an action in which the nonresident alien enemy is a plaintiff, that is applied to an action in which he is defendant,⁴ the courts have ordinarily regarded the two classes of cases as very different in

crimination is permitted in the case of contracts made before the outbreak of war. Further performance which enures to the aid of or involves any dealing with the enemy is illegal. If from its character the contract is incapable of suspension it is dissolved. But where such interruption of performance does not go to the root of the transaction, the contract is merely suspended during the war. The alien enemy is not *civilliter mortuus*; he is merely in a state of suspended animation. When the war ends the mutual obligations of performance and right of action revive. Where, therefore, such a contract has been entered into with an alien enemy before the outbreak of the war and has been performed on his side, the war merely suspends his remedy; in other words, he can not sue upon it during the existence of hostilities. If, on the other hand, performance of the contract is on the side of the other party, he can enforce the contract (particularly such as require for performance payment of money only) in the courts of his own country during the continuance of war, provided, of course, a cause of action has accrued. The reason why the rule debarring action

on the part of an alien enemy plaintiff can have no application where the parties are reversed is plain. The rule is based upon the obvious ground that it is contrary to public policy for the courts of a belligerent country to render any assistance to an alien enemy to enforce rights, which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of his opponent. It is apparent, therefore, that to hold that a subject's right of action against an alien enemy in his own country is suspended, would be to defeat the very object of the suspensory rule and to turn a disability into a relief." *Watts v. Unione Austriaca Di Navigazione*, 224 Fed. 188 [quoted in *Compagnie Universelle, etc., v. United States Service Corporation*, 84 N. J. Eq. 604, 95 Atl 187].

Contra, *Haymond v. Camden*, 22 W. Va 180.

² *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581, 20 L. ed. 216; *Dorsey v. Kyle*, 30 Md 512, 96 Am. Dec. 617.

Contra, *Haymond v. Camden*, 22 W. Va 180.

³ *Dean v. Nelson*, 77 U. S. (10 Wall.) 158, 19 L. ed. 926.

⁴ *The Oropa*, 255 Fed. 132.

principle.⁵ If the nonresident alien is plaintiff, he is ordinarily the only person who will be inconvenienced by dismissing the action or by continuing it; and, accordingly, the courts are, as a rule, unwilling to allow the case to proceed to final judgment during the war.⁶ If, on the other hand, the nonresident alien is a defendant, the person who will be inconvenienced by the dismissal or continuance of the action is the resident subject who seeks relief, and in a case of this sort, the only question to be considered is whether the hardship of seizing the property of a nonresident alien enemy by judicial proceedings in which he can not be represented unless he has appointed an attorney before the outbreak of the war, is a sufficient reason for refusing prompt and speedy justice to the resident subject.⁷

Wherever an alien enemy may appoint an attorney at law to represent him, he may appear and defend, although the war is not yet terminated;⁸ and it is error for the court to strike his answer from the files and to refuse to permit him to make such defense as he could have made if he had not been an alien enemy.⁹ If a judgment is rendered which affects the alien enemy adversely, his appeal therefrom is regarded as a defensive measure rather than as the institution of a new action; and accordingly a nonresident alien enemy may appeal.¹⁰

§ 2756. Rendition of final judgment against nonresident alien enemy plaintiff. Whether an action which is brought against a nonresident alien enemy should be prosecuted to final judgment or not, depends to a large extent upon the nature of the issues which are involved. In many of the cases no substantial defense was suggested by the nonresident alien, and the only question which was presented was the question of the jurisdiction of the courts to render final judgment. In cases of this sort it is held by practically all the courts that the court has jurisdiction to render final

⁵ See §§ 2751 et seq.

⁶ See §§ 2751 et seq.

⁷ See § 2756.

⁸ *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 20 L. ed. 80; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Russ v. Mitchell*, 11 Fla. 80; *Buford v. Speed*, 74 Ky. (11 Bush.) 338; *Compagnie Universelle de Tele-*

graphie v. United States Service Co., 84 N. J. Eq. 604, 95 Atl. 187.

⁹ *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 20 L. ed. 80; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

¹⁰ *Rau v. Rowe*, 184 Ky. 841, 213 S. W. 226.

judgment.¹ Accordingly, the fact that one of the heirs of a decedent is an alien enemy, does not prevent the court from rendering a final judgment in a proceeding to probate the will of the decedent, especially if such alien enemy had retained counsel before the declaration of war.²

If, however, the alien enemy is not represented by counsel, and it appears that he may have a meritorious defense, it has been said that the interests of the resident plaintiff can be protected and possible injustice to the alien enemy may be prevented by permitting the action to be brought, thus subjecting the property in question to the jurisdiction of the court, and then by continuing such action until the termination of the war, or until such time as the alien enemy may be heard.³

¹ **England.** *Robinson v. Continental Ins. Co.* [1915], 1 K. B. 155.

United States. *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 20 L. ed. 80; *Washington University v. Finch*, 85 U. S. (18 Wall.) 106, 21 L. ed. 818; *Watts v. Unione Austriaca Di Navigazione, etc.*, 248 U. S. 9, 63 L. ed. — [reversing, 229 Fed. 136]; *The Kaiser Wilhelm II*, 246 Fed. 786, L. R. A. 1918C, 795 [reversing decree, 230 Fed. 717].

Massachusetts. *Riddell v. Fuhrman*, — Mass. —, 123 N. E. 237.

Minnesota. *McNair v. Toler*, 21 Minn. 175.

Missouri. *De Jarnette v. De Giverville*, 56 Mo. 440.

² *Riddell v. Fuhrman*, — Mass. —, 123 N. E. 237.

³ *Watts v. Unione Austriaca Di Navigazione, etc.*, 248 U. S. 9, 63 L. ed. — [reversing, 229 Fed. 136]; *The Kaiser Wilhelm II*, 246 Fed. 786, L. R. A. 1918C, 795 [reversing decree, 230 Fed. 717]; *City National Bank v. Dresdner Bank*, 255 Fed. 225; *Kintner v. Hoch-Frequenz-Maschinen Aktien-Gesellschaft für Drahtlose Telegraphie*, 256 Fed. 849.

"This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad

powers of a court of admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights if relations with his country are hereafter resumed; second, providing for adjudging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor, and the further obligation of the German vessel owner as between themselves.

"In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial government of its country, we are impelled by three all-sufficient reasons: first, the innate sense of fairness, decency, and justice, which respects the rights of an enemy; second, the broad principles of international intercourse, which lead courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, be-

§ 2757. Effect of war on Statute of Limitations and presumption of payment. Since communication between persons who are domiciled respectively in the territory of the belligerent power is forbidden during the continuance of the war,¹ and since the courts of each country are closed to plaintiffs who are domiciled in the territory of the adversary belligerents,² the courts have been placed in the dilemma of being obliged to hold, on the one hand, that the Statute of Limitations runs as against a creditor who is not permitted to enter the country or to appoint a local agent or attorney,

cause the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights, is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in *Ex Boussmaker*, 13 Ves. Jr. 71, 33 Eng. Rep. 221, 9 Revised Rep. 142, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny, even to their enemies in times of war." *The Kaiser Wilhelm II*, 246 Fed. 786, L. R. A. 1918C, 795 [reversing decree, 230 Fed. 717].

"The respondent, although an alien enemy, is, of course, entitled to defend before a judgment should be entered. *McVeigh v. United States* (11 Wall. 259). See also, *Windsor v. McVeigh*, 68 U. S. 274, 280; *Hovey v. Elliott*, 167 U. S. 409. It is now represented by counsel. But intercourse is prohibited by law between subjects of Austria-Hungary outside the United States and persons in the United States. Trading with the Enemy Act of October 6, 1917, § 3 (c), c. 106, 40 Stat. 411. And we take notice of the fact that free intercourse between residents of the two countries has

been also physically impossible. It is true that, more than three years ago, a stipulation as to the facts and the proof of foreign law was entered into by the then counsel for respondent, who has died since. But reasons may conceivably exist why that stipulation ought to be discharged or modified, or why it should be supplemented by evidence. We can not say that, for the proper conduct of the defense, consultation between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.

"Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the district court for further proceedings, but that no action should be taken there (except such, if any, as may be required to preserve the security and the rights of the parties in statu quo) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become possible for the respondent to present its defense adequately. Compare, *The Kaiser Wilhelm II*, 246 Fed. Rep. 786; *Robinson & Co. v. Continental Insurance Company of Mannheim* [1915], 1 K. B. 155, 161-162." *Watts v. Unione Austriaca Di Navigazione, etc.*, 248 U. S. 9, 63 L. ed. —.

¹ See § 2726.

² See §§ 2751 et seq.

or to sue in the courts; or, on the other, that the period during which the courts are closed to the alien enemy plaintiff is to be deducted from the entire period which has elapsed between the time that the cause of action accrued and the time at which the action on such cause was begun. Of these two possible solutions, the courts have adopted the latter and they have held that in such cases the period of the war is to be deducted from the total period which has elapsed between the accrual of the cause of action and the commencement of the action thereon; or, as it is sometimes put, that the operation of the period of limitations is suspended during the period of the war.³

³ **United States.** *Hopkirk v. Bell*, 7 U. S. (3 Cranch) 454, 2 L. ed. 497; *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 13 L. ed. 939; *Brown v. Hiatts*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128; *Bird v. Louisiana State Bank*, 93 U. S. 96, 23 L. ed. 818.

Arkansas. *Williamson v. McCrary*, 33 Ark. 470.

Illinois. *Mixer v. Sibley*, 53 Ill. 61.

Indiana. *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

Kentucky. *Selden v. Preston*, 74 Ky. (11 Bush.) 191.

Missouri. *McMerty v. Morrison*, 62 Mo. 140.

South Carolina. *Robson v. Wall*, 2 Nott & M'C. (S. Car.) 497, 10 Am. Dec. 623.

Wisconsin. *Ahnert v. Zaun*, 40 Wis. 622.

"It is unnecessary to go at length over the grounds upon which the court has repeatedly held that the Statutes of Limitation of the several states did not run against the right of action of parties during the continuance of the Civil War. It is sufficient to state that the war was accompanied by the general incidents of a war between independent nations; that the inhabitants of the Confederate states on the one hand, and of the loyal states on the other, became thereby reciprocally enemies to each other, and were liable to be so treated without reference to

their individual dispositions or opinions; that during its continuance all commercial intercourse and correspondence between them were interdicted by principles of public law as well as by express enactments of congress; that all contracts previously made between them were suspended; and that the courts of each belligerent were closed to the citizens of the other.

"Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes v. Hartford Insurance Company* (13 Wall. 160): 'The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.'"
Brown v. Hiatt, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

See, *The Effect of War on the Operation of Statutes of Limitation*, by Charles Noble Gregory, 23 *Harvard Law Review*, 673.

This rule is applied to wars between different nations;⁴ and in the United States the Civil War was recognized as a war with a *de facto* belligerent in the sense that the period of limitations was suspended during its continuance.⁵ For the purpose of determining whether or not the Statute of Limitations has run, the courts of the United States will deduct the time during which the Civil War lasted from the time which elapsed between the maturity of the obligation and the time of commencing action.⁶ While in the greater number of cases the creditor was domiciled in a state which adhered to the Union, and the debtor was domiciled in a state which adhered to the Confederacy, the application of the rule was not limited to cases of this sort, and it was held that the Statute of Limitations does not run in favor of a debtor who is a citizen of a state which adhered to the Union and who is domiciled therein, as against a creditor who was a citizen of a state which adhered to the Confederacy, and who was domiciled therein during the existence of the Civil War.⁷ For the purpose of determining the suspension of the Statute of Limitations, the Civil War was held to begin as to the state in which the creditor resided, with the proclamation of the President declaring a state of war to exist in such state, and it was held to end with the proclamation of the President declaring that peace existed.⁸ For the purpose of determining the amount of time to be deducted from the period between the maturity of the debt and an action thereon in order to determine whether limitations has run or not, the Civil War will be held as against a Virginia creditor to have begun with the President's proclamation of an intended blockade of its ports, and it will be held to have ended with the President's proclamation of the restoration of peace.⁹

⁴ *Hopkirk v. Bell*, 7 U. S. (3 Cranch) 454, 2 L. ed. 497; *Robson v. Wall*, 2 Nott & M'C. (S. Car.) 497, 10 Am. Dec. 623.

⁵ *United States v. Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939; *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128; *Bird v. Louisiana State Bank*, 93 U. S. 96, 23 L. ed. 818.

Arkansas v. Williamson v. McCrary, 33 Ark. 470.

Illinois v. Mixer v. Sibley, 53 Ill. 61.

Indiana v. Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639.

Kentucky v. Selden v. Preston, 74 Ky. (11 Bush) 191.

Missouri v. McMerty v. Morrison, 62 Mo. 140.

Wisconsin v. Ahnert v. Zaun, 40 Wis. 622.

⁶ *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.

⁷ *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

⁸ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

⁹ *Brown v. Hiatt*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128.

Since the rule that war suspends the operation of the Statute of Limitations as between alien enemies is based upon the inability of the alien enemy plaintiff to bring an action in the courts in which he can get jurisdiction over the debtor, the rule has no application where at the outbreak of the war the creditor was a citizen of a state which adhered to the Union, although he voluntarily left such state and withdrew to a state which adhered to the Confederacy.¹⁰

The courts of England held that the Civil War of England, in the first half of the seventeenth century, did not have this effect;¹¹ but this result was possibly reached because the English courts took a different theory of the nature of that civil war from the theory which the United States courts took of the Civil War in the United States. The latter was an attempt of a part of the United States to set up an independent government. The former was a contest between two factions for the control of the English government; neither of the factions attempting to set up a permanent independent government over a part of England, and neither faction contemplating secession.

While statutes which fix the period within which appeals may be taken, or proceedings in error may be instituted, are not ordinarily regarded as statutes of limitation, and while the operation of such statutes can not ordinarily be waived, the effect of war upon such statutes is much the same as its effect upon the ordinary statutes of limitation;¹² and the period of the war will be deducted from the period which has elapsed between the time at which such appellate remedy could have been sought and the time at which it was in fact sought.¹³

A stipulation in a contract restricting the time within which an action may be brought, is not suspended, but is entirely discharged by the outbreak of war which prevents the plaintiff from bringing an action in the courts in which he can obtain jurisdiction over the person of the debtor within the time fixed by the contract.¹⁴ If the action upon such a contract is brought within the period fixed by the Statute of Limitations as affected by the outbreak of the war, the fact that the period between the accrual of the cause of action and the outbreak of the war, together with the period

¹⁰ *O'Neal v. Boone*, 53 Ill. 35; *Hall v. Connecticut Mutual Life Ins. Co.*, 68 Ill. 357.

¹¹ *Weller v. Prideux*, 1 Keb. 157; *Hall v. Wybourn*, 2 Salk. 420.

¹² *The Protector*, 76 U. S. (9 Wall.) 687, 19 L. ed. 812.

¹³ *The Protector*, 76 U. S. (9 Wall.) 687, 19 L. ed. 812.

¹⁴ *Semmes v. Hartford Insurance Co.*, 80 U. S. (13 Wall.) 158, 20 L. ed. 490.

between the outbreak of the war and the time at which the action was instituted, when added together, exceed the period fixed by such stipulation in the contract, does not prevent recovery thereon.¹⁵

Since a presumption of payment is at most only a *prima facie* inference, it may be rebutted by showing the existence of war which prevented the creditor from maintaining an action against the debtor in the courts of the country in which the latter was domiciled and in which service of process could have been obtained upon him.¹⁶

§ 2758. Litigation in courts of neutral. The courts of a neutral country will enforce a contract which was entered into before the outbreak of the war, between two parties who have become alien enemies to one another by reason of the outbreak of the war,¹ at least if the performance of such contract is not of itself discharged or suspended by reason of the war.

V

IMPOSSIBILITY OF PERFORMANCE DUE TO WAR

§ 2759. Impossibility of performance of domestic contracts due to war—General principles. Apart from the effect of war upon the performance or enforcement of contracts between parties who have become alien enemies,¹ and apart from the effect of war upon contracts the performance of which will aid the public enemy,² and apart from the effect of war on contracts which can not be performed without trading with the enemy,³ a number of other questions have been presented, involving the effect of war upon contracts between subjects of the same state or between a subject and a neutral, the performance of which will not aid the enemy and will not involve trading with the enemy, but the performance of which is nevertheless directly affected by the existence of the war.⁴

¹⁵ *Semmes v. Hartford Insurance Co.*, 80 U. S. (13 Wall.) 158, 20 L. ed. 490.

¹⁶ *Dunlop v. Ball*, 6 U. S. (2 Cranch) 180, 2 L. ed. 246; *Tunstall v. Withers*, 86 Va. 802, 11 S. E. 565.

¹ *Compagnie Universelle de Telegraphie et de Telephone v. United States Service Corporation*, 84 N. J. Eq. 604, 95 Atl. 187.

See also, *Watts v. Unione Austriaca Di Navigazione*, 224 Fed. 188.

² See §§ 2731 et seq. and 2750 et seq.

³ See § 2725.

⁴ See § 2726.

⁴ See, *War Time Impossibility of Performance of Contract*, by Arnold D. McNair, 35 *Law Quarterly Review*, 84.

Questions of this sort are closely connected with questions of the general nature of impossibility of performance and for that reason might well be considered in connection with that subject,⁸ but at the same time they are so closely connected with the effect of war on contracts, that they will be considered in that connection.

The effect of war as causing impossibility of performance has been discussed, in the English courts at least, as if it were a problem to be solved by principles other than those which govern ordinary impossibility. This has been due, to a large extent, to the fact that the English courts deciding these cases have explained them by the doctrine of the frustration of the voyage or venture.⁹ The expression "frustration of the voyage" was one which was well known to English law, but it had nothing to do with impossibility in the proper sense of the term. It was invoked

⁸ See ch. LXXVIII.

⁹ *Horlock v. Beal* [1916], 1 A. C. 486; *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397; *Anglo-Northern Trading Co. v. Emlyn Jones* [1917], 2 K. B. 78.

"The modern doctrine of frustration assumes that the parties to a contract enter into it upon the implied understanding that conditions, under which performance is in some substantial sense possible, exist and shall continue. But if the parties to a time charter had reduced that understanding to words, how would they have phrased it? It is not likely that they would have said that the party who is not hurt by what the government does, shall be free to end the contract, and thereby make a great profit for himself against the protest of the other, who was the only person who suffered at all. It is true that it is not easy to give the choice of treating the contract as dead or as alive to one party under any other circumstances than those in which the other party is at fault. It is not improbable that the great difficulties which the courts would have as to the how and the when under which the

choice must be made, the absurdity of making believe that the parties had tacitly gone into such details, and the feeling that otherwise there would be some lack of mutuality, have been among the causes which have led many eminent judges to hold that what is silently understood is that, when what happens is sufficiently serious to justify one party in treating the contract as at an end if he wills, it is at an end whether he so wills or not. *Earn Line S. S. Co. v. Sutherland S. S. Co. (D. C.)*, 254 Fed. 120; Lord Loreburn, in the *Tamplin Case*, T. L. R. [1916], 2 App. Cas. 397.

"Such a rule is clear and simple. It can be applied with far less trouble than any other. It is true that it goes further in upsetting contracts than in some cases may be just and expedient." *The Isle of Mull*, 257 Fed. 798.

For a discussion of this subject, based on the assumption that the theory of the frustration of the contract is a valuable addition to the doctrine of impossibility, see *War Time Impossibility of Performance of Contract*, 35 *Law Quarterly Review*, 84.

in construing the effect of specific contractual provisions.⁷ It was invoked for the purpose of determining whether a distinct loss existed within the meaning of a policy of marine insurance;⁸ whether a hostile blockade of a port by an alien government was such a "restraint of princes" as would discharge a contract to transport goods to such port;⁹ and to what extent a long delay due to congestion in shipping would justify failure to bring a vessel to a certain dock under a contract to bring such vessel to such dock, or as near thereto as it might be brought.¹⁰ While the principles underlying the general doctrine of impossibility of performance were in great need of development, and while they were far from being harmonious, uniform or symmetrical, nothing but additional confusion has resulted from the importation of an idea taken from construction and performance of contracts, into the doctrine of impossibility which involves the idea of discharge of a contract without performance and without any regard to the intention of the parties, since, in cases in which impossibility operates, the parties had not anticipated the combination of facts which arose.

It has been said that the general principle which underlies the doctrine of impossibility is that if a party enters into an express covenant to perform an action, the performance of which is possible in the nature of things, and in accordance with the provisions of law, subsequent events which do not render performance impossible in the nature of things or by rules of law forbidding it, but which merely make performance more burdensome, expensive or difficult, will not operate as a discharge.¹¹ While this statement must be taken with some qualifications,¹² it expresses the general attitude of the courts toward an alleged impossibility which arises after the formation of the contract. The application of this principle to impossibility due to war is discussed subsequently.¹³ War operates as a discharge of a contract only in cases in which the contract was not entered into in contemplation of the war. If the parties to the contract know that war is probable and enter into

⁷ *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125; *Becker v. London Assurance Corporation* [1918], A. C. 101; *Geipel v. Smith*, L. R. 7, Q. B. 404; *Dahl v. Nelson*, 6 App. Cas. 38.

⁸ *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125; *Becker v. London Assurance Corporation* [1918], A. C. 101.

⁹ *Geipel v. Smith*, L. R. 7, Q. B. 404.

¹⁰ *Dahl v. Nelson*, 6 App. Cas. 38.

¹¹ *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499]. See ch. LXXVIII.

¹² See ch. LXXVIII.

¹³ See §§ 2760 et seq.

the contract in question in anticipation of the outbreak of the war, such contract is not discharged by such war.¹⁴

§ 2760. Specific types of impossibility—Requisitions and governmental preferences. Whether the requisition by the government, of property such as a vessel, discharges a prior contract which involves the use or sale of such property, is a question which some courts have endeavored to solve, in cases arising out of the present war, by the application of the doctrine of frustration of the venture.¹ The results which have been reached have not been characterized by such harmony and consistency as to indicate that the doctrine of the frustration of venture will furnish the missing clue to the subject of impossibility of performance in general. On the contrary, the results reached by the application of this doctrine seem more discordant than those reached under the general principles of impossibility of performance.²

It is held that the charter of a vessel is not discharged, as a matter of law, by reason of the fact that the government has requisitioned such vessel.³ In a case in which A chartered a vessel to B for sixty months, with provisions which gave to B the right to sublet such steamer to the admiralty or for other purposes, and which contained an exception among other things, of arrests and restraint of princes, it was held that the fact that the admiralty requisitioned such steamer as a transport three years before the termination of such contract, did not operate as a discharge of the contract if B wished to treat the contract as in force.⁴ In this case, however, B was willing to treat the contract as in effect and to pay the amount provided for therein, and A was the party who contended that the contract was discharged. B's position was due to the fact that he was willing to accept the compensation paid by the admiralty and to continue the contract, while A's position was

¹⁴ *Smith v. Morse*, 20 La. Ann. 220. See §§ 2673 et seq.

¹ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397 [affirming (1916), 1 K. B. 485, which affirmed (1915), 3 K. B. 668]; *Anglo-Northern Trading Co. v. Emlyn Jones* [1917], 2 K. B. 78.

² See ch. LXXVIII.

³ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397 [affirming (1916),

1 K. B. 485, which affirmed (1915), 3 K. B. 668]; *Modern Transport Co. v. Duneric Steamship Co.* [1917], 1 K. B. 370 [affirming (1916), 1 K. B. 726]; *Chinese Mining & Engineering Co. v. Sale* [1917], 2 K. B. 599; *Earn Line Steamship S. Co. v. Sutherland Steamship S. Co.*, 254 Fed. 126.

⁴ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397.

due to the fact that he preferred to terminate the contract and deal directly with the admiralty. An additional ground for contending that there was such a change of circumstances as to terminate the original contract, was the fact that the vessel was built and chartered as a tank steamer, and that it was altered so as to fit it for transporting troops. This change in use, together with the alterations in the vessel necessary to fit it for such use, was held not to be such a change of circumstances as to terminate the contract.⁵ The same result was reached in a similar case in which the compensation which was paid by the admiralty was less than the amount which B had agreed to pay to A for the use of the vessel.⁶ A contract by which A chartered vessels to B, is not discharged by the requisition of such vessels by the admiralty at a time at which the charter has from two years to four years to run.⁷

A contract by which a vessel is to be chartered for twelve months after it is delivered, and which gives to the charterers an option to terminate the contract if the vessel is not delivered by a specified time, is discharged by the requisition of such vessel by the admiralty before such time for delivery.⁸ The requisition of a vessel by the admiralty at a time at which the charter has about five months to run, operates as a discharge, at least if it is understood that the vessel is requisitioned for the period of the war and if it is also understood that the war will probably last more than five months.⁹ A contract by which A chartered a vessel to B for twelve calendar months, is held to be discharged by the requisition of such vessel by the admiralty at a time at which the charter has about four months to run.¹⁰ In this case A sought to recover from B the compensation fixed by the contract, and B contended that the contract was discharged.¹¹

The result of holding that a charter is not discharged by governmental requisition is that the compensation which is paid by the government must be paid to the charterer if the vessel is used

⁵ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916], 2 A. C. 397 [affirming (1916), 1 K. B. 485, which affirmed (1915), 3 K. B. 668].

⁶ *Modern Transport Co. v. Duneric Steamship Co.* [1917], 1 K. B. 370 [affirming (1916), 1 K. B. 726].

⁷ *Chinese Mining & Engineering Co. v. Sale* [1917], 2 K. B. 599.

⁸ *Bank Line v. Capel* [1919], A. C. 435.

⁹ *Countess of Warwick Steamship Co. v. Le Nichel Societé Anonymé* [1918], 1 K. B. 372.

¹⁰ *Anglo-Northern Trading Co. v. Emlyn Jones* [1917], 2 K. B. 78.

¹¹ *Anglo-Northern Trading Co. v. Emlyn Jones* [1917], 2 K. B. 78.

by the government for the purposes and in the manner prescribed by the charter.¹² If the government uses the vessel outside of the limits fixed by the charter and for purposes for which it could not have been used under the charter, the government is evidently using the interest of the owner in part, as well as the interest of the charterer in part; and the compensation paid by the government must be apportioned between the owner and the charterer according to their respective interests.¹³ If the charter provides that the compensation to be paid for the vessel is to cease when the vessel is lost, the charterer is not entitled to compensation for the vessel which is paid by the government on the loss of the vessel.¹⁴

A contract for the transportation of freight by a certain steamship is not discharged by the fact that the owner voluntarily chartered such steamship to the government for use during the war.¹⁵ It is said, however, that such contract would have been discharged if the government had requisitioned such vessel.¹⁶

A contract for the sale of specified wheat to be delivered in the war is discharged by the fact that the government has requisitioned such wheat.¹⁷

Under a statute¹⁸ which provides that compliance with the government orders shall be obligatory and that such orders shall take precedents over all other orders and contracts, a prior contract is discharged if a government order has been placed which takes up so much of the capacity of the manufacturing plant that performance of the prior contract is impracticable.¹⁹ Even under such a statute, a government order does not operate as a discharge if the government did not compel the manufacturer to accept the order and did not intend to use its powers of compulsion, and if the manufacturer voluntarily entered into such contract with the

¹² *Earn Line Steamship S. Co. v. Sutherland Steamship S. Co.*, 254 Fed. 126.

¹³ *Chinese Mining & Engineering Co. v. Sale* [1917], 2 K. B. 599. (A complete discussion of the rules for fixing the value of the respective interests, and for apportioning the compensation to be paid by the government, is found in this case.)

¹⁴ *London-American Maritime Trad-*

ing Co. v. Rio De Janeiro Tramway, Light & Power Co. [1917], 2 K. B. 611.

¹⁵ *Graves v. Miami Steamship Co.*, 61 N. Y. Supp. 115, 29 Misc. 645.

¹⁶ *Graves v. Miami Steamship Co.*, 61 N. Y. Supp. 115, 29 Misc. 645.

¹⁷ *In re Shipton* [1915], 3 K. B. 676.

¹⁸ 30 St. at L. 213, c. 134, § 120.

¹⁹ *Moore v. Roxford Knitting Co.*, 250 Fed. 278; *Mawhinney v. Milbrook Woolen Mills*, 172 N. Y. Supp. 461, 105 Misc. 99.

government.²⁰ The federal legislation for food administration was not intended to affect the performance of prior contracts, and it did not have such effect.²¹

§ 2761. Governmental order forbidding performance. An order of the government which forbids performance of the contract, operates as a discharge thereof, at least in actions in the courts of the government which issued such order.¹ A contract for the construction of certain reservoirs, which was to extend over a period of six years, was terminated by order of the Ministry of Munitions, under the Defense of the Realm Acts and Regulations. The delay might well have lasted for years. Furthermore, the plant was sold by direction of the Ministry of Munitions. It was held that such acts of the government operated as a discharge of the contract and not merely as a suspension thereof.² In this case the contractor contended that the contract was discharged, while the public board for which the reservoirs were being constructed claimed that it was merely suspended. It was held that the contractor was not

²⁰ *Moore v. Roxford Knitting Co.*, 250 Fed. 278; *Mawhinney v. Milbrook Woolen Mills*, 172 N. Y. Supp. 461, 105 Misc. 99.

²¹ *J. C. Lysle Mill Co. v. Sharp*, — Mo. App. —, 207 S. W. 72.

¹ On this subject generally, see *Impossibility of Performance of Contracts Due to War-Time Regulations*, by E. Merrick Dodd, 32 *Harvard Law Review* 789.

The war-time prohibition act, 40 Stat. at L. C. 212, pp. 1045, 1046, is valid, is not repealed by the eighteenth amendment and is in force until demobilization is proclaimed by the President. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 140, — L. ed. —.

See also *Jacob Ruppert (incorp.) v. Caffey*, — U. S. —, 6 U. S. Sup. Ct. Adv. Op. [1919-1920], 138; *United States v. Standard Brewery*, — U. S. —, 6 U. S. Sup. Ct. Adv. Op. [1919-1920], 174.

² *Metropolitan Water Board v. Dick* [1918], A. C. 119 [affirming, Metro-

politan Water Board v. Dick (1917), 2 K. B. 1; distinguishing, *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* (1916), 2 A. C. 397, and disapproving, *Hadley v. Clarke*, 8 T. R. 259].

"It is admitted that the prosecution of the works became illegal in consequence of the action of the Minister of Munitions. It became illegal on February 21, 1916, and remains illegal at the present time. This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labor and material required for purposes immediately connected with the war. Condition 32 provides for cases in which the contractor has, in the opinion of the engineer, been unduly delayed or impeded in the completion of his contract by any of the causes

bound to take the chance which would be involved in requiring him to assemble a new plant at the end of the war, and to proceed with the performance of the contract at some indefinite time in the future. Under a provision of the war-time regulations which authorizes the minister of munitions to regulate or restrict or prohibit building work except under license, a builder who proceeds without a license after an order has been made forbidding work for which a license has not been issued, can not recover the agreed compensation therefor.³ A contract between persons who are domiciled in Great Britain for the selling of certain articles to be delivered in another country, is discharged by a regulation made by the government which forbids the sale of such articles as war material, although by the terms of the contract it could have been performed by shipping such articles from any country.⁴

Greater difficulties arise where the order of the government prevents performance of part of the contract, but does not affect performance of the residue. A contract which provides for supplying gas lamps, maintaining them in good condition and furnishing gas, is not discharged by a regulation which forbids the lighting of street lights until further order, since the remaining covenants of such contract may be performed.⁵ A contract by one who is domi-

therein enumerated or by any other causes, so that an extension of time was reasonable. Condition 32 does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.

"It was not disputed, as I understand the argument for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end. It was sought to distinguish the present case on the ground that the contract was for the construction of works of a permanent character, which would last for a very long time, and that a delay, even of years, might be disregarded. This contention ignores the fact that, though

the works when constructed may last for centuries, the process of construction was to last for six years only. It is obvious that the whole character of such a contract for construction may be revolutionized by indefinite delay, such as that which has occurred in the present case, in consequence of the prohibition." *Metropolitan Water Board v. Dick* [1918], A. C. 119.

³*Brightman & Co., Ltd., v. Tate* [1919], 1 K. B. 463.

⁴*Anglo-Russian Merchant Traders v. Batt* [1917], 2 K. B. 679.

⁵*Leiston Gas Co. v. Leiston-Cum-Sizewell Urban District Council* [1916], 2 K. B. 428.

"Under the contract the plaintiffs undertook to perform various services for the defendants in return for an agreed rate of payment to be made quarterly by the defendants for every quarter in the five years' duration of

ciled in Canada for the sale of certain articles, which does not provide that such articles shall be shipped from Canada, is not discharged by the fact that the Canadian government has forbidden the export of such articles.⁶

A contract to export goods which can not be exported at the time without a special license is construed as if there were an express condition that such license should first be obtained; and, accordingly, no liability exists if the party who is unable to perform has used reasonable diligence and care to procure such license.⁷ If a provision in the charter-party requires the cargo to be consigned to the Netherlands Overseas Trust, and if the cargoes consigned to such trust with the consent of the trust will be permitted by British cruisers to proceed, such provision will be construed as requiring the assent of the Netherlands Overseas Trust as a condition precedent; and if such consent can not be obtained, the contract is discharged.⁸

§ 2762. Embargo, detention, etc. An embargo is said not to operate necessarily as a discharge of a contract whose perform-

the contract. These services included the provision and erection and maintenance of the column lamps and other plant for the supply of gas as stipulated, and the defendants agreed to make these payments extending over five years as the remuneration to the plaintiffs, not only for supplying and lighting the gas for the lamps, but also for providing and erecting and maintaining the plant. In fact, the plaintiffs had performed the various services under the contract for nearly three and a half years before the event under discussion happened. The column lamps remain their property under the contract, and the defendants have had the advantage of them throughout the three and a half years. They have used them in the three quarters of 1915, not indeed to the full extent, as the lamps were not lighted except for the twenty-six days of the first quarter, but to the extent that they remained there connected with the main

and would be lighted whenever the prohibition by the military authority was relaxed or withdrawn. Upon these facts I can not hold that the performance of the contract had become unlawful, or that the venture was frustrated by the act of the executive in forbidding the lighting of the lamps. Part of the performance of the contract had become unlawful, but another part of the contract, which can not be regarded as a trivial part, was lawful and could be performed. In these circumstances, the defendants are not justified in treating the contract as at an end, or in refusing to make the payments as agreed by them." *Leiston Gas Co. v. Leiston-Cum-Sizewell Urban District Council* [1916], 2 K. B. 428.

⁶ *Thompson & Stacy Co. v. Evans*, 100 Wash. 277, 170 Pac. 578.

⁷ *Anglo-Russian Merchant Traders v. Batt* [1917], 2 K. B. 679.

⁸ *The Malcolm Baxter, Jr.*, 253 Fed. 486.

ance it renders legally impossible for the time being.¹ An embargo the time of which is not fixed by the government and which therefore may continue indefinitely, is, nevertheless, said to suspend a contract for the transportation or delivery of goods and not to discharge such contract.² A contract for the transportation of goods to a port of another country is said to be suspended and not discharged by an order of council which forbids such shipment, although such embargo is not lifted for two years.³ A contract for the sale of goods to be exported from England, was held not to be discharged by a civil embargo placed on such export, where the embargo was dissolved ten days after it was imposed and before the expiration of the time within which such goods were to be furnished.⁴ This result was reached upon the theory that the embargo was intended evidently to be temporary and that the manufacturer should have waited a reasonable time before he could elect to treat the contract as discharged.⁵ If the contract calls for the delivery of a certain article f. o. b. at a German port, it is held not to be discharged by an embargo upon the export of such article, since the embargo may prove to be temporary or the buyer may be willing to accept delivery at a warehouse.⁶ A contract for the sale of an article which was to be delivered at a German port, either on board a vessel or at a certain warehouse, at the option of the buyer, was held to be valid, although the German government had placed an embargo on the export of such an article and although the seller did not know that such embargo had been imposed.⁷ A contract to carry goods is not discharged by the fact that the outbreak of war is imminent and that the owner of the vessel will be subject to an embargo as being in a hostile port, if it waits to load a full cargo.⁸ A contract to transport certain passengers is discharged by the fact that members of the crew have been mobilized, that the government has imposed restrictions upon the sailing of vessels, and that the government has taken over the coal supply.⁹

Even if an embargo operates as a suspension or discharge of the contract, it is not equivalent to performance,¹⁰ since impossibility

¹ *Millar v. Taylor* [1916], 1 K. B. 402.

² *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325.

³ *Hadley v. Clarke*, 8 T. R. 259.

⁴ *Millar v. Taylor* [1916], 1 K. B. 402.

⁵ *Millar v. Taylor* [1916], 1 K. B. 402.

⁶ *Jager v. Tolme* [1916], 1 K. B. 939.

⁷ *Smith v. Becker* [1916], 2 Ch. 86.

⁸ *Atkinson v. Ritchie*, 10 East 530.

⁹ *Foster v. Compagnie Francaise de Navigation a Vapeur*, 237 Fed. 858.

¹⁰ *Hore v. Whitmore*, 2 Cowp. 784.

is not performance,¹¹ although it may discharge the parties to the contract from the consequences of breach.¹² The fact that a vessel is kept from sailing by an embargo does not prevent such failure to sail within the time limited from being a breach of a warranty that it shall sail within such period.¹³ If an embargo is laid upon vessels belonging to another country by way of reprisal, such an embargo discharges the liability of a citizen of the country which laid the embargo for damages due to his inability to make use of the vessels.¹⁴ Any other rule would result in transferring the loss arising from the inability to use the vessel from the subject of the other country to the subject of the country which has imposed the embargo.¹⁵

If a British vessel was in a German port when war broke out between England and Germany, and such vessel was detained and the seamen were later imprisoned, such detention of the vessel made the further performance of the contract of employment impossible,¹⁶ and the wages of the seamen ceased at the time at which such impossibility began.¹⁷

§ 2763. Probable seizure as prize, contraband, etc. If a vessel has started on a voyage before the actual or threatened outbreak of war, the fact that war has broken out or has become imminent and that the vessel may be seized as a prize, justifies the vessel in returning to a neutral port or in proceeding to a neutral port, instead of proceeding on the voyage.¹ A German vessel which sailed from an American port on the day that Austria declared war on Servia, is justified in returning to an American port without completing her voyage on learning that war would probably follow

¹¹ See §§ 2711 et seq.

¹² See §§ 2711 et seq.

¹³ *Hore v. Whitmore*, 2 Cowp. 784.

¹⁴ *Touteng v. Hubbard*, 3 Bos. & Pul. 291.

¹⁵ *Touteng v. Hubbard*, 3 Bos. & Pul. 127.

¹⁶ *Horlock v. Beal* [1916], A. C. 486 [distinguishing, *Hadley v. Clarke* (1799) 8 T. R. 250; and *Beale v. Thompson* (1804), 4 East. 546; and reversing (1915), 3 K. B. 627].

¹⁷ *Horlock v. Beal* [1916], A. C. 486 [distinguishing, *Hadley v. Clarke* (1799), 8 T. R. 250; and *Beale v.*

Thompson (1804), 4 East 546; and reversing (1915), 3 K. B. 627]. (Of the judges who held that these facts amounted to an impossibility which discharged the contract, the majority held that the impossibility began when the vessel was detained; and the minority held that it began when the crew was imprisoned.)

¹ *The Teutonia*, L. R. 4 P. C. 171; *Nobel's Explosives Co. v. Jenkins* [1896], 2 Q. B. 326; *The Kronprinzessin Cecilie*, 244 U. S. 12, — L. ed. — [reversing, *The Kronprinzessin Cecilie*, 238 Fed. 668].

between Germany and Great Britain, and that such vessel would be seized as a prize when she attempted to deliver her cargo at the English port to which it was consigned.² Under a contract between an English shipper and the owners of a German vessel, for transporting goods to Canada and return, the owners are not liable for delay due to the fact that, at the outbreak of war between Germany and France, the captain of the vessel put into a neutral port to avoid the risk of capture by French cruisers.³ On the other hand, it is held that the fact that performance of a contract will involve the danger of the seizure of the property by the military authorities, does not operate as a discharge of the contract.⁴

A contract for chartering a vessel to proceed to a certain port is discharged by the fact that such port has been blockaded, if the blockade is effective, at least if it continues for such time as to prevent performance in accordance with the intention of the parties.⁵ Blockade has, however, been held to suspend a contract for transporting goods from such port, and not to discharge it.⁶ A contract to transport goods to a certain port is not discharged by the fact that a blockade of such port is declared if such blockade is not effective.⁷ For the purposes of international law, however, a blockade which is not effective is not recognized as having any regular effect.

The owner of a vessel on which goods have been placed before the outbreak of the war is not bound to attempt to perform the contract after war has broken out and such goods have been declared contraband.⁸ He is not liable in damages, therefore, because of his conduct in unloading such contraband at a neutral port and continuing his voyage.⁹ If such articles have been declared contraband by a formal decree, the carrier is not bound

² *The Kronprinzessin Cecilie*, 244 U. S. 12, — L. ed. — [reversing, *The Kronprinzessin Cecilie*, 238 Fed. 668].

³ *Anderson v. San Roman*, L. R. 5 P. C. 301. (In this case it was shown that at least five French cruisers were lying off the neutral port in which such vessel had taken refuge for a considerable length of time.)

⁴ *Elsev v. Stamps*, 78 Tenn. (10 Lea) 709 (a contract for the delivery of whiskey).

⁵ *The Tutela*, 6 C. Rob. 177.

⁶ *Palmer v. Lorillard*, 16 Johns (N. Y.) 348; *Ogden v. Barker*, 18 Johns (N. Y.) 87.

⁷ *Balfour v. Portland & A. Steamship Co.*, 167 Fed. 1010.

⁸ *The Styria*, 186 U. S. 1, 46 L. ed. 1027 [modifying, *The Styria*, 101 Fed. 728].

Such contract is not illegal in the proper sense of the term. See § 2771.

⁹ *The Styria*, 186 U. S. 1, 46 L. ed. 1027 [modifying, *The Styria*, 101 Fed. 728].

to rely upon oral declarations of the belligerent power to the contrary, nor upon its orders to its naval officers.¹⁰

A contract for chartering a vessel is not discharged because of the fact that submarine warfare has assumed such proportions that the danger of the destruction of the vessel by submarine has become considerable, at least as long as commerce is carried on in spite of submarine warfare.¹¹

§ 2764. Increase in risk as affecting employment contracts. A contract for rendering service as seamen, which is not made in anticipation of war risks, does not oblige such seamen to undertake war risks.¹ The term "war risk" in this sense includes not only risks of capture,² but also risk to life from mines and the like.³ The action of the owner or charterer of the vessel in incurring such additional risks may not only operate to discharge the contract if the seamen elect, but it may also amount to breach.⁴ Accordingly, if seamen sign for a voyage which does not involve war risks, and contraband is taken on board as a result of which the vessel is captured and the seamen are detained, they are entitled to compensation up to the time that they arrive at their home port, together with damages for breach of the contract.⁵ A seaman who has agreed in time of peace to serve on a voyage for delivering a war vessel to the country which has purchased it, is justified in refusing to perform further on the outbreak of war between the government which has purchased such vessel and another foreign government.⁶ Such war, furthermore, operates as breach, and such seaman may recover compensation for the entire voyage, although he left the vessel at an intermediate port on learning that war had broken out.⁷ In this case the seaman incurred not only the risks

¹⁰ *The Styria*, 186 U. S. 1, 46 L. ed. 1027 [modifying, *The Styria*, 101 Fed. 728].

¹¹ *Piaggio v. Somerville*, 119 Miss. 6, 80 So. 342.

¹ *Palace Shipping Co. v. Caine* [1907], A. C. 386; *Liston v. The Carpathian* [1915], 2 K. B. 42; *Burton v. Pinkerton*, L. R. 2 Exch. 340; *The Epsom*, 227 Fed. 158; *O'Niel v. Armstrong* [1895], 2 Q. B. 418.

² *Palace Shipping Co. v. Caine* [1907],

A. C. 386; *Liston v. The Carpathian* [1915], 2 K. B. 42.

³ *Liston v. The Carpathian* [1915], 2 K. B. 42.

⁴ *Austin Friars Steam Shipping Co. v. Strack* [1905], 2 K. B. 315.

⁵ *Austin Friars Steam Shipping Co. v. Strack* [1905], 2 K. B. 315.

⁶ *O'Niel v. Armstrong* [1895], 2 Q. B. 418.

⁷ *O'Niel v. Armstrong* [1895], 2 Q. B. 418.

of war, but also danger of prosecution by his own government under the Foreign Enlistment Act.³

§ 2765. Effect of enlistment on contracts for personal services.

A contract by which A employs B as sales agent on a commission, is discharged by B's enlisting in the military forces of the nation,¹ and in the absence of specific provision to the contrary, in the contract, B can not recover compensation for services rendered after such enlistment.²

§ 2766. Difficulty or expense due to war. Unforeseen difficulty or expense in the performance of a contract is not of itself impossibility of performance so as to operate as a discharge,¹ although it is suggested that there may be such an increase in expense or difficulty as to make the contract not only unprofitable, but also so impossible from a practical standpoint, that the law will recognize and adopt the view which persons generally would take of the effect of such circumstances. This principle of impossibility in general applies to impossibility which is due to the outbreak of war; and within reasonable limits, at least, an increase in the expense or difficulty of performance which is due to the war, does not of itself operate as a discharge.² A contract, made before the outbreak of the war, to deliver magnesium chloride at a certain price, was not discharged by the outbreak of the war which stopped the importation of such article from Germany, and which thus caused an increase in price, amounting to about sixteen per cent.³ A contract which was made before the war, to deliver a certain quantity of Finland birch in England, was held not to be discharged by the outbreak of the war which made it practically impossible to import such timber during the war,⁴ at least if it

³O'Niel v. Armstrong [1895], 2 Q. B. 418.

¹Marshall v. Glanville [1917], 2 K. B. 87.

²Marshall v. Glanville [1917], 2 K. B. 87.

¹See §§ 2705 et seq.

²Tennants v. Wilson [1917], A. C. 495 [affirming, Wilson v. Tennants (1917), 1 K. B. 208; not affected on this point by reversal in Tennants v. Wilson (1917), A. C. 495]; Blackburn Bobbin Co. v. Allen [1918], 2 K. B.

467, 3 A. L. R. 11 [affirming (1918), 1 K. B. 540]; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499].

³Tennants v. Wilson [1917], A. C. 495 [reversing, Wilson v. Tennants (1917), 1 K. B. 208; not affected on this point by reversal in Tennants v. Wilson (1917), A. C. 495].

⁴Blackburn Bobbin Co. v. Allen [1918], 2 K. B. 467, 3 A. L. R. 11 [affirming (1918), 1 K. B. 540].

was not shown that the purchaser knew that such timber was not carried in stock in England and that the practice was to load such timber into vessels at Finnish ports for direct transportation to England.⁵ A contract for the transportation of goods by sea is not discharged by the outbreak of war if the ports to which goods are to be carried are not blockaded, although as a result of the war the insurance rates increase heavily and although the usual means by which payment is made for goods can not be employed.⁶ A contract by which a street railway company agrees to furnish transportation and the like at certain specified rates, is not discharged by the fact that owing to war conditions and especially to an award of the war labor board, the wages of the employees and the cost of material are such that the rates of compensation fixed by the contract are very inadequate,⁷ at least if it is not shown that the compensation for the entire period of the contract will be inadequate.⁸ In the absence of a specific agreement to the contrary, a contract to carry and transmit cable messages is not discharged because of the outbreak of war which interferes with the regularity of such service.⁹ In a case in which the court repeated the rule that increase in cost of production did not amount to impossibility, it construed the contract so as to provide for the manufacture of the article in question from the material from which the parties had undoubtedly expected that it should be manufactured; and it then held that if the manufacturer made every reasonable effort to secure the raw material and if he was ready to pay any reasonable sum necessary to obtain it, the fact that he could not obtain the raw material operated as a discharge of his contract.¹⁰

VI

EFFECT OF WAR TO WHICH STATE WHOSE LAW CONTROLS CONTRACT IS NOT PARTY

§ 2767. Effect of foreign war. In analogy to the rule that the courts of a state by whose law a contract is governed do not regard

⁵ Blackburn Bobbin Co. v. Allen [1918], 2 K. B. 467, 3 A. L. R. 11 [affirming (1918), 1 K. B. 540].

⁶ Furness v. Muller, 232 Fed. 186.

⁷ Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499].

⁸ Columbus Railway, Power & Light

Co. v. Columbus, 249 U. S. 399, — L. ed. — [affirming, 253 Fed. 499].

⁹ Commercial Cable Co. v. Philipp Bauer Co., 169 N. Y. Supp. 450, 102 Misc. 699 [reversing, 165 N. Y. Supp. 399, 100 Misc. 663].

¹⁰ Davison Chemical Co. v. Baugh Chemical Co., 133 Md. 203, 3 A. L. R. 1, 104 Atl. 404.

as a discharge, impossibility due to the change of a law of a foreign state, or due to the act of such state,¹ it has been said in a number of cases that the courts of a country by whose law a contract is governed will not regard a war between other nations, to which such nation is not a party, as a discharge.² A contract governed by English law for exporting barley from Russia, has been held not to be discharged by an order from the Russian government as a war measure forbidding the export of such article.³ A contract which is regarded as governed by English law for exporting hemp from the Philippines is not discharged or suspended by a delay due to the war between the United States and Spain.⁴ A contract for the sale of goods which can be obtained only from Germany, is said not to be discharged by the fact that its performance was rendered practically impossible by the outbreak of war between England and Germany, to which the United States was not at that time a party.⁵ In some of these cases the result may be explained on the theory that the contract did not require the performance of any act which was rendered impossible by the war, and that the adversary party was free to perform in any way that he saw fit.⁶ In a case of this sort, the fact that one of the parties had expected a means of performance which eventually proved impracticable, should probably not operate as a discharge if he was free by the contract to perform in some other way. In other cases, however,⁷ the contract can by its terms be performed only by the act which is rendered impossible by the outbreak of the war. This rule probably stands on the same basis as the rule that a change of foreign law or the act of a foreign government is not a discharge of a contract the performance of which is not governed by the law of such foreign government. If one of these rules is

¹ See § 2701.

² *Blight [Bright] v. Page*, 3 Bos. & P. 295, note; *Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co.*, 244 Fed. 250; *Ashmore v. Cox* [1899], 1 Q. B. 436; *Ducas v. Bayer*, 163 N. Y. Supp. 32; *Richards v. Wreschner*, 156 N. Y. Supp. 1054, 174 App. Div. 484.

A hostile blockade operates as a suspension of a contract which requires transportation through the lines of a blockading squadron, but not as a discharge of such contract. *Palmer v. Lorillard*, 16 Johns. (N. Y.) 348

(obiter); *Ogden v. Barker*, 18 Johns. (N. Y.) 87.

³ *Blight [Bright] v. Page*, 3 Bos. & P. 295, note.

⁴ *Ashmore v. Cox* [1899], 1 Q. B. 436.

⁵ *Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co.*, 244 Fed. 250.

⁶ *Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co.*, 244 Fed. 250.

⁷ See, for example, *Blight [Bright] v. Page*, 3 Bos. & P. 295, note.

right, the other probably is. It would seem difficult to justify the result which is reached in some of these cases on any theory of impossibility. It would seem difficult to justify the arbitrary exception of the change of foreign law or the act of a foreign government which renders performance impossible. In reaching this result, the courts have probably been influenced by the theory which some courts have adopted in determining the law which controls a contract, namely, that discharge is to be determined by the law of the place where the contract was made and the last act of performance was to be done, and not by the law of the place where the parties had agreed to perform the act, the performance of which has been rendered impossible by such change of foreign law or by the act of such foreign state.

War does not suspend interest on a debt due from a citizen of one of the belligerent powers to a neutral, at least if it is possible to remit the amount of the debt to the creditor.⁸ Interest can be recovered, in such cases, even in the courts of such belligerent country.⁹

VII

SPECIFIC CONTRACTUAL PROVISIONS WITH REFERENCE TO WAR

§ 2768. Effect of specific contractual provisions with reference to war—Provisions for suspension or discharge of contract. Whether the general rules which control the effect of war upon the performance of contracts can be modified by specific provisions in a contract with reference to the outbreak of war, is a question which is in part to be determined by the general principles of public policy underlying the rule that war discharges or suspends certain contracts, and in part by the general principles of construction. If the contract is one the performance of which is forbidden on the ground that the contract if performed will aid the enemy,¹ or will involve trading with the enemy, the parties can not prevent the effect of such rules of law by any provision in the contract,²

⁸ Crawford v. Willing, 4 U. S. (4 Dall.) 286, 1 L. ed. 836.

⁹ Crawford v. Willing, 4 U. S. (4 Dall.) 286, 1 L. ed. 836.

¹ See § 2733.

² Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Trans-

port-Maatschappij Vulcaan [1917], 2 K. B. 639; Bieber v. Rio Tinto Co. [1918], A. C. 260; Naylor v. Krainische Industrie Gesellschaft [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331; and citing, Bieber v. Rio Tinto Co. (1918), A. C. 260]; Distington Hema-

although even in cases of this sort the court is likely to base its decision on the construction of the contract, if the contract can be construed as not providing for illegal performance in express terms,³ rather than on questions of public policy. In so doing, however, the courts are merely applying the general rule of construction that a contract will be construed so as to render its performance legal if such construction can fairly be placed upon the words which the parties have used when read in connection with the surrounding circumstances.⁴ A contract by which a British company charters a ship to a Holland company, the stock in which is held by Germans, is discharged by the outbreak of war between England and Germany, although such contract provides that "in the event of war between the nation to whose flag the chartered steamer belongs, and any European power * * * charterers and/or owners shall have the option of suspending this charter during the time in which hostilities are in progress."⁵ A contract by which an English company had agreed to sell a large amount of ore to a German company, which would be useful to Germany in carrying on the war, is dissolved and not merely suspended by the outbreak of war between England and Germany, although such contract contains a provision that if owing to war the seller should be prevented from shipping and delivering the ore, the obligation to ship and deliver should be suspended while such impediment should continue, and for a reasonable time thereafter.⁶ A contract by which a British corporation agrees to sell its output of iron to a German corporation, who is to act as its sales agent, is discharged by the outbreak of the war,⁷ though such contract contains a provision that during mobilization of German military forces, the defendant should not be bound to take deliveries of such iron.⁸ If an English company has agreed to sell a large quantity of ore to a German company, and such ore will assist Germany in carrying

tite Iron Co. v. Possehl [1916], 1 K. B. 811; *Zinc Corporation v. Hirsch* [1916], 1 K. B. 541, L. R. A. 1917C, 650.

³ See § 2733.

⁴ See §§ 2051 et seq.

⁵ *Clapham Steamship Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcaan* [1917], 2 K. B. 639.

⁶ *Bieber v. Rio Tinto Co.* [1918], A. C. 260.

See to the same effect, *Naylor v. Krainische Industrie Gesellschaft* [1918], 2 K. B. 486 [affirming (1918), 1 K. B. 331; and citing, *Bieber v. Rio Tinto Co.* (1918), A. C. 260].

⁷ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811.

⁸ *Distington Hematite Iron Co. v. Possehl* [1916], 1 K. B. 811.

on the war, such contract is discharged by the outbreak of war between England and Germany, although it contains a provision that such contract should be suspended during the continuance of disabilities, such as acts of God, force majeure, or any cause beyond the control of either seller or buyer.⁹ Under a contract for the sale of a product, the bulk of which is in fact imported from Germany, which contains a provision for suspending such contract in case of a contingency beyond the control of the parties, such as war, which causes a shortage in labor, fuel, raw material, or manufactured product, it has been held that such contract is suspended on the outbreak of war between England and Germany, if there is a general shortage in the article which makes it impossible for the seller to fill all his orders, although he had sufficient supply to have filled any one order to the exclusion of others.¹⁰ If a contract in legal effect provides for the sale of a given product to be manufactured by the seller from material which can be obtained in commercial quantities only by importing it from Europe, and if such contract contains a provision to the effect that "obstructions to navigation * * * insurrections or other uncontrollable causes * * * shall be good and sufficient reasons to make that contract inoperative during * * * the continuance of the difficulties," such contract is suspended by the fact that the importation of such material has practically ceased owing to the attacks of submarines. It is not necessary that the sellers should manufacture such product out of a different and more expensive material, nor is it necessary that they should buy such product from other manufacturers.¹¹ A contract for the sale of prussiate of soda, which contains a provision to the effect that sellers were not liable for delays due to causes beyond their control, including war, was held not to be discharged by the outbreak of war between Great Britain and Germany, although as a result of such war goods could not be exported from Germany, and such article was produced only in Germany, at least if the seller had enough of such article on hand at the time that such contract was made to perform such contract.¹² It was said that, since the contract was entered into after war had broken out between Great Britain and Germany, the provision with

⁹ Zinc Corporation v. Hirsch [1916], 1 K. B. 541, L. R. A. 1917C, 650.

¹⁰ Tennants v. Wilson [1917], A. C. 495 [reversing, Wilson v. Tennants (1917), 1 K. B. 208].

¹¹ Davison Chemical Co. v. Baugh Chemical Co., 133 Md. 203, 3 A. L. R. 1, 104 Atl. 404.

¹² Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co., 244 Fed. 250.

reference to the war could apply only to a war in which the United States might become a party.¹³

If the contract is one which would not be discharged or suspended by the operation of the law on the outbreak of war, full effect is given to an express provision for suspending it or terminating it in case of war.¹⁴ Under a provision in a contract of employment to be performed in the United States, and terminating such contract "in case of war,"¹⁵ or in case of "public calamity or casualty,"¹⁶ such contract may be terminated because of the outbreak of the war in Europe.

If a contract for the construction of a vessel in France provided that if France should become engaged in European war, "this contract shall become void," the word "void" is to be construed literally and not as meaning "voidable at the option of the purchaser," and if the seller takes advantage of such provision and refuses to perform because of causes beyond his own control, the buyer can not maintain an action on such contract.¹⁷

§ 2769. Insurance. If a contract of life insurance contains a provision that the policy shall be void if the insured is in active service, the insurance company is liable if the death of the insured is caused by pneumonia while he is in a training camp.¹ An insurance against loss "directly caused by war, bombardment, military or usurped power, or by aerial craft (hostile or otherwise) * * * and fire * * * directly caused by any of the foregoing," but not against "destruction by the government of the country in which the property is situated," includes a loss due to fire which was caused by a bombardment by the government of buildings which were seized by the so-called provisional government of the Irish Republic.² If a lease contains a covenant on the part of the lessee to keep the premises insured against loss by fire in a certain named insurance company, such covenant is performed if insurance in the usual form in which such company issues insurance is taken

¹³ *Standard Silk Dyeing Co. v. Roessles & Hasslachher Chemical Co.*, 244 Fed. 250.

¹⁴ *Tennants v. Wilson* [1917], A. C. 495 [reversing, *Wilson v. Tennants* (1917), 1 K. B. 208]; *In re Boston Opera Co.*, 249 Fed. 271.

¹⁵ *In re Boston Opera Co.*, 249 Fed. 271.

¹⁶ *In re Boston Opera Co.*, 249 Fed. 280.

¹⁷ *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* [1919], A. C. 1.

¹ *Redd v. American Central Life Ins. Co.*, 200 Mo. App. 383, 207 S. W. 74.

² *Curtis v. Mathews* [1919], 1 K. B. 425 [affirming (1918), 2 K. B. 825].

out;³ and such lease is not broken by the fact that the lessee, after taking such insurance which contains an exception against "invasion, foreign enemy * * * military or usurped power," refuses to comply with the demand of the lessor that he insures premises against loss by fire occasioned by hostile aircraft.⁴ A policy which insures against loss by fire, excepting fire "resulting from insurrection, riots, civil commotion or military or usurped power," does not cover a loss by fire which was caused by a bombardment from a German Zeppelin.⁵ If goods are insured against perils, including "takings at sea, arrests, restraints and detainments of all kings, princes and people," and such goods are bound in a British vessel from the Argentine Republic to Germany, when the war between England and Germany broke out, the owner may recover on the theory of constructive total loss if he is instructed by his government or by a French cruiser to put into an English port.⁶ In a

³ Upjohn v. Hitchens [1918], 2 K. B. 48 [affirming (1918), 1 K. B. 171].

⁴ Upjohn v. Hitchens [1918], 2 K. B. 48 [affirming (1918), 1 K. B. 171].

⁵ Rogers v. Whittaker [1917], 1 K. B. 942.

⁶ British and Foreign Marine Ins. Co. v. Sanday [1916], 1 A. C. 650 [affirming (1915), 2 K. B. 781].

"A declaration by His Majesty that there was a state of war was issued on August 4, 1914, and thereupon a number of things theretofore lawful became unlawful. Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offense, and, in fact, impracticable. That the declaration was an act of State can not be doubted. The real point made by the underwriters was that the declaration of war did not directly restrain the ships from proceeding to Hamburg, or the owners of goods from taking them there. They argued that the declaration set up a state of war, and the general law applicable to that state thereupon came

into force, and it was not the declaration, but the consequence of it, which destroyed their enterprise. To hold otherwise, they said, would be to throw upon the underwriters an insurance against the consequences of war. In their contention, though the actual exercise of force might not be necessary, yet the fear of its being used must be present if there is to be a loss by restraint of princes, and here there was neither force nor the fear of it, for the voyage was abandoned simply because it had become unlawful, and the assured obeyed the law. The proximate or direct cause of the loss was, they said, simply the law of the land.

"My lords, I am not pressed by the circumstances that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey, and which he might have successfully resisted either by

case in which an English merchant shipped goods on a German vessel before the outbreak of the war, and insured them with an insurance company against the customary perils, including "men-of-war * * * enemies * * * takings at sea, arrests, restraints and detentions of all kings, princes and people," and on the outbreak of war the master put into a neutral port to avoid capture by a British cruiser, the merchant was not entitled to recover upon his policy of insurance, since the frustration of the adventure was not due to the peril itself, but to the precautions taken to avoid the peril.⁷ An insurance against "loss of and/or damage or misfortune to" a stock of jewelry, is not payable by reason of the fact that the jewelry is in territory which has been

violence or by process of law, a question might arise whether or not there had been in fact a restraint. But that is outside the present case, and I say nothing of it. What has given me some anxiety is the argument that His Majesty's declaration was not the direct cause of these adventures being destroyed. The maxim, '*Causa proxima non remota spectatur*,' has been strictly applied in marine insurance cases. And properly so, for there are a variety of perils that may lead to a loss either partial or total, some of them, it may be, covered and others not covered by a policy, and a variety of events or causes that may contribute to a loss, so that without straining language it will be possible to treat it as due either to an insured or to an excepted peril.

"That, I take it, is the reason why this maxim is pushed to considerable lengths in marine insurance law. In view of that, ought we to say that His Majesty's declaration was the direct cause of these adventures being frustrated, or ought we to say that it merely created a state of war which brought into activity a new set of duties and prohibitions, and that one of them, the prohibition against trading with the enemy, necessitated the adventure being wholly given up? Did

the interruption directly come from the declaration or from the law which it awakened? In a sense it came from both, but we must choose which was the proximate cause, for one is the subject of insurance and the other is not.

"I can see how far-reaching a decision in the former of these senses may prove, but I think it is the right decision. I do not see my way to separating the act of State from its sequel and treating the advent of war conditions as a last distinct link in the chain of causes which brought these voyages to an end. No new law or ordinance was made after the risk commenced. No event occurred to impede the adventure except the declaration of war.

"In my opinion, the clause insuring these goods insures their safe arrival at Hamburg, and the destruction of that adventure was directly caused by His Majesty's declaration. It was therefore a loss within the clause which insures these goods at and from losses against restraint by kings, princes or peoples." *British and Foreign Marine Ins. Co. v. Sanday* [1916], 1 A. C. 650 [affirming (1915), 2 K. B. 781].

⁷*Becker v. London Assurance Corporation* [1918], A. C. 101.

seized by the Germans in the absence of evidence to show that the Germans had stolen or confiscated such jewelry.⁸ Since the goods and not the commercial venture were insured, the fact that the owner of the jewelry can not get possession thereof does not amount to a loss on the policy.⁹

§ 2770. Contracts for chartering vessels. If a contract for chartering a vessel contains an exception in case of the act of God, the king's enemies, and restraint of princes and rulers, a contract to take a cargo and carry it to a given port is discharged if such port is blockaded by a hostile power.¹ If a contract for chartering a vessel contains a provision that no voyage should be undertaken and no goods shipped that would involve risk of seizure, capture or penalty by rulers or governments, the owner of such vessel may insist that it shall not be sent on a voyage after the outbreak of the war which will expose it to risk of being destroyed by submarines.² Under a clause in a bill of lading to the effect that the prepaid freight was to be retained by the carrier, whether ship or cargo were lost or not lost, the contract is not discharged by reason of the fact that the government delays the voyage indefinitely by refusing to give clearance to sailing vessels destined for the war zone,³ and the freight thus paid can not be recovered by the shipper.⁴ This result was reached even where the voyage could have been made but for the fact that the vessel was injured in a storm and returned to port for repairs, where it was delayed by the refusal of the government to issue a clearance.⁵ While the right of the carrier to retain the freight is most clear where the bill of lading provides that it shall be retained "irrevocably,"⁶ such

⁸ Moore v. Evans [1918], A. C. 185 [affirming (1917), 1 K. B. 458, which reversed (1916) 1 K. B. 479].

⁹ Moore v. Evans [1918], A. C. 185 [affirming (1917), 1 K. B. 458, which reversed (1916) 1 K. B. 479].

¹ Geipel v. Smith, L. R. 7 Q. B. 404.

² In re Tonnevold [1916], 2 K. B. 551.

³ International Paper Co. v. "Gracie D. Chambers," 248 U. S. 387, — L. ed. — [citing, Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, — L. ed. —; and affirming, 253 Fed. 182]; Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 3 A. L. R. 15, 63 L. ed. —.

⁴ International Paper Co. v. "Gracie D. Chambers," 248 U. S. 387, 63 L. ed. — [citing, Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 63 L. ed. —; and affirming, 253 Fed. 182]; Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 63 A. L. R. 15, 63 L. ed. —.

⁵ Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 3 A. L. R. 15, 63 L. ed. —.

⁶ Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 3 A. L. R. 15, 63 L. ed. —.

result is to be reached under a clause which provides that "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost."⁷ A contract to load a Grecian vessel in the Black Sea with a cargo for England, is discharged by the outbreak of war between Turkey and Greece, as a result of which Turkey prevents Grecian vessels from passing the Dardanelles.⁸ The fact that the Turkish government subsequently modified its original practice and permitted Grecian vessels with cargo for neutral countries to pass for a short time, did not prevent the discharge of such contract.⁹ A contract which contains an express provision against arrests and restraint of princes, and which provides against voyages involving the risk of seizure or capture, and which gives to the charterer the option of canceling the charter or insuring the vessel against war risks if any war should break out which affected the operation of the vessel, is discharged by the outbreak of the war of 1914, while the vessel was in the Gulf of Finland on a voyage of indefinite duration.¹⁰ A contract by which A agreed to furnish a steamer to B, to transport a cargo from a port on the Sea of Azof to Japan in 1914, was held not to be discharged on September 1, 1914, by reason of the outbreak of war, since Turkey had not then entered the war, and did not enter it until November, and did not close the Dardanelles to navigation until after sunset on September 26, and since the English government had not prohibited steamers from going to the Black Sea to load.¹¹ The "reasonable apprehension that the Dardanelles might be closed," was held not to amount to a "restraint of princes" within the meaning of the contract.¹² The fact that the steamer could not have gotten out of the Sea of Azof after loading its cargo before the Dardanelles were closed, was held not to operate as a discharge.¹³

⁷ *Standard Varnish Works v. "Bris,"* 248 U. S. 302, 63 L. ed. — [citing, *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, 3 A. L. R. 15, 63 L. ed. —, and *International Paper Co. v. "Gracie D. Chambers,"* 248 U. S. 387, 63 L. ed. —].

⁸ *Embiricos v. Reid* [1914], 3 K. B. 45.

⁹ *Embiricos v. Reid* [1914], 3 K. B. 45.

¹⁰ *Scottish Navigation Co. v. Souter* [1917], 1 K. B. 222.

¹¹ *Watts v. Mitsui* [1917], A. C. 227.

¹² *Watts v. Mitsui* [1917], A. C. 227.

¹³ *Watts v. Mitsui* [1917], A. C. 227.

"In my opinion there was no restraint of princes on September 1st when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage, I should have regarded that as in fact

VIII

CONTRACTS IN VIOLATION OF WAR RIGHTS OF FRIENDLY
ALIEN NATIONS**§ 2771. Contracts in violation of war rights of friendly nations.**

A contract to aid an insurrection against a friendly state is invalid.¹ A contract to lend money to be used in aiding Texas in her war of independence with Mexico, before the United States had recognized the independence of Texas, was held invalid.²

A contract to sell and deliver contraband of war is not illegal,³ although such goods may be seized under proper circumstances by the belligerent nation at war with the nation to which they are consigned.⁴

A contract for sailing to a port, the blockade of which has been declared by an alien government, is not illegal in the ordinary sense of the term.⁵ A contract to carry goods to or from a port which is blockaded, is not rendered invalid by the fact that the port was blockaded when the contract was made, if the parties to the contract knew such fact.⁶

a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised. I agree, however, with Lord Dunedin's expression that 'it would be useless to try and fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear.' No form of words is likely to cover automatically all contingencies. In the present case the lists of ships that went through the Dardanelles to and fro during the material days, which were furnished to us during the argument, though not printed in the book, show that there was no restraint by princes when the voyage was abandoned. I can not agree with the learned counsel for the appellants that we are

to judge merely by the event. The decision must be made at the time by those concerned." *Watts v. Mitsui* [1917], A. C. 227.

¹ *Kennett v. Chambers*, 55 U. S. (14 How.) 38, 14 L. ed. 316.

² *Kennett v. Chambers*, 55 U. S. (14 How.) 38, 14 L. ed. 316.

³ *Northern Pacific Railway Co. v. American Trading Co.*, 195 U. S. 439, 49 L. ed. 269.

⁴ *Northern Pacific Railway Co. v. American Trading Co.*, 195 U. S. 439, 49 L. ed. 269.

⁵ *Medeiros v. Hill*, 8 Bing. 231 (at least if no premeditated intent of breaking the blockade is shown).

⁶ *Medeiros v. Hill*, 8 Bing. 231.

For the effect of liability to seizure as breaking blockade or carrying contraband upon contracts entered into with contemplation of war, see § 2763.

CHAPTER LXXX

PERFORMANCE

- § 2772. Definition and nature of performance.
- § 2773. Treatment of topics involved in performance.
- § 2774. Performance as dependent on actual benefit to adversary party, or expense to party who performs.
- § 2775. Performance of building and construction contracts as affected by benefit conferred.
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- § 2792. Contracts for work, labor, services, etc.—Performance less than substantial.
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- § 2799. Contracts to be performed in the alternative.
- § 2800. Covenant prescribing duty in case of default.
- § 2801. Effect of performance.

§ 2772. Definition and nature of performance. Performance of a contract consists in doing the thing which has been promised.¹ While the term performance ordinarily implies affirmative action, it may also include negative action wherever the contract in question contains a negative covenant.²

A contract which has been performed by both of the parties thereto is frequently said to be fully executed;³ while a contract which has been performed by one party, but not by the other, is said to be executed as to the party who has performed.⁴ In this sense the term "execute" is regarded as equivalent to "perform." In one sense the use of this term is natural. If the contract has not been performed on one side by one party, it is called executory as to such party.⁵ The natural antithesis of an executory contract

¹ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130; *Wertheim v. Maintenance Co.*, 119 N. Y. Supp. 909; *McElraevy & Hauck Co. v. St. Joseph's Home*, 143 N. Y. Supp. 235.

"Performance is, as the term implies, such a thorough fulfilment of a duty as puts an end to obligations by leaving nothing more to be done. *Hare, Cont.* 569." *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

"Performance of a contract consists in doing the thing agreed to be done." *McElraevy & Hauck Co. v. St. Joseph's Home*, 143 N. Y. Supp. 235.

"Perform" is regarded as synonymous with "fulfil." *Wertheim v. Maintenance Co.*, 119 N. Y. Supp. 909.

The meaning of the word "perform" or "performance" in a statute, is frequently affected or modified by the context. In a statute which is intended to protect laborers who have done work in constructing a building by giving them a lien thereon for labor which they have performed, the word "perform" is regarded as equivalent to "commenced." *Griffith v. Blackwater Boom & Lumber Co.*, 46 W. Va. 56, 33 S. E. 125.

Under a statute which provides that an action against a corporation may be brought in a county in which a contract of such corporation is to be per-

formed, it is held that "the words 'to be performed' have reference to a contract that is to be performed wholly or in all its essential parts in one county, and that when a contract provides that it may be performed in more than one county, the venue of the action is confined to the other counties mentioned in the section in which the action may be brought." *Job Iron & Steel Co. v. Clark*, 150 Ky. 246, 150 S. W. 367; *Right of Real Estate and Loan Brokers to Commissions*, 26 *American Law Register*, 545 (N.S.) 1887; *Right of Real Estate and Loan Brokers to Commissions*, 26 *American Law Register*, 545 (N.S.) 1887.

For a special question under performance, see *The Real Estate Broker and His Commissions*, by Floyd R. Mechem, 6 *Illinois Law Review*, 145, 238, 313.

² *Old Colony Trust Co. v. Tacoma*, 219 Fed. 775.

³ *DeBergere v. Chaves*, 14 N. M. 352, 93 Pac. 762; *Galbreath Gas Co. v. Lindsey*, — Okla. —, 161 Pac. 826.

⁴ *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652.

⁵ *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. ed. 162; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558. See § 52.

is an executed contract; and if the term "executory" is to be used of contracts which have not been performed, the term "executed" would seem to be the natural term to employ in referring to contracts which have been performed. The chief objection to the use of this term in this sense, however, is that it is already used in another sense. Execution is practically equivalent to formation, especially if the contract is under seal,⁶ or if the contract is in writing though not under seal.⁷ The same term should not be used to indicate the formation of the contract on the one hand and the performance of the contract on the other. While there is relatively little danger of confusion in thought, it is nevertheless necessary, if the term "executed" is to be used in each of these senses, to explain in which sense it is used in the particular instance. In some cases the term "executed" is limited to contracts which are fully performed on each side;⁸ and a contract which has been performed on one side and which is executory in whole or in part on the other side, is classed as an executory contract.⁹

A contract which has been performed on one side and not on the other is sometimes referred to as a contract which is executed on one side and executory on the other;¹⁰ and sometimes it is referred to as a unilateral contract. The difficulties in the way of using the term "unilateral" as a technical term have already been indicated.¹¹ It is actually used much more frequently to indicate a promise which is not a contract, especially a gratuitous promise; or to indicate a contract which is unenforceable because of a failure to comply with the Statute of Frauds or because of the disability of one of the parties thereto, than it is used to indicate a contract which is a valid obligation against each of the parties thereto. It has also been suggested as the proper term to use of a contract which is made by the acceptance of a promise by means of an act so that it is never executory as to one of the parties thereto.¹² To

⁶ See §§ 1157 et seq.

⁷ See §§ 1173 et seq.

⁸ *United States*. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558.

Colorado. *McCutchen v. Klaes*, 26 Colo. App. 374, 143 Pac. 143.

Georgia. *Watkins v. Nugen*, 118 Ga. 372, 45 S. E. 262.

Illinois. *Fox v. Kitton*, 19 Ill. 519.

New Jersey. *State v. Jersey City*, 31 N. J. L. 575, 86 Am. Dec. 240.

Oregon. *Leadbetter v. Hawley*, 59

Or. 422, 117 Pac. 289 [rehearing denied, *Leadbetter v. Hawley*, 117 Pac. 505].

Utah. *Adams v. Reed*, 11 Utah 480, 40 Pac. 720.

⁹ *McCutchen v. Klaes*, 26 Colo. App. 374, 143 Pac. 143; *Leadbetter v. Hawley*, 59 Or. 422, 117 Pac. 289 [rehearing denied, *Leadbetter v. Hawley*, 117 Pac. 505].

¹⁰ See § 52.

¹¹ See § 51.

¹² See § 51.

employ the same term of a contract which was originally executory as to each of the parties thereto, but which has been performed in full by one of the parties, leaving it executory as to the adversary party, is to add another opportunity for confusion in names which in this case not infrequently leads to confusion in thought.

§ 2773. Treatment of topics involved in performance. Performance is a subject which, in comparison with its importance, is discussed but little by the courts as a separate topic. The question of the performance of a contract involves, in the first instance, the necessity of determining the terms of the contract. Questions of this sort are generally discussed in other connections, such as offer and acceptance,¹ the formation of formal contracts,² and of written contracts.³

In many cases the question of performance also involves the meaning of the terms of the contract. Questions of this sort are usually considered under the subject of construction,⁴ and the so-called parol evidence rule.⁵ The duty of performing covenants which are implied from the fair construction of the contract taken as a whole,⁶ is as imperative as the duty of performing contracts which are expressed in specific language.⁷ In order to perform a contract, however, it is not necessary to do acts which are not required by the contract either by express language or by fair implication, although the doing of such acts would greatly facilitate the performance of the contract.⁸ A contract to drill a well to such a depth that it will supply a certain quantity of water, has been held not to impose upon the contractor the risk of continuing work indefinitely or of losing all compensation in case water is not found after a reasonable depth has been reached.⁹ It is held that after such reasonable depth is reached, the owner must pay the agreed compensation.¹⁰

When the duty of one of the parties under the contract is thus ascertained by a determination of the terms of the contract and of

¹ See ch. V.

² See ch. XXXIX.

³ See ch. XL.

⁴ See §§ 2020 et seq.

⁵ See §§ 2137 et seq.

⁶ See § 2038.

⁷ *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766; *Culp v. Sand-oval*, 22 N. M. 71, L. R. A. 1917A, 1157, 160 Pac. 956.

⁸ *M. P. Smith & Sons Co. v. Trexler Lumber Co.*, 216 Fed. 134, L. R. A. 1916B, 1086; *Lansdowne v. Reihmann*, — Ky. —, 124 S. W. 353.

⁹ *Thomas v. Kanawha Valley Traction Co.*, 73 W. Va. 374, 80 S. E. 476.

¹⁰ *Thomas v. Kanawha Valley Traction Co.*, 73 W. Va. 374, 80 S. E. 476.

the meaning of such terms, the question of what has been done under the contract is a question of fact; and in this sense performance is said to be a question of fact.¹¹ It is true that the question whether the facts thus established amount to performance, is a question for the court, and in this sense performance is said to be a question of law;¹² but most of the questions of law are, as has been pointed out already, questions of construction and the like.

Apart from questions of construction and the like, the chief question of law which arises in connection with performance is found in cases in which the established facts show a performance which is less than a technical and literal performance, and yet one which has conferred upon the adversary party the greater part of the benefits for which he bargained. This question is discussed under the head of substantial performance.¹³ The performance of covenants to pay money is ordinarily known as payment, and because of certain peculiarities in the law of such performance, it is discussed subsequently under the heading of payment.¹⁴

The antithesis of performance is breach. Because of the effects and consequences of breach, both as giving rise to a cause of action and as operating as a discharge of the contract, many of the questions of performance are discussed under the heading of breach,¹⁵ rather than under the heading of performance.

§ 2774. Performance as dependent on actual benefit to adversary party, or expense to party who performs. A party to a contract who by the terms of such contract assumes risk as to certain possible forms of loss, is bound by such assumption without regard to the actual outcome of the transaction;¹ and accordingly the

¹¹ *United States. Lincoln v. Orthwein*, 120 Fed. 880.

Arkansas. Robinson Contracting Co. v. Twin City Bank, 103 Ark. 219, 146 S. W. 523.

Iowa. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co., 137 Ia. 558, 113 N. W. 326; *Pierce v. Welkie*, 165 Ia. 386, 145 N. W. 908.

Massachusetts. Gunther v. Gunther, 181 Mass. 217, 63 N. E. 402.

Missouri. United States, etc., Co. v. Sprinkler Co., 84 Mo. App. 204.

New York. Stokes v. Foote, 172 N. Y. 327, 65 N. E. 176.

Oregon. Bade v. Hibberd, 50 Or. 501, 93 Pac. 364.

Wisconsin. Charley v. Potthof, 118 Wis. 258, 95 N. W. 124.

¹² *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Sandy Valley & Elkhorn Ry. v. Hughes*, 172 Ky. 65, 188 S. W. 894.

¹³ See §§ 2778 et seq.

¹⁴ See ch. LXXXI.

¹⁵ See ch. LXXXIV.

¹ *Stewart v. Henningsen Produce Co.*, 88 Kan. 521, 50 L. R. A. (N.S.) 111, 129 Pac. 181; *Hoskins v. Powder Land & Irrigation Co.*, 90 Or. 217, 176 Pac. 124; *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369; *Speliopoulos v. Schick*, 129 Wis. 556, 109 N. W. 568.

right to enforce the contract against the party who has not performed is not affected by the fact that performance has not benefited him as much as he had expected.² The question in such cases is whether the party who claims to have performed a contract has done what he agreed to do, and not whether the adversary party has made a wise bargain, or received a financial benefit therefrom. The benefit to which the party is entitled is the benefit of performance of the contract and not the benefit of success in the ultimate outcome of the transaction.

On the other hand, performance is not dependent upon the detriment or expense to the party who performs.³ The fact that the conduct of one of the parties makes it possible for the adversary party to do what he has promised with less expense than he had contemplated, does not prevent him from recovering the contract price for such performance.⁴

§ 2775. Performance of building and construction contracts as affected by benefit conferred. One who performs a building contract can recover, without reference to the actual value of the building constructed, even if it is worth much less than the contract price.¹ If a building is constructed in accordance with the terms of the contract, the contractor can recover, if he has not guaranteed results, even though owing to defects in the plans

² United States. *Thompson v. Searcy*, 57 Fed. 1030.

Arkansas. *Gottlieb v. Rinaldo*, 78 Ark. 123, 6 L. R. A. (N.S.) 273, 93 S. W. 750.

Georgia. *May Mantel Co. v. Blowpipe Co.*, 93 Ga. 778, 21 S. E. 142.

Indiana. *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 260.

Iowa. *Fauble v. Davis*, 48 Ia. 462.

Louisiana. *Sully v. Pratt*, 106 La. 601, 31 So. 161.

Massachusetts. *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284.

Minnesota. *Thompson-McDonald Lumber Co. v. Morawetz*, 127 Minn. 277, L. R. A. 1915E, 302, 149 N. W. 300.

New York. *Knoch v. Bernuth*, 145 N. Y. 643, 40 N. E. 398; *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323.

Oregon. *Hoskins v. Powder Land & Irrigation Co.*, 90 Or. 217, 176 Pac. 124.

Rhode Island. *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

Tennessee. *Wallace v. Williams* (Tenn.), 69 S. W. 267.

Virginia. *Adams v. Tri-City Amusement Co.*, — Va. —, 98 S. E. 647.

Washington. *Perkins v. Bank*, 17 Wash. 100, 49 Pac. 241; *Schwede v. Hemrich*, 29 Wash. 124, 60 Pac. 643.

Wisconsin. *Speliopoulos v. Schick*, 129 Wis. 556, 109 N. W. 568.

³ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

⁴ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

¹ *Thompson v. Searcy County*, 57 Fed. 1030, 6 C. C. A. 674. (In this case, one-third.)

and specifications the performance does not accomplish the results expected by the owner.² If the contractor does not guarantee results, and if he constructs walls in accordance with the plans and specifications of the architect which the owner has adopted, the contractor is not liable by reason of the fact that the walls are not strong enough to stand in wet ground.³ If the terms of a building contract provide that certain concrete shall be well tamped, the contractor is not liable for any injury caused by tamping such concrete in accordance with the terms of the contract, although such provision ought not to have been inserted in the contract.⁴ A contractor who under protest erects the foundation for a bridge as required by the proper officials can recover, although it subsequently settles due to a defective construction.⁵ One who constructs a wall in freezing weather when required to do so by the owner, and conforms to plans and specifications, is not liable for defects due to the freezing of the mortar if he has not guaranteed that the wall will stand the weather.⁶ A contractor who has built a street at the level provided for in the specifications, is not liable because of the nature of the soil and of the exposure of the soil to rain, frost and the like, if the surface subsequently settles below the designated level.⁷ If walls are plastered with the material which is named in the specifications, there

² California. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929; *Mannix v. Tyron*, 152 Cal. 31, 91 Pac. 983.

Indiana. *Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Kentucky. *McBurnie v. Stelsly* (Ky.), 97 S. W. 42, 29 Ky. L. Rep. 1191.

Massachusetts. *Duncan v. Cordley*, 199 Mass. 299, 17 L. R. A. (N.S.) 697, 85 N. E. 160.

Montana. *Roberts v. Sinnott*, 55 Mont. 369, 177 Pac. 252.

Michigan. *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

New York. *MacKnight, etc., Co. v. New York*, 160 N. Y. 72, 54 N. E. 661.

Pennsylvania. *Harlow v. Homestead*, 194 Pa. St. 57, 45 Atl. 87.

Vermont. *Fairman v. Ford*, 70 Vt. 111, 39 Atl. 748.

Virginia. *Adams v. Tri-City Amusement Co.*, — Va. —, 98 S. E. 647.

Washington. *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742.

Wisconsin. *Bentley v. State*, 73 Wis. 416, 41 N. W. 338.

The contractor is not liable for damages due to the fact that the roof leaks, if he has built the roof in accordance with the plans and specifications. *Roberts v. Sinnott*, 55 Mont. 369, 177 Pac. 252.

³ *Adams v. Tri-City Amusement Co.*, — Va. —, 98 S. E. 647.

⁴ *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742.

⁵ *Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

⁶ *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700.

⁷ *Duncan v. Cordley*, 199 Mass. 299, 17 L. R. A. (N.S.) 697, 85 N. E. 160.

is no implied warranty that the walls will be white.⁸ An architect may recover for plans furnished in accordance with his contract, though the owner makes no use of them and receives no benefit therefrom.⁹ If, however, the contractor guarantees certain results from his performance under certain specifications, he is liable if such results are not produced, even if such failure is due to inherent defects in the specifications.¹⁰ If the contractor in legal effect guarantees results under the plans, he is liable for damage caused by the fall of the building which he is constructing because of architectural defects, although he has constructed as properly as it could have been constructed under such plans and specifications.¹¹ Wherever possible the courts prefer to construe such guaranty as conditioned on the possibility of producing such results under such specifications.¹² A contract to construct a water-tight cellar,¹³ or reservoir,¹⁴ or roof,¹⁵ has been held to be performed, though owing to defects in the plans furnished by the owner such result was not obtained. A contract to dig a well not specifying the flow of water to be obtained, is performed by obtaining a flow even if insufficient for the needs of the owner; and the contractor can recover.¹⁶ Thus, if "deep strata water" is to be obtained and is obtained in the required quantity, the owner takes the risk of such water not being suitable for his needs.¹⁷ If a contract to dig a well does not guarantee results, such contract will be regarded as

⁸ *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983.

⁹ *Sully v. Pratt*, 106 La. 601, 31 So. 161.

¹⁰ *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795; *Donergan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S. W. 1061 [rehearing denied, *Donergan v. San Antonio Loan & Trust Co.*, 106 S. W. 876].

¹¹ *Donergan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S. W. 1061 [rehearing denied, *Donergan v. San Antonio Loan & Trust Co.*, 106 S. W. 876].

¹² *Gilbox v. Merrill*, — Vt. —, L. R. A. 1918F, 387, 104 Atl. 10; *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742.

¹³ *MacKnight-Flintic Stone Co. v.*

New York, 160 N. Y. 72, 54 N. E. 661.

¹⁴ *Harlow v. Homestead*, 194 Pa. St. 57, 45 Atl. 87.

¹⁵ *Fairman v. Ford*, 70 Vt. 111, 39 Atl. 748.

¹⁶ *Skalsky v. Johnson*, 138 Minn. 275, L. R. A. 1918A, 1084, 164 N. W. 978; *Omaha, etc., Co. v. Burns*, 49 Neb. 220, 68 N. W. 492.

See also, *Poland v. Thomaston Face & Ornamental Brick Co.*, 100 Me. 133, 60 Atl. 795.

If an abundant supply of water is obtained, the fact that its quality makes it unfit to use does not prevent the contractor from recovering. *Skalsky v. Johnson*, 138 Minn. 275, L. R. A. 1918A, 1084, 164 N. W. 978.

¹⁷ *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 So. 983.

discharged when it is reasonably certain that further performance will be of no benefit to one of the parties and that it will be detrimental to the other.¹⁸ If the purpose for which the well was to be sunk was known to both parties and it was a term of such contract by implication that a supply of water suitable for such purpose was to be obtained, failure to obtain a supply sufficient for such purpose is a breach.¹⁹

§ 2776. Contracts to furnish and install machinery. A contract to furnish or to install machinery which is to be constructed in accordance with certain specifications, is held to be performed if the machinery is furnished or installed in accordance with such plans and specifications, without regard to the ability of such machinery to accomplish the work which the purchaser intends that it shall accomplish.¹ One who furnishes machinery in accordance with his contract may recover, though owing to the defective working of appliances furnished by the other party the expected result is not obtained.² One who agrees to furnish and install furnaces,³ elevators in which a larger motor⁴ or deeper cushions⁵ than those provided for in the contract should have been specified, a refrigerating machine, though defective because the owner did not furnish a cinder foundation as he had agreed to do,⁶ or because the specific refrigerating machine contracted for had not sufficient capacity,⁷ or boilers, though not capable of the pressure desired,⁸ nor having the heating surface contracted for, if made in exact accordance with specifications,⁹ or such as marble for slabs,¹⁰ and who furnishes

¹⁸ *Poland v. Thomaston Face & Ornamental Brick Co.*, 100 Me. 133, 60 Atl. 795.

¹⁹ *Sigworth v. Holcomb (Ia.)*, 70 N. W. 364.

¹ *Curwen v. Quill*, 165 Mass. 373, 43 N. E. 203; *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284; *Gilbox v. Merrill*, — Vt. —, L. R. A. 1918F, 387, 104 Atl. 10; *Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 49 L. R. A. 859, 82 N. W. 290.

² *May Mantel Co. v. Blowpipe Co.*, 93 Ga. 778, 21 S. E. 142. (A pipe furnished by A to carry off dust and shavings from B's machinery, which fails to work because the fan furnished by B and set by A is defective.)

³ *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583; *Gantt v. Cox & Sons Co.*, 199 Pa. St. 208, 48 Atl. 992.

⁴ *Morse v. Puffer*, 182 Mass. 423, 65 N. E. 804.

⁵ *Muckle v. Payne*, 198 Pa. St. 444, 48 Atl. 413.

⁶ *Dodsworth v. Iron Works*, 66 Fed. 483, 13 C. C. A. 552.

⁷ *Gubbins v. Lautenschlager*, 74 Fed. 160.

⁸ *Haskin Wood Vulcanizing Co. v. Shipbuilding Co.*, 94 Va. 439, 26 S. E. 878.

⁹ *City, etc., Ry. v. Basshar*, 82 Md. 397, 33 Atl. 635.

¹⁰ *Evans v. Mfg. Co.*, 118 Mo. 548, 24 S. W. 175.

exactly what he agreed to furnish, may recover, although the chattel proves unsuitable for the use intended for it by vendee.

§ 2777. Other contracts. One who agrees to deliver goods to a common carrier for another, performs so as to discharge himself from liability if he delivers such goods in accordance with the terms of the contract without regard to the actual receipt of such goods by the party to whom they are consigned.¹ A common carrier who contracts only to deliver to the next carrier discharges its liability by so doing, no matter what the fate of the goods shipped.² The consignor may, however, under such circumstances, be liable for his own negligence or improper conduct,³ such as failing to secure liability on the part of the carrier for the full valuation of the goods.⁴ If one party agrees to pay money to a third person for the use of the adversary party,⁵ or to deposit money in a specified bank,⁶ and he does what he agrees to do, he is discharged from liability even if the adversary party is unable to enforce payment from such third person or such bank. Under a contract by which A agrees to manufacture certain goods for B, to store them and to ship them in certain instalments, the goods to be delivered f. o. b. at A's station, the title passed to B when A had completed the entire amount of the product contracted for and had placed it in the cold-storage plant. From that time the risk of loss was B's in the event of the destruction of the property.⁷ The fact that the purchase of the good will of a business does not prove financially advantageous to the buyer, does not discharge his duty to pay the purchase money in accordance with the terms of the contract.⁸ One who agrees to bring an action and does so discharges his liability, although a hearing on the merits is delayed longer than was expected.⁹ One who agrees to apply for certain lands to the board

¹ *Gottlieb v. Rinaldo*, 78 Ark. 123, 6 L. R. A. (N.S.) 273, 93 S. W. 750; *Thompson-McDonald Lumber Co. v. Morawetz*, 127 Minn. 277, L. R. A. 1915E, 302, 149 N. W. 300.

² *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 55 L. R. A. 182, 86 N. W. 176.

³ *Miller v. Harvey*, 221 N. Y. 54, L. R. A. 1917F, 559, 116 N. E. 781.

⁴ *Miller v. Harvey*, 221 N. Y. 54, L. R. A. 1917F, 559, 116 N. E. 781.

⁵ *Knoch v. Bernuth*, 145 N. Y. 643, 40 N. E. 398.

⁶ *Perkins v. Bank*, 17 Wash. 100, 49 Pac. 241.

⁷ *Stewart v. Henningsen Produce Co.*, 88 Kan. 521, 50 L. R. A. (N.S.) 111, 129 Pac. 181.

⁸ *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

⁹ *Wallace v. Williams* (Tenn.), 69 S. W. 267. (A contract by lessor with lessee to bring an action to evict a third person from adjoining premises of lessor's.)

of land commissioners and who does so, is discharged, although his application is rejected and he takes no appeal, if none was contracted for.¹⁰ If the tenant of a building grants permission to erect a bootblack stand on a sidewalk at the risk on the part of the occupant of the danger of removal by the city, the tenant is not liable in damages to such occupant if the city compels the removal of such stand.¹¹

§ 2778. Degree of performance required—Origin of doctrine of substantial performance. At common law in England the original rule was that strict and literal performance was necessary to enable the party who alleged performance of a precedent covenant on his part to recover against the adversary party;¹ and in many cases the courts of this country have laid down the same rule as the original common-law rule.² In equity, on the other hand, the courts held that if a party "gets substantially that for which he bargains, he must take a compensation for a deficiency in value," and accordingly, on the theory of substantial performance, they frequently decreed specific performance and rendered, allowed or imposed compensation for a deficiency where there was no strict and literal performance.³ In modern law the equitable theory rather than the original common-law theory has prevailed, and it is held by the great weight of authority that recovery may be had without strict and literal performance, if the party who seeks to recover can

¹⁰ Schwede v. Hemrich, 29 Wash. 124, 60 Pac. 643.

¹¹ Speliopoulos v. Schick, 129 Wis. 556, 100 N. W. 568.

¹ Dorrington v. East, 1 Yelv. 87; Farrer v. Nightingal, 2 Esp. 639; Ellis v. Hamlen, 3 Taunt. 52; Lord v. Stephens, 1 Y. & Coll. Exch. 222; Forman v. The Liddesdale [1900], A. C. 190.

² Colorado. Lombard v. Overland Ditch and Reservoir Co., 41 Colo. 253, 92 Pac. 695.

New Hampshire. Bruce v. Snow, 20 N. H. 484.

New York. Dauchey v. Drake, 85 N. Y. 407.

Ohio. Rees v. Smith, 1 Ohio 124.

Oregon. White v. Price, 56 Or. 376, 108 Pac. 776.

For a case in which substantial performance was recognized in equity but not at law, see Rees v. Smith, 1 Ohio 124

³ Dyer v. Hargrave, 10 Ves. Jr. 505; Cleaton v. Gower, Cases Temp. Finch 104; Howland v. Norris, 1 Cox Ch. 59; Calcraft v. Roebuck, 1 Ves. Jr. 221; Guest v. Homfray, 5 Ves. Jr. 818 (obiter); McQueen v. Farquhar, 11 Ves. Jr. 467; Stapylton v. Scott, 13 Ves. Jr. 425; Green v. Low, 22 Beav. 625; Wilkinson v. Clements, L. R. 8 Ch. 96; Hayward v. Leonard, 24 Mass. (7 Pick.) 181, 16 Am. Dec. 269; Heckmann v. Pinkney, 81 N. Y. 211.

For substantial performance as to title and as to time of conveyance, see Rees v. Smith, 1 Ohio 124.

show substantial performance.⁴ The existence of the doctrine of

⁴ **United States.** *Woodruff v. Hough*, 91 U. S. 596, 23 L. ed. 332; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278; *Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321; *Destructor Co. v. Atlanta*, 232 Fed. 746.

Alabama. *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263; *Catanzano v. Jackson*, — Ala. —, 73 So. 510.

Arkansas. *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

California. *Griffith v. Happersberger*, 86 Cal. 605, 614, 25 Pac. 137, 487; *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 709; *Smith v. Mathews Const. Co.*, — Cal. —, 179 Pac. 205.

Colorado. *Lombard v. Overland Ditch & Reservoir Co.*, 41 Colo. 253, 92 Pac. 695.

Connecticut. *Morehouse v. Bradley*, 80 Conn. 611, 60 Atl. 937; *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 99 Atl. 853; *Fagerholm v. Nielson*, — Conn. —, 106 Atl. 333.

Illinois. *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Peterson v. Pusey*, 237 Ill. 204, 86 N. E. 692; *Erikson v. Ward*, 206 Ill. 250, 107 N. E. 593.

Iowa. *Aetna, etc., Works v. Kosuth County*, 79 Ia. 40, 44 N. W. 215; *Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co.*, 137 Ia. 558, 113 N. W. 320; *Birdsall v. Perry Gas Works*, 181 Ia. 1268, 161 N. W. 304.

Kansas. *Lofsted v. Bohman*, 88 Kan. 600, 129 Pac. 1168; *Sipe v. Sipe*, 102 Kan. 742, L. R. A. 1918E, 1029, 173 Pac. 13.

Kentucky. *Vincennes Bridge Co. v. Walker*, 181 Ky. 651, 205 S. W. 778.

Louisiana. *Dugue v. Levy*, 114 La. 21, 37 So. 995.

Maine. *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989.

Maryland. *Nes v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

Massachusetts. *Hennessey v. Preston*, 219 Mass. 61, 106 N. E. 570.

Michigan. *Phelps v. Beebe*, 71 Mich. 554, 39 N. W. 761.

Minnesota. *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408 (obiter); *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003.

New York. *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; *Steel Storage & Elevator Const. Co. v. Stock*, 225 N. Y. 173, 121 N. E. 786 (obiter).

North Carolina. *Russell v. Iredell County*, 123 N. Car. 204, 31 S. E. 717.

North Dakota. *Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 104, 159 N. W. 6.

Ohio. *Goldsmith v. Hand*, 26 O. S. 101; *Kane v. Stone Co.*, 39 O. S. 1.

Oklahoma. *Wiebener v. Peoples*, 44 Okla. 32, 142 Pac. 1036.

Pennsylvania. *Gallagher v. Sharpless*, 134 Pa. St. 134, 19 Atl. 491; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243; *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410; *Otis Elevator Co. v. Flanders Realty Co.*, 244 Pa. St. 186, 90 Atl. 624.

South Carolina. *Kenan v. Yorkville Cotton Oil Co.*, 109 S. Car. 462, 1 A. L. R. 1387, 96 S. E. 524.

Tennessee. *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 154.

Texas. *Linch v. Elevator Co.*, 80 Tex. 23, 15 S. W. 208.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

substantial performance has been denied in earlier cases,⁵ and this denial is occasionally reiterated;⁶ but the doctrine must nevertheless be regarded as thoroughly established at modern law by the great weight of authority. It is therefore error to charge the jury that unless the plaintiff has been discharged by impossibility and the like, he can recover only if he has shown performance of the contract according to its terms, since such a charge eliminates substantial performance of the contract.⁷

In some jurisdictions the doctrine of substantial performance was first recognized at law in building contracts.⁸ While language is occasionally used which seems to indicate that the courts feel that the doctrine of substantial performance at law is limited to building contracts, or at least finds its ordinary application in such contracts,⁹ the doctrine is not thus limited, but it applies to contracts of other classes.¹⁰ One of the reasons which induced the courts to apply the doctrine of substantial performance to building contracts before they applied it to contracts of other classes, was

Washington. *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

Wisconsin. *Meinke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785; *Manning v. School District*, 124 Wis. 84, 102 N. W. 356; *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443 (obiter); *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

⁵ *Blakeslee v. Holt*, 42 Conn. 226 (obiter).

The opposite view was expressed in earlier Connecticut cases such as *Smith v. Scott's Ridge School District*, 20 Conn. 312, and in later cases such as *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264, and *Chariott v. McMullen*, 84 Conn. 702, 81 Atl. 65.

⁶ It has been repeated as to English and Canadian law in *Sherlock v. Powell*, 26 Ont. App. 407.

It is said that, to recover on a contract, performance must be shown. This, probably, is not meant to exclude substantial performance. *Eyerman v. Mount Sinai Cemetery Asso.*, 61 Mo. 489.

It is said that, to recover on general assumpsit, full performance must be shown. This is probably not intended to exclude substantial performance. *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 27 Mont. 44, 69 Pac. 241; *Cook v. Gallatin Railroad Co.*, 28 Mont. 509, 73 Pac. 131; *McFarland v. Welch*, 48 Mont. 196, 136 Pac. 304; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736; *De Young v. Benepe*, — Mont. —, 176 Pac. 609.

⁷ *Fagerholm v. Nielson*, — Conn. —, 106 Atl. 333.

⁸ See § 2784.

In equity the doctrine of substantial performance seems to be recognized first in contracts for the sale of realty. See § 2785.

⁹ *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515; *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

¹⁰ See §§ 2785 et seq.

probably the fact that the work which was done under a building contract to the material which was furnished thereunder was absolutely lost to the contractor unless some compensation in money could be given to him. In contracts for the sale of chattels and the like, the party who is not in default may be required to permit the party in default to regain possession of the chattels and the title thereto, if such chattels are not in compliance with the terms of the contract; and the law may give to the party who is not in default the choice between returning such chattels and accepting them as performance of the contract and as waiving at least his right to avoid the contract for any deficiency therein.¹¹ In building contracts, on the other hand, the materials become a part of the realty and the labor which is expended is applied to the realty. Neither materials nor labor can be restored to the contractor. Even if the materials could be restored to him in theory, it would, as a rule, be practically a denial of his right to recover; since ordinarily the cost of removing the material would exceed the value of the material in the condition in which it would be after such removal. For these reasons the doctrine of substantial performance was first recognized in building contracts.¹²

§ 2779. Amount of recovery in case of substantial performance.

The theory of substantial performance is that there is performance which, on the one hand, is less than strict and literal performance,¹ but which, on the other hand, is so close to strict and literal performance that it can not be regarded as breach.² The amount which the party who has performed substantially is entitled to recover should therefore be something less than he would have been entitled to recover in case of strict and literal performance; but on the other hand the consequences of breach ought not to attach to substantial performance.³

In most jurisdictions this distinction is observed. On the one hand, the party who has performed substantially is not entitled to recover the full contract price.⁴ On the other hand, the contract

¹¹ For this distinction, see *Danforth v. Freeman*, 60 N. H. 466, 43 Atl. 621.

See also, ch. LXXXIV.

¹² See § 2784.

¹ See § 2778.

² See ch. LXXXIV.

³ For the right to recover on quasi-contract in case of breach, and for the

amount of such recovery, see ch. LXXXVIII.

⁴ *Keeler v. Herr*, 157 Ill. 57, 41 S. E. 750. See however, *Brown v. Needles*, — Ia. —, 170 N. W. 804, where the adversary party refused to allow further performance.

price with necessary deduction should be the basis for the amount of recovery and it is not proper to fix the amount of recovery at the value of the performance to the owner.⁵

If the contract has been performed substantially, and deviations from strict and literal performance of the contract have been made, which are comparatively immaterial and which are not made willfully or in bad faith, the party so performing can recover the contract price, less the amount of damages caused by such deviation.⁶ Where interest may be allowed as damages, the measure of recovery is said to be the contract price less the damage due to defective performance, together with interest thereon.⁷

⁵ *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 269.

This is sometimes explained as equivalent to the value of the performance to the owner, "although the true measure of damages, where an action will not lie upon the contract, is the additional value to the land of the defendant by reason of the labor performed and the materials furnished by the plaintiffs (see *Gillis v. Cobe*, 177 Mass. 584), yet this value may in many cases be ascertained by deducting from the contract price what the house was worth less to the defendant by reason of the deviations from the contract. *Hayward v. Leonard*, 7 Pick. 181; *Walker v. Orange*, 16 Gray 193; *Cardell v. Bridge*, 9 Allen 355; *Powell v. Howard*, 109 Mass. 192; *Cullen v. Sears*, 112 Mass. 290; *White v. McLaren*, 151 Mass. 553; *McCue v. Whitwell*, 156 Mass. 205, 207." *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

⁶ *United States. Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. A. 278.

California. City Street Improvement Co. v. Kroh, 158 Cal. 308, 110 Pac. 933; *Jones Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290.

Connecticut. Morehouse v. Bradley, 80 Conn. 611, 69 Atl. 937.

Illinois. Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 N. E. 714;

Peterson v. Pusey, 237 Ill. 204, 86 N. E. 692.

Iowa. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co., 137 Ia. 558, 113 N. W. 326.

Louisiana. Dugue v. Levy, 114 La. 21, 37 So. 905.

Maine. Hattin v. Chase, 88 Me. 237, 33 Atl. 989.

Minnesota. Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003.

New Jersey. Korman v. Livesey, 91 N. J. L. 690, 103 Atl. 381.

New York. Crouch v. Gutmann, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271.

Ohio. Goldsmith v. Hand, 26 O. S. 101; *Kane v. Stone Co.*, 39 O. S. 1.

Oregon. Edmunds v. Welling, 57 Or. 103, 110 Pac. 533.

Pennsylvania. Morgan v. Gamble, 230 Pa. St. 165, 79 Atl. 410.

Utah. Foulger v. McGrath, 34 Utah 86, 95 Pac. 1004.

Virginia. Smith v. Packard, 94 Va. 730, 27 S. E. 586.

Wisconsin. Foeller v. Heintz, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

See also, as to damages for delay in performance, *Van Buren v. Diggea*, 52 U. S. (11 How.) 461, 13 L. ed. 771.

⁷ *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495.

In some of the cases a distinction has been suggested between cases of substantial performance in which the deviation from strict and literal performance consists of omissions merely and in which strict and literal performance can be obtained by supplying such omissions, and cases of substantial performance in which the deviation from strict and literal performance runs through so much of the performance that has been tendered that strict and literal performance is not possible without a very material reconstruction. If the deviation from strict and literal performance consists of omissions rather than of defects in performance, so that strict and literal performance can be furnished by supplying such omissions, the amount of such damages is usually said to be the expense of furnishing complete performance of the original contract strictly and literally.⁸ If the deviation from strict and literal performance

⁸ **Connecticut.** *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 99 Atl. 853.

Illinois. *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

Kansas. *MacCullough v. Hayde*, 82 Kan. 734, 109 Pac. 176; *Lofsted v. Bohman*, 88 Kan. 600, 129 Pac. 1168.

Massachusetts. *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942.

Michigan. *Phelps v. Beebe*, 71 Mich. 554, 39 N. W. 761.

Missouri. *Haysler v. Owen*, 61 Mo. 270.

New York. *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418.

Oregon. *Edmunds v. Welling*, 57 Or. 103, 110 Pac. 533.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

Wisconsin. *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543; *Buchholz v. Rosenberg*, 163 Wis. 312, 156 N. W. 946.

"In the determination of the amount of deduction which ought to be made in the application to specific cases of the rule stated, regard must be had to the circumstances which each presents. A different method, for instance, is required to accomplish the ends of justice where the shortcomings are such as may be remedied and completion ac-

cording to the contract had without substantial interference with the structure of the building than where the remedy and completion involve substantial structural changes. In the first case, and that upon the finding is this case, the approved method under ordinary conditions is to deduct from the contract price such sum as it would cost to make the work comply with the contract. In the latter case, the amount of deduction might be measured by the diminished value of the building to the owner by reason of the defects. In any case, the deduction is to be so determined that the owner's resultant payment will be fair and reasonable compensation with reference to the contract price for what of value to him he has received and no more, and that the contractor shall receive a fair reward determined by the contract standard for the benefit conferred by him in his attempt to execute the contract." *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 99 Atl. 853.

"The contractor is entitled to recover the contract price, less such deductions therefrom as will make good to the proprietor the imperfections in the work. Such equivalent for the imperfections and the substantially com-

runs through the entire performance of the contract, so that strict and literal performance can be furnished only by a destruction of the work which has been done, and a reconstruction in accordance with the terms of the contract, and if such performance is nevertheless such a compliance with the terms of the contract that it can be regarded as substantial performance,⁹ the amount of recovery is said to be the contract price less the diminished value of the performance to the owner by reason of such defects.¹⁰ This rule has been adopted where a concrete floor was constructed in a defective manner; but in this case each party requested a similar instruction, and the real point decided was that even if such instruction were erroneous, a party at whose request it was given could not complain of error in giving it.¹¹ If a defect in construction can be corrected by making comparatively slight additions and changes, the property owner can not recover the cost of entire reconstruction.¹² If a contract for constructing a concrete floor is performed substantially, but not literally, the property owner is not entitled to the cost of resurfacing the floors unless such resurfacing is a reasonable and practicable method of correcting such defects.¹³

pleted work are regarded as affording the proprietor the full performance of the contract to which he is entitled. So far as the imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property, the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy; and otherwise the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects." *Manning v. School District*, 124 Wis. 84, 102 N. W. 356 [quoted in *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543].

⁹ See § 2794.

¹⁰ *Connecticut*. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264.

Georgia. *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831.

Massachusetts. *Cullen v. Sears*, 112 Mass. 299.

New Hampshire. *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621.

Oregon. *Edmunds v. Welling*, 57 Or. 103, 110 Pac. 533.

Wisconsin. *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095; *Buchholz v. Rosenberg*, 163 Wis. 312, 156 N. W. 946.

¹¹ *Iron Clad Mfg. Co. v. Stanfield*, 112 Md. 360, 76 Atl. 854.

¹² *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 99 Atl. 853.

¹³ *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468.

"The finding of the auditor that the concrete floors were not constructed in accordance with the specifications was unquestioned. Not only was the alignment imperfect and the workmanship poor, but the material used for topping, instead of being composed of the ingredients specified, showed the presence of foreign substances, which not only detracted from the appearance of the floors, but being imbedded in their surface became loose as the floors were

In some cases, however, it has been said that the measure of recovery is the reasonable value to the owner of the performance which is furnished as long as such reasonable value does not exceed the contract price;¹⁴ or it has been said that the amount of recovery is such reasonable value less the deductions necessary to complete the contract,¹⁵ or less the cost of correcting the defective work as far as it could be corrected reasonably.¹⁶ This measure of recovery may be allowed in jurisdictions in which a party who is in default may recover reasonable compensation for the value of the performance which he has furnished, without regard to the contract.¹⁷ It should not, however, be applied in cases of substantial performance, since, if the substantial performance is to be given effect, the contract should be the measure of the recovery and not

used, leaving small cavities, which as a source of dust seriously depreciated the value of the building for use as a piano factory. The plaintiff having failed to comply with the contract, and the defective work not having been accepted, the defendant could recoup as damages the difference between the value of the floors if they had been built as designed, and their value as built and left by the plaintiff. *Burke v. Coyne*, 188 Mass. 401, 405, and cases cited. *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.*, 195 Mass. 356.

"This general rule was given and fully explained. The jury, however, had viewed the premises, and what they had seen as to the condition of the surface and general character of the work being evidence of its value to be considered with other testimony, the judge directed their attention to the defendant's position, that the only feasible way in which the floors could be rendered serviceable was to reconstruct the surface by putting on the finish called for by the contract. *Smith v. Morse*, 148 Mass. 407, 409, 410. They then were instructed, if they found that, instead of using the floors as they had been left, resurfacing was not only a reasonable but a practical

method of repairing the defects, their estimate of the cost would measure the extent of the damages. But if they deemed such repairs to have been inexpedient, or the evidence was insufficient to enable them to estimate the probable expense, they were to give the matter no further consideration. These instructions being the equivalent of saying that, the plaintiff having broken the contract, the damages suffered by the defendant were measured by the difference between the value of the floors when finished in accordance with the specifications and their value in the condition in which the plaintiff left them, the plaintiff has no just cause for complaint. *Veazie v. Hosmer*, 11 Gray 396; *Olds v. Mapes-Reeve Construction Co.*, 177 Mass. 41, 43; *Hebb v. Welsh*, 185 Mass. 335, 337. By the terms of the report the verdict is to stand." *Norcross Bros. Co. v. Vose*, 190 Mass. 81, 85 N. E. 468.

¹⁴ *Estep v. Fenton*, 66 Ill. 467; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

¹⁵ *Hooper v. Cuneo*, 227 Mass. 37, 116 N. E. 237.

¹⁶ *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621.

¹⁷ See ch. LXXXVIII.

the reasonable value of the performance furnished thereunder. If the performance is regarded as substantial, and if substantial performance is to be regarded as analogous in any way to complete performance, each party should be given the benefit of the bargain into which he has entered; and the parties should not be treated as if the contract had been discharged without performance, leaving the rights of the parties to be adjusted on the theory of quasi-contract.

In some of the cases at least in which performance is referred to as substantial performance, the courts really mean that the performance is short of substantial performance, but that the adversary party with full knowledge of the defects and omissions in performance has elected to accept the performance which is tendered to him. Cases of this sort are to be explained by the doctrine of waiver, so called,¹⁸ rather than on the theory of substantial performance in the correct sense of the term.

§ 2780. Definitions of substantial performance. It is generally assumed that "substantial performance" is a term which represents a definite idea and which accordingly can be defined. It has been said that substantial performance exists "if there has been an honest and faithful performance of the contract in its material and substantial parts and no willful departure from or omission of the essential points of the contract."¹ Substantial performance is said to exist "where there has been no willful departure from the terms of the contract and no omission in essential points and it has been honestly and faithfully performed in its material and substantial particulars," and the only variance from strict and literal performance consists of "technical or unimportant omissions or defects."²

¹⁸ See ch. LXXXIV.

¹ *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

² *Peterson v. Pusey*, 237 Ill. 204, 86 N. E. 692.

"The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omis-

sions or defects. It is incumbent on him who invokes this protection to present a case in which there has been no willful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury." *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19 [quoted in *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410].

"The proper rule is stated in *Ashland L., S. & C. Co. v. Shores*, 105 Wis. 122, 81 N. W. 136, in effect, thus:

It is said to be unsafe to submit a case of substantial performance to a jury without defining the term "substantial performance."³

When a contract has not been fully, but has been substantially, performed, in that it has been in good faith complied with in all essentials to the full accomplishment of that which was contracted for (*Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515), and the contract labor and material wrought into the property of the proprietor has been appropriated to the use intended, such contractor is entitled to recover the contract price, less such deductions therefrom as will make good to the proprietor the imperfections in the work." *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

For a discussion of the nature of substantial performance, see *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

Substantial performance is said to exist "where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment," and also in cases in which the benefits of defective performance have been accepted voluntarily. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.

³ *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

"The learned court, though using the term 'substantial performance' many times in the instructions as to each particular feature of the agreement, yet singularly, as we have said, failed entirely to enlighten the jury as to what was meant thereby. That is a very unsafe way to submit a case. It is very liable to result in the jury not passing upon the vital point at issue. The term 'substantial performance' is by no means without limitation of a legal nature. The rule allowing a

recovery on a contract for such performance is equitable in its nature. It is really a judicial invasion of strict contract right out of regard for the contractor who would otherwise, without bad faith, but through mere inadvertence, suffer great or substantial loss, and the proprietor be correspondingly enriched, perhaps obtaining for all practical purposes just what he contracted for. Being a relaxation which modifies the contract without the proprietor's consent, much care should be taken not to permit its abuse to the latter's prejudice, who is entitled, in strict right, to just what he contracted for and in the form agreed upon. To that end the jury should not be left to apply the rule without any guide. They should be instructed that 'substantial performance' means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good faith or bad faith, any departure from the contract, not caused by inadvertence, or unavoidable omission, any defect so essential 'as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished,' is inconsistent with substantial performance of the contract. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515; *Woodward v. Fuller*, 80 N. Y. 312; *Phillips v. Gallant*, 62 N. Y. 256. Care should be exercised also to distinguish between that 'substantial performance' enabling the contractor to recover upon the contract, and that other such compliance spoken of in the books, furnishing a basis for relief regardless of the attitude of the

On the other hand, it has been said that "substantial performance" is a term which can not be defined further.⁴

§ 2781. The elements of substantial performance—Bona fide attempt to perform. Apart from the cases in which the variance between strict and literal performance and actual performance is so slight that the maxim "*de minimis non curat lex*" applies, substantial performance does not exist unless the party who alleges such performance has made a genuine and bona-fide attempt to perform strictly.¹ A deliberate and material departure from the terms of the contract prevents substantial performance, even though

proprietor as regards acceptance of the work, so long as he in fact, though unavoidably, has the benefit of what is done. The doctrine that a recovery can be had grounded upon the latter species of substantial performance prevails in many, and perhaps most, jurisdictions at this day. 3 Sutherland, Damages, § 711. It was adopted in Massachusetts as early as 1828 (Hayward v. Leonard, 7 Pick. 181), and has been there since firmly adhered to, as the numerous cases found cited in the text in Sutherland show. Authorities in other states that have adopted the same rule are there referred to in connection with the statement that the weight of modern authority is in harmony therewith. However, in this state if there were at any one period, as shown by the decided cases, some tendency in the same direction, it will be found that for a long period reaching up to the present time the adjudications have been in harmony to the contrary, the most recent cases being *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515, and *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1005." *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

⁴*Nance v. Patterson Building Co.*, 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484.

It is said to be "a term which is not easily defined." *Vincennes Bridge Co. v. Walker*, 181 Ky. 651, 205 S. W. 778.

"The definition of 'substantial performance' is difficult to give in general terms. It is usually a question to be determined in each case with reference to the existing facts and circumstances." *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769 [quoted in *Smith v. Mathews Const. Co.*, — Cal. —, 179 Pac. 205].

¹*Iowa. Littell v. Webster County*, 152 Ia. 206, 131 N. W. 691, 132 N. W. 426.

Kansas. *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750.

Massachusetts. *Veazie v. Hoamer*, 77 Mass. (11 Gray) 396; *Casavant v. Sherman*, 213 Mass. 23, 99 N. E. 475; *Hennessey v. Preston*, 219 Mass. 61, 106 N. E. 570; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42.

Minnesota. *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845.

New York. *Crane v. Knubel*, 61 N. Y. 645.

North Dakota. *Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 164, 159 N. W. 6.

Pennsylvania. *Wade v. Haycock*, 25 Pa. St. 382; *Harris v. Sharpless*, 202 Pa. St. 243, 58 L. R. A. 214, 51 Atl. 965.

the work done may be as good or as valuable to the promisee as the work agreed to be done.² A contract to construct sewers, using certain material, is not performed substantially where material different from that specified, although as good for practical use, is employed.³ The act of printers in adding their imprint for advertising purposes to covers for catalogues which they are printing for a customer, without obtaining his permission to add such imprint, and after he has approved the proof of such covers, is a willful breach which prevents the application of the doctrine of substantial performance.⁴ The intentional act of the contractor in substituting earthen sewer pipe for iron sewer pipe of a larger diameter which was required by the contract, prevents his performance from being substantial performance.⁵ If the contractor intentionally abandons performance before he has performed the contract completely, there is no substantial performance of the contract.⁶ If all the work provided for in the contract is done, but it is intentionally so done as not to comply with the terms of the contract in material matters, there is no substantial performance;⁷ especially if the contractor has failed to perform the contract in this respect intentionally and with the intention of defrauding the adversary party.⁸

It has, however, been said that "it is not true . . . that any conscious deviation from the absolute terms of the agreement causes a failure of performance."⁹ It has been said that if the performance is so nearly as strict a literal performance that the maxim "de minimis non curat lex" applies, the good faith of the contractor is immaterial and that recovery can be had in such cases on the theory of substantial performance.¹⁰ From the other analogies of

² *Schultze v. Goodstein*, 180 N. Y. 248, 73 N. E. 21; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

³ *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790.

⁴ *Harris v. Sharpless*, 202 Pa. St. 243, 58 L. R. A. 214, 51 Atl. 965.

⁵ *Schultz v. Goodstein*, 180 N. Y. 248, 73 N. E. 21.

Contra, that in a similar case he must be charged with the whole cost of a new pipe in accordance with the contract, and not with the difference

between the cost of the two kinds of pipe. *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410.

⁶ *Crane v. Knuble*, 61 N. Y. 645; *Wade v. Haycock*, 25 Pa. St. 382.

⁷ *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845; *Wade v. Haycock*, 25 Pa. St. 382.

⁸ *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845.

⁹ *Smith v. Mathews Const. Co.*, — Cal. —, 179 Pac. 205.

¹⁰ *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017 (obiter).

the law, this is probably true, although the cases in which the failure to perform the contract is willful are from their nature usually cases in which there is a material variance between the contract and the performance.

If it is true that good faith is not necessary where there is a very slight and immaterial variance between the actual performance and the performance required by the terms of the contract, it follows that the good faith of the party who attempts performance is operative only where the actual performance is, on the one hand, so close to the performance required by the contract that it can fairly be said to be substantial as far as the character of the performance is concerned;¹¹ and where, on the other hand, it is not so close to the performance required by the contract that the maxim "de minimis non curat lex" applies. If the actual performance is so different from the performance required by the terms of the contract that it can not be said to be substantial performance as far as the character of the work itself is concerned, the good faith of the party who attempts performance can not supplement such failure of performance,¹² although if he is seeking to recover on the theory of quasi-contract and not upon the contract itself, his good faith may be material in some jurisdictions.¹³

§ 2782. Elements of substantial performance—Relation of actual performance to terms of contract. In order to amount to substantial performance, the actual performance must conform so closely to the terms of the contract that the variance therefrom is relatively immaterial and that the adversary party has received for practical purposes the benefits for which he contracted.¹ It is said, on the other hand, that the amount of damage is not conclusive as to the question of substantial performance.² A technical

¹¹ See § 2782.

¹² See §§ 2782 and 2789 et seq.

¹³ See ch. LXXXVIII.

¹ *Massachusetts*. *Jeffries v. Jeffries*, 117 *Mass.* 184.

New York. *King v. Knapp*, 59 *N. Y.* 402.

Pennsylvania. *Harris v. Sharpless*, 202 *Pa. St.* 243, 58 *L. R. A.* 214, 51 *Atl.* 965.

South Dakota. *Symms Powers Co. v. Kennedy*, 33 *S. D.* 355, 146 *N. W.* 570.

Wisconsin. *Manthey v. Stock*, 133 *Wis.* 107, 113 *N. W.* 443; *Whalen v. Eagle Lime Products Co.*, 155 *Wis.* 26, 143 *N. W.* 689.

² *Crouch v. Gutmann*, 134 *N. Y.* 45, 30 *Am St. Rep.* 608, 31 *N. E.* 271 [discussing, *Phillip v. Gallant*, 62 *N. Y.* 257].

breach which does not result in damage is, of course, consistent with substantial performance.³

A greater variance between the actual performance and the performance provided for by the contract may be allowed if the contract shows on its face,⁴ as by the use of such a term as "about,"⁵ that it is intended merely as a general guide and not as a rigid requirement. In like manner, by a rather liberal application of principles of construction, provisions fixing the time of performance are frequently held not to be mandatory, but merely to indicate what is regarded as a reasonable time.⁶

On the other hand, the actual performance must be more than a mere partial performance of the contract.⁷ In theory, at least, the doctrine of substantial performance is not intended to abrogate the general rule that a party can not recover on a contract unless he has performed precedent covenants or unless he is at least ready and willing to perform all concurrent covenants and notifies the adversary thereof.⁸ The difficulty in laying down abstract rules in greater detail in determining the existence of substantial performance in cases as they arise, which has induced some of the courts to say that substantial performance is incapable of definition,⁹ makes it advisable to consider such further questions in connection with the various types of contract in the performance of which questions of substantial performance have arisen.¹⁰

The fact that the actual performance is as beneficial financially to the adversary party as the performance of the contract would have been, does not of itself show that the contract is performed substantially,¹¹ since the adversary party has a right to bargain for the benefits which he wishes to obtain under the contract; and he can not be compelled to accept benefits of a different sort even

³ Alabama. *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912; *Catanzano v. Jackson*, — Ala. —, 73 So. 510.

Illinois. *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085; *Evans v. Howell*, 811 Ill. 85, 71 S. E. 854.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

Wisconsin. *Crawford v. Witherbee*, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545; *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

⁴ *Kenan v. Yorkville Cotton Oil Co.*, 109 S. Car. 462, 1 A. L. R. 1387, 96 S. E. 524.

⁵ *Kenan v. Yorkville Cotton Oil Co.*, 109 S. Car. 462, 1 A. L. R. 1387, 96 S. E. 524.

⁶ See §§ 2103 et seq.

⁷ *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

⁸ See ch. LXXXIV.

⁹ See § 2780.

¹⁰ See §§ 2784 et seq.

¹¹ *Connor v. Trapp*, 127 Ia. 742, 104 N. W. 333.

though they may be as advantageous to him financially. If a certain specific result has been guaranteed and such result is not attained, the contract can not be said to be performed substantially, even though the stipulation for such result may have been unwise or unnecessary.¹² In cases of this sort, the obtaining of such result is almost an express condition precedent to recovery, rather than a mere covenant to perform in a certain way.¹³ The test for determining the existence of substantial performance is said to be whether compensation to the party not in default by an abatement of the contract price would give him the benefits for which he contracted in substance if not in outward form.¹⁴

§ 2783. Theory and actual operation of doctrine of substantial performance. The degree of compliance with the terms of the contract which is necessary to substantial performance depends in part upon the detail of performance which is provided for by such terms. The doctrine of substantial performance rests in part upon the theory that a contract should be construed reasonably and liberally.¹ If performance is provided for in general terms, it is assumed that the parties intended some leeway in performance growing out of the practical difficulties of literal performance subject to compensation because of such deficiency. If the contract provides in detail as to the method of performance, the courts can not apply the doctrine of substantial performance so as to ignore such express provisions; and they can not compel one party to perform if the adversary party has failed to perform the covenants which are inserted with such detail as to show that strict performance thereof is intended to be precedent to the right of the obligor to recover.² The doctrine of substantial performance is occasionally justified as a doctrine of construction, on the theory that a contract should be so construed as to give a just result,³ and that in the particular case in question it should not be so construed as to require a strict and literal performance.⁴

The doctrine of substantial performance was almost forced upon the courts by the practical operation of the doctrine of strict and literal performance, especially in jurisdictions in which no recovery in quasi-contracts could be had by one who was in default in the

¹² *Bush v. Jones*, 144 Fed. 942, 6 L. R. A. (N.S.) 774.

¹³ See §§ 2576 et seq.

¹⁴ *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408.

¹ See § 2053.

² *Bush v. Jones*, 144 Fed. 942, 6 L. R. A. (N.S.) 774.

³ See § 2053.

⁴ *Belworth v. Hassell*, 4 Camp. 140.

performance of a contract.⁵ In such jurisdictions a party who had not performed strictly and literally could not recover reasonable compensation for the value of the work done, the material furnished, and the like; since he could not recover on the contract where the doctrine of strict and literal performance was recognized, recovery of every sort was denied to one who had performed in good faith, but had deviated in some minor respect from literal performance. While the doctrine of substantial performance may thus be justified, its practical operation has probably erred as far on the one side as the doctrine of strict and literal performance erred on the other.

In spite of the generally repeated formula of the courts that they will not make contracts for the parties, but that they will merely enforce the contracts which the parties have made for themselves, the combined action of the courts and the jury in applying the rule of substantial performance is frequently to compel a party who is not in default to pay practically the full contract price for something for which he bargained and which quite possibly he would not have agreed to accept at any price or upon any terms. The courts have admitted that they have adopted the doctrine of substantial performance without any strict regard to logic.⁶ The doctrine of substantial performance is said to be a "relaxation of the general rule out of the charity of the law."⁷ The actual working out of the doctrine has been that courts have "gone to very great length in compelling parties to go on with purchases, contrary to their original agreement and intention."⁸

If substantial performance exists, the question of acceptance by the adversary party, or of waiver by him of literal performance, is immaterial.⁹ The refusal of the adversary party to permit literal performance after substantial performance has been made, is said, however, to waive literal performance.¹⁰

§ 2784. Substantial performance of building contracts—General principles. If one who has agreed to construct a building, or to do work thereon, performs the contract substantially, and makes

⁵ See ch. LXXXVIII.

⁶ Foeller v. Heintz, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543

⁷ Foeller v. Heintz, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

⁸ Poole v. Shergold, 1 Cox Ch. 273, 2 Bro. Ch. 118.

⁹ Korman v. Livesey, 91 N. J. L. 699, 103 Atl. 381.

¹⁰ Brown v. Needles, — Ia. —, 170 N. W. 804.

a bona-fide effort to comply with its terms, slight defects in his work and slight deviations from the contract will not prevent him from recovering the contract price, less the damage to the adversary party, which is usually the amount that will be necessary to make the building to conform to the terms of the contract.¹ On the one hand the owner can not terminate the contract for slight departures from its terms, nor can he defeat recovery thereon

¹ **United States.** *Woodruff v. Hough*, 91 U. S. 596, 23 L. ed. 332.

Alabama. *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263; *Catanzano v. Jackson*, — Ala. —, 73 So. 510.

California. *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Connell v. Higgins*, 170 Cal. 541, 160 Pac. 769.

Connecticut. *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937; *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 99 Atl. 853; *Fagerholm v. Nielson*, — Conn. —, 106 Atl. 333.

Illinois. *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Palmer v. Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306 (obiter); *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Erikson v. Ward*, 266 Ill. 259, 107 N. E. 593; *Cook v. Luxfer Prism Co.*, 93 Ill. App. 299.

Kansas. *Lofsted v. Bohman*, 88 Kan. 660, 129 Pac. 1168.

Louisiana. *Dugue v. Levy*, 114 La. 21, 37 So. 995.

Massachusetts. *Wagner v. Allen*, 174 Mass. 563, 55 N. E. 320; *Hennessey v. Preston*, 219 Mass. 61, 106 N. E. 570.

Michigan. *Scheible v. Klein*, 89 Mich. 376, 50 N. W. 857.

Minnesota. *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842; *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408 (obiter); *Peet v.*

East Grand Forks, 101 Minn. 518, 112 N. W. 1003.

New Jersey. *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Schauffele v. Greenburg*, 82 N. J. L. 343, 82 Atl. 921.

New York. *Phillip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648; *Oberlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999; *Steel Storage & Elevator Const. Co. v. Stock*, 225 N. Y. 173, 121 N. E. 786 (obiter).

North Carolina. *Russell v. Iredell County*, 123 N. Car. 264, 31 S. E. 717.

Ohio. *Goldsmith v. Hand*, 26 O. S. 101; *Kane v. Stone Co.*, 39 O. S. 1; *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

Oklahoma. *Wiebener v. Peoples*, 44 Okla. 32, 142 Pac. 1036; *Robinson v. Beaty*, — Okla. —, 181 Pac. 941.

Pennsylvania. *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410; *Otis Elevator Co. v. Flanders Realty Co.*, 244 Pa. St. 186, 90 Atl. 624.

South Dakota. *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. 811; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

Washington. *Anderson v. Harper*, 30 Wash. 378, 70 Pac. 965.

Wisconsin. *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327; *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443 (obiter); *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

"Since the rule of exact or literal performance has been relaxed, literal

entirely,² and on the other hand the contractor can not recover the entire contract price without any abatement for the expense of making the work conform to the contract.³

§ 2785. Substantial performance of contracts for the sale of realty. Contracts for the sale of realty or interests therein are frequently enforced in equity by the remedy of specific performance,¹ and it is in contracts of this sort that the original rule requiring strict and literal performance is first relaxed and substantial performance is recognized.² At a relatively early period, equity enforced contracts for the sale of realty even if such performance fell short of a strict and literal performance, as long as such contract was performed substantially.³

compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient." *Robinson v. Beaty*, — Okla. —, 181 Pac. 941.

² *Colorado*. *Ross Mining Co. v. Sethman*, 50 Colo. 33, 114 Pac. 287.

Connecticut. *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Pratt v. Dunlap*, 85 Conn. 180, 82 Atl. 195.

Illinois. *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038.

Iowa. *Littell v. Webster County*, 152 Ia. 206, 131 N. W. 691, 132 N. W. 426.

Louisiana. *Dugue v. Levy*, 114 La. 21, 37 So. 995.

Massachusetts. *Handy v. Bliss*, 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864.

Ohio. *Goldsmith v. Hand*, 26 O. S. 101; *Kane v. Stone Co.*, 39 O. S. 1; *Ashley v. Henahan*, 56 O. S. 559, 47 N. E. 573.

Oklahoma. *Mitchell v. Spurrier Lumber Co.*, 31 Okla. 834, 124 Pac. 10.

Oregon. *Pippy v. Winslow*, 62 Or. 219, 125 Pac. 298.

Pennsylvania. *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410.

Utah. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

³ *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

¹ See ch. LXXXIX.

² See § 2778.

³ *Illinois*. *D'Wolf v. Pratt*, 42 Ill. 198.

Kansas. *Keepers v. Yocum*, 84 Kan. 554, 114 Pac. 1063.

Maryland. *Foley v. Crow*, 37 Md. 51; *Hammer v. Westphal*, 120 Md. 15, 87 Atl. 488.

New Jersey. *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466, 52 Atl. 147.

Ohio. *Rees v. Smith*, 1 Ohio 124.

Oregon. *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

South Carolina. *Alderman v. McKnight*, 95 S. Car. 245, 78 S. E. 982.

Virginia. *Farris v. Hughes*, 89 Va. 930, 17 S. E. 518.

West Virginia. *Creigh v. Boggs*, 19 W. Va. 240; *Morgan v. Brast*, 34 W. Va. 332, 12 S. E. 710.

A defective execution of a deed which is cured by a deed of confirmation as soon as the defect is noticed, does not prevent performance from being substantial. *Nes v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

A contract for the sale of an interest in realty may be substantially performed, although there is a slight variance between the duration of the estate for which the contract was made and the duration of the estate which is tendered in performance.⁴ A contract for the sale of the residue of a term of years which was said to be eight years, was held to be performed substantially by tendering an assignment of a residue for seven years and seven months.⁵ This result was reached in part on the theory that by a fair construction of the contract it could not be assumed that a term of the exact time specified would be assigned.⁶

Substantial performance has been held to exist, although there is a failure of title as to a small part of the realty, or a deficiency in the area specified in the contract,⁷ as where there is a shortage of about two hundred acres out of six thousand,⁸ or a shortage of between a tenth of an acre and a half of an acre out of twelve,⁹ or a shortage of ten acres out of two hundred and twenty-four,¹⁰ or a shortage of twelve acres of comparatively worthless land out of about one hundred and forty-six,¹¹ or a shortage of sixty-six acres out of three hundred,¹² or a failure of title to one lot out of four, if the possession of such lot was not essential to the use of the other three.¹³ Even if the deficiency may otherwise be material, as where there was a total failure of title to two acres in the center of land which was sold as a park, the act of the purchaser in taking forceable possession of the realty may entitle the vendor to specific performance.¹⁴ This, however, is rather the result of waiver by the purchaser,¹⁵ than of substantial performance on the part of the vendor.

Language has, however, been used which seems to indicate that the existence of any deficiency in the quantity of the land pre-

⁴ *Belworth v. Hassell*, 4 Camp. 140.

⁵ *Belworth v. Hassell*, 4 Camp. 140.

⁶ *Belworth v. Hassell*, 4 Camp. 140.

⁷ *Poole v. Shergold*, 1 Cox Cases 273.

⁸ *Brown Ch.* 118; *Hepburn v. Ault*,

9 U. S. (5 Cranch) 262, 3 L. ed. 96

(dictum); *Charles B. James Land &*

Investment Co. v. Vernon, 129 Tenn.

637, 52 L. R. A. (N.S.) 959, 168 S.

W. 156; *Morgan v. Brast*, 34 W. Va.

332, 12 S. E. 710.

⁹ *Hepburn v. Ault*, 9 U. S. (5 Cranch)

262, 3 L. ed. 96 (obiter).

⁸ *Heltzel v. Baird*, 90 Or. 156, 175 Pac. 851.

¹⁰ *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

¹¹ *Charles B. James Land & Investment Co. v. Vernon*, 129 Tenn. 637, 52 L. R. A. (N.S.) 959, 168 S. W. 156.

¹² *Morgan v. Brast*, 34 W. Va. 332, 12 S. E. 710. (Failure of title as to twenty acres.)

¹³ *Foley v. Crow*, 37 Md. 51 (obiter).

¹⁴ *Calcraft v. Roebuck*, 1 Ves. Jr. 221.

¹⁵ See ch. LXXXIV.

vents substantial performance and makes it improper to declare specific performance with compensation.¹⁶

A contract conditioned on confirmation by congress of a land grant is performed substantially if the grant for the allotment is confirmed, although the claim as to certain outlying pasture land is not confirmed;¹⁷ and although such confirmation is by the court of private land claims instead of by act of congress.¹⁸

A contract for the conveyance of an interest in realty free from incumbrances is performed substantially, although minor incumbrances thereon exist.¹⁹ A contract for the sale of realty free from incumbrances is substantially performed, though incumbrances exist, if they are less than the amount of the purchase money,²⁰ especially if a release of them is obtained and tendered.²¹ The fact that a third person has an easement of maintaining an underground pipe across a tract of land does not prevent a tender of a deed subject to such easement from being substantial performance of a contract to sell such realty free of all incumbrances; and the vendor may have specific performance against the purchaser subject to compensation for such easement.²² Under a contract for the sale of about fourteen acres of land, a defect as to the quality of two acres has been held to be consistent with substantial performance.²³ A contract to sell bonds to be secured by a first mortgage is performed substantially if all but a few of the bonds secured by a prior mortgage are retired and if a fund is set aside to retire the few remaining bonds of the original issue, if the owners of such can not be ascertained.²⁴ The existence of easements to which the realty is subject does not prevent substantial performance if such easements are of minor importance and affect but a small part of the realty.²⁵

¹⁶ *McKean v. Read*, 16 Ky. (Litt. Sel. Cases) 395, 12 Am. Dec. 318.

¹⁷ *Joseph v. Catron*, 13 N. M. 202, 81 Pac. 439.

¹⁸ *Joseph v. Catron*, 13 N. M. 202, 81 Pac. 439.

¹⁹ *Binks v. Rokeby*, 2 Swanst. 222; *Horniblow v. Shirley*, 13 Ves. Jr. 81; *Mansfield v. Wiles*, 221 Mass. 75, 108 N. E. 901; *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312.

²⁰ *Guild v. R. R.*, 57 Kan. 70, 33 L. R. A. 77, 45 Pac. 82; *Smith v. Howard* (Ky.), 105 S. W. 411; *Posey v. Kim-*

sey, 146 Ky. 205, 142 S. W. 703; *Rife v. Lybarger*, 49 O. S. 422, 17 L. R. A. 403, 31 N. E. 768.

²¹ *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

²² *Shepherd v. Croft* [1911], 1 Ch. 521.

²³ *Scott v. Hanson*, 1 Russ. & M. 128.

²⁴ *Nes v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

²⁵ *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16. (Defect waived by vendee. Vendor given specific performance with compensation to vendee.)

A contract to convey land to B is substantially performed where the grantor conveys to A, who then conveys to B.²⁶ A contract for the sale of realty is performed substantially and possibly literally if the vendor has no title when he enters into the contract of sale, but acquires it thereafter before the time for performance on his part, especially if the purchaser knows of the condition of the title.²⁷ A contract to pay a certain sum for land down and the balance in a certain time is substantially performed by the tender of the entire amount due, such tender being kept good.²⁸

§ 2786. Substantial performance of contracts for work, labor, services, etc. A contract by A to effect a sale of B's land during the existence of an option thereon is substantially performed if A effects a valid contract for such sale, though the deeds are not executed until the option has expired.¹ A contract to haul all the wood cut upon a certain tract, amounting to about eight thousand cords, is substantially performed by hauling all but a few scattered blocks which amounted to about one-tenth of one per cent. of the entire amount of wood.² The contractor's act in voluntarily collecting the scattered blocks at considerable expense after suit is brought, is not an admission that he had not performed the contract before bringing suit, but is to be referred to an excess of caution. A contract to maintain an omnibus line from a given hotel to the depot is substantially performed although at times the same omnibus was used to take passengers to several different hotels, and a separate omnibus line was contemplated by the contract.³ A contract to place and keep up fourteen hundred signs on an elevated railway is substantially performed where all were kept up except twenty, and these were placed in galleries leading to a bridge, but were removed and placed in temporary galleries while the other galleries were being reconstructed.⁴ A contract to share

²⁶ *Benge v. Potter* (Ky.), 55 S. W. 431.

²⁷ *Olson v. Rogness*, 173 Ia. 331, 155 N. W. 301.

²⁸ *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

¹ *Reed v. Crane*, 89 Mo. App. 670. In *Newman v. McGregor*, 5 Ohio 349, it is said that recovery may be had in common counts upon substantial performance; in this case, of a contract for work and labor. However, it seems

probable that performance was waived in part. The court says that "it is very difficult to discover the point in controversy."

² *Drew v. Goodhue*, 74 Vt. 436, 52 Atl. 971.

³ *Hathaway v. Lynn*, 75 Wis. 186, 6 L. R. A. 551, 43 N. W. 956.

⁴ *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N. Y. 486, 56 N. E. 995.

fees with one who collects certain claims, by obtaining the passage of an act of congress for the purpose of such settlement, is substantially performed where a bill is passed at a later season substantially like the former bill, except that it provides for the payment to claimant in person.⁵ A contract to devote all one's time to a certain business is substantially performed though the contractor is absent for short periods of time when his presence is not necessary to the success of the business.⁶ Substantial performance of a contract to exterminate all the prairie dogs on a certain tract of land will entitle the contractor to recovery.⁷

A contract to render services which are not unique in their character and which do not involve personal skill, is performed substantially if the contractor employs others to assist him in the work or to do the work in his stead.⁸ A contract to drill a well is performed, although the contractor does no part of the work himself, but employs others to perform.⁹ A contract by A to support B for B's life is performed substantially if A supports B for fifteen years, and then, although A dies a short time before B dies, A's administrator and widow offer to continue performance.¹⁰

§ 2787. Substantial performance of contracts for locating business, railroad, etc. A contract of subscription which provides that the use of certain realty shall be given without charge, is performed substantially if one dollar a year is charged for such use which is reasonably worth about thirty thousand dollars a year.¹ A contract for subscription of money to be paid to the owner of the premises where a specified stock exchange is situated, is performed substantially if such building is erected upon ground which is leased for that purpose.² A contract to locate a business at a

⁵ *Spalding v. Mason*, 161 U. S. 375, 40 L. ed. 738.

⁶ *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

⁷ *Craig v. Weitner*, 33 Neb. 484, 50 N. W. 442.

⁸ *Council v. Teal*, 122 Ga. 61, 49 S. E. 806; *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130; *Horne v. McRae*, 53 S. Car. 51, 30 S.

E. 701; *Collins v. Davis & Elkins College*, 72 W. Va. 583, 79 S. E. 10.

⁹ *Council v. Teal*, 122 Ga. 61, 49 S. E. 806.

¹⁰ *Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 164, 159 N. W. 6.

¹ *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am. St. Rep. 145, 71 N. E. 22.

² *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 102 Am. St. Rep. 145, 71 N. E. 22.

certain town is substantially performed by locating such business there, in good faith, though it is subsequently removed, or its property and franchises are sold at judicial sale to one who removes the business.³ A contract to publish a newspaper in an addition to a town for a given time is substantially performed where the paper is printed and distributed in such addition for such time, though the publisher writes his editorials and sets type for a small portion of the time outside of such addition, because the adversary party does not furnish him an office as he had agreed to do.⁴

A contract to locate a business⁵ is not substantially performed by merely constructing the buildings in which it is expected that such business will thereafter operate; nor is a contract to locate the business of a specified corporation in a certain city substantially performed by transferring the business and good will of the corporation to a partnership formed of men who were interested in such corporation and who transfer such business to such city.⁶

The doctrine of substantial performance applies to contracts to locate railroads.⁷ A contract that one road should intersect another "at" a given city is substantially performed where they intersect within a hundred yards of the city limits.⁸ A contract by which a street railway company agrees to "build its road" to a given place, is substantially performed, though for part of the distance such railway exercises its statutory right to make use of the track of another railway company.⁹ However, a contract to extend a railroad to a certain section of land is not performed by extending beyond such section, but not nearer to it than five hundred feet.¹⁰ Building a different railroad from that agreed upon is not substantial performance of such contract.¹¹

³ *Elizabethtown v. Ry.*, 94 Ky. 377, 22 S. W. 609.

⁴ *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610.

⁵ *Ft. Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 14 L. R. A. 804, 30 N. E. 23.

⁶ *Keys v. Weaver*, 95 Ia. 13, 63 N. W. 357.

⁷ *Judson v. Gage*, 91 Cal. 304, 27 Pac. 676.

⁸ *Ft. Worth, etc., Ry. v. Williams* (Tex.), 18 S. W. 206. (The word "at" as applied to the intersection was contrasted by the court with "in" as applied to the location of the depot.)

⁹ *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086.

¹⁰ *Stevens v. Ambler*, 30 Fla. 575, 23 So. 10.

¹¹ *Northup v. Standifer* (Ky.), 23 S. W. 348; *Northup v. Ward* (Ky.), 15 S. W. 247.

§ 2788. Substantial performance of contracts for manufacture and sale of goods. The doctrine of substantial performance at law is, in most jurisdictions, by no means limited to building contracts. If any contract is performed substantially, recovery can be had thereon subject to recoupment of damages, if any.¹ A contract to manufacture chattels to conform to a given pattern or style is enforceable if substantially performed.² A contract to make a carriage to order "just like" another specified carriage, is said to be performed substantially if the body, style, size and general appearance of the two carriages are alike, although the manufacturer has made some minor changes which he believes to be improvements.³ This result, however, is placed on the ground that such a contract requires only a carriage of the general style, appearance and dimensions of the specified carriage, and that it leaves the builder free to improve it if he can.⁴ The proof of a shield design for an advertising sign was approved by the party for whom it was made, with the statement that he wanted "something of that style." Slight changes made afterwards in placing the words upon the sign were held not to prevent substantial performance.⁵ A pro-

¹ **United States.** *Gottschalk Co. v. Cattle Feeding Co.*, 62 Fed. 901.

California. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

Colorado. *Lombar v. Overland Ditch & Reservoir Co.*, 41 Colo. 253, 92 Pac. 695 (obiter).

Connecticut. *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937.

Illinois. *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 26, 101 Am. St. Rep. 145, 71 N. E. 22; *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306 (obiter).

Kansas. *Sipe v. Sipe*, 102 Kan. 742, L. R. A. 1918E, 1029, 173 Pac. 13.

Maine. *Ayer v. Bangor*, 85 Me. 511, 27 Atl. 523.

Maryland. *Nes v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

Michigan. *Hayes v. Stortz*, 131 Mich. 63, 90 N. W. 678; *Snyder v. Patton & Gibson Co.*, 143 Mich. 350, 106 N. W. 1106.

Minnesota. *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

Mississippi. *E. T. Burrowes Co. v. Crittenden (Miss.)*, 37 So. 504.

Ohio. *Newman v. M'Gregor*, 5 Ohio 348.

New Mexico. *Joseph v. Catron*, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439.

South Carolina. *Kenan v. Yorkville Cotton Oil Co.*, 109 S. Car. 462, 1 A. L. R. 1387, 96 S. E. 524.

Tennessee. *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 154.

Wisconsin. *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

² *Bailey v. Wayman*, 201 Pa. St. 249, 50 Atl. 767; *Meinke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785.

³ *Meinke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785.

⁴ *Meinke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785.

⁵ *Thoubboron v. Lewis*, 43 Mich. 635, 38 Am. Rep. 218, 5 N. W. 1082.

vision that the vendee of a grain separator is to give the vendor notice when he intends to open the threshing season, so that the vendor may send down an expert to remedy defects, is substantially performed if the vendor in fact sends an expert at the time of the opening.⁶ A contract that manufacturing agents shall keep a patented fence in stock to fill orders taken by their selling agent, is substantially performed by their having materials and machinery for making such fence and being prepared to furnish it upon demand.⁷ A contract for sending goods for sale on commission, goods not returned in thirty days with express charges prepaid to be treated as sold, is substantially performed by returning the goods within thirty days and remitting the amount of the express charges within a reasonable period after the expiration of thirty days.⁸ A caterer who does not furnish as good an entertainment as he agreed, but acts in good faith, performs substantially so that he may recover the contract price subject to recoupment for damages.⁹ A contract giving A a prior right, over any other person, to buy B's stock in a corporation is substantially performed by giving A an opportunity to buy such stock at the price for which it is finally sold.¹⁰ A contract to advance thirty-three thousand dollars for bonds of a corporation is satisfied by paying eighteen thousand dollars and retiring fifteen thousand par value of old bonds of the corporation, even though only fourteen thousand dollars was paid to procure such bonds.¹¹ A contract to sell bonds secured by first mortgage on the property of a corporation, which property at that time is incumbered by a mortgage securing a prior bond issue, is performed substantially if the great majority of the bonds of the first issue are retired and if an adequate fund is set aside for the payment of the bonds the ownership of which can not at that time be ascertained.¹² A contract whereby A agrees to assign certain patents to B is substantially performed where at B's request A assigns such patents to X for B's use.¹³

⁶ *Hansen v. Gaar*, 68 Minn. 68, 70 N. W. 853.

⁷ *Carrington v. Waff*, 112 N. Car. 115, 16 S. E. 1008.

⁸ *Main v. Oien*, 47 Minn. 89, 49 N. W. 523.

⁹ *Ponce v. Smith*, 84 Me. 266, 24 Atl. 854.

¹⁰ *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770.

¹¹ *Franklin Trust Co. v. Electric Co.*, 57 N. J. Eq. 42, 41 Atl. 488.

¹² *Nea v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

¹³ *Dalzell v. Watch Case Co.*, 138 N. Y. 285, 33 N. E. 1071.

It is said that the doctrine of substantial performance does not extend to contracts to manufacture articles.¹⁴ Trade usage and custom are invoked, however, to show that literal performance exists where the performance falls short of literal compliance with the terms of the contract in their popular sense.¹⁵ A contract to make colortype pictures is performed literally although the borders are not perfect because of the fact that the dust in the air caused specks which could be seen by close examination.¹⁶

A small deficiency in the quantity of the goods delivered does not prevent substantial performance of a contract of sale.¹⁷ If a number of articles are sold, delivery of all but one is substantial performance.¹⁸

§ 2789. Attempted performance less than substantial performance—General principles. If performance of the covenants of the contract, on the one side, has not been waived by the adversary party, no recovery upon a contract can be had by one who has not performed a precedent covenant, at least substantially; or who is not ready and willing to perform concurrent covenants at least substantially, and who has not notified the adversary party thereof and has demanded performance from him.¹ Failure to perform either of these classes of covenants, at least substantially, amounts to breach which gives rise to a cause of action for damages, and

¹⁴ *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306.

¹⁵ *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306.

¹⁶ The contract is said to be "not only substantially but literally complied with." *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306.

¹⁷ *Simmons Hardware Co. v. Bucket Pump Co.*, 18 O. C. C. 878, 10 O. C. D. 285 (a deficiency of one-fourth of one per cent., which the seller offered to make up).

¹⁸ *Hansen v. Baltimore Packing Co.*, 86 Fed. 832.

¹ *United States. Bush v. Jones*, 144 Fed. 942, 6 L. R. A. (N.S.) 774; *Bosch Magneto Co. v. Rushmore*, 255 Fed. 465.

Alabama. Green v. Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707; *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40

So. 579; *Hartsell v. Turner*, 196 Ala. 209, 71 So. 658.

Georgia. Bull v. St. Johns, 39 Ga. 78.

Idaho. Olympia Mining Co. v. Kerns, 13 Ida. 514, 91 Pac. 92; *Nave v. McGrane*, 19 Ida. 111, 113 Pac. 82.

Illinois. Swanzey v. Moore, 22 Ill. 63, 74 Am. Dec. 134; *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161.

Iowa. Jordan v. Hill, 172 Ia. 414, 154 N. W. 579.

Kentucky. Vincennes Bridge Co. v. Walker, 181 Ky. 651, 205 S. W. 778.

Louisiana. Barr v. Henderson, 105 La. 691, 30 So. 158.

Maryland. Gill v. Vogler, 52 Md. 663.

Massachusetts. Olmstead v. Beale, 36 Mass. (19 Pick.) 528.

Minnesota. Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; *Taylor v. Marcum*, 60 Minn. 292, 62 N. W. 330;

which may operate as a discharge of the contract as far as the covenants of the adversary party are concerned.² From the nature of the independent covenant, failure to perform such a covenant substantially does not operate as a discharge of the contract, although it will give rise to a cause of action for damages.³ Apart from questions of whether performance is less than substantial performance, which are considered in the following sections,⁴ the consequences of failure to perform at least substantially, are treated in connection with the subject of breach.⁵

In many cases performance less than substantial is tendered by one party and is accepted by the other. Whether the consequences of such acceptance are to prevent such defective performance from amounting to breach, or whether they also prevent the adversary party from maintaining an action for such defective performance, is a question which is considered subsequently under the so-called heading of waiver.⁶

Another question which is sometimes confused with substantial performance is the right of the party who is in default to recover from the adversary for the benefits conferred upon the latter by reason of such defective performance. This question is considered subsequently under the topic of the quasi-contractual right of recovery which arises on discharge.⁷

Literal performance may exist though substantial performance is lacking. The law does not regard this as performance.⁸ A contract

Uldrickson v. Samdahl, 92 Minn. 297, 100 N. W. 5; **Hoglund v. Sortedahl**, 101 Minn. 359, 112 N. W. 408.

Mississippi. Butt v. Williams (Miss.), 15 So. 130.

Missouri. Miller v. Goddard, 34 Mo. 102, 56 Am. Dec. 638; **Henson v. Hampton**, 32 Mo. 408; **Earp v. Tyler**, 73 Mo. 617.

Nebraska. Omaha Consolidated Vinegar Co. v. Burns, 44 Neb. 21, 62 S. W. 301.

New York. Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; **Acme Realty Co. v. Schinasi**, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577; **Steel Storage & Elevator Const. Co. v. Stock**, 225 N. Y. 173, 121 N. E. 786.

Ohio. Mehurin v. Stone, 37 O. S. 49; **Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.**, 89 O.

S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. Robinson v. Beaty, — Okla. —, 181 Pac. 941.

Pennsylvania. Martin v. Schoenberg, 8 Watts & S. (Pa.) 367.

Vermont. Kelley v. Bradford, 33 Vt. 35.

Washington. Roubush v. Gannon, 92 Wash. 508, 159 Pac. 680.

² See ch. LXXXIV.

³ See ch. LXXXIV.

⁴ See §§ 2790 et seq.

⁵ See ch. LXXXIV.

⁶ See ch. LXXXIV.

⁷ See ch. LXXXVIII.

⁸ **Edison, etc., Electric Co. v. Navigation Co.**, 8 Wash. 370, 40 Am. St. Rep. 910, 24 L. R. A. 315, 36 Pac. 260; **Fuller-Warren Co. v. Shurts**, 95 Wis. 606, 70 N. W. 683.

for an electric light plant, to be paid for when "found to be in good working order," is not performed by so constructing the plant that it works properly at the very moment of completion, but soon proves deficient.⁸ A contract to construct a furnace to heat a dwelling to a given temperature by means of hot air is not substantially performed if in fulfilling the requirement as to temperature the furnace generates coal gas and fills the house with it so as to render the rooms unsuitable for use.¹⁰

§ 2790. Sale of realty—Performance less than substantial performance—Party in default seeking to enforce contract. A contract for the sale of realty or an interest therein, is not performed substantially if the performance which is tendered is substantially and materially different from that which is provided for by the terms of the contract.¹ Substantial performance does not exist if there is a defect in the title,² including a defect in the title to any substantial or material part of the realty agreed upon.³ If a tract of land is sold which is bounded by a public street or road, failure of title to a part of the land which cuts off such tract from such road prevents substantial performance.⁴ Under a contract for the sale of four acres of land, including a residence, a failure of title to a quarter of an acre was said to prevent substantial performance if such tract lay between the house and the public road, and if it

⁸ Edison, etc., Electric Co. v. Navigation Co., 8 Wash. 370, 40 Am. St. Rep. 910, 24 L. R. A. 315, 36 Pac. 260.

¹⁰ Fuller-Warren Co. v. Shurts, 95 Wis. 606, 70 N. W. 683.

¹ England. Arnold v. Arnold, L. R. 14 Ch. Div. 270; Hick v. Phillips, Prec. Ch. 575; Drewe v. Corp, 9 Ves. Jr. 368.

Alabama. Boylan v. Wilson, — Ala. —, 79 So. 364.

Michigan. Connor v. Buhl, 115 Mich. 531, 73 N. W. 821.

New Jersey. New York Life Ins. Co. v. Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494.

New York. Acme Realty Co. v. Schinasi, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

Virginia. Jackson v. Ligon, 30 Va. (3 Leigh) 161.

² England. Arnold v. Arnold, L. R. 14 Ch. Div. 270.

Alabama. Boylan v. Wilson, — Ala. —, 79 So. 364.

Illinois. Baker v. Baker, 284 Ill. 537, 120 N. E. 525.

New Jersey. New York Life Ins. Co. v. Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494.

Virginia. Jackson v. Ligon, 30 Va. (3 Leigh) 161.

³ Arnold v. Arnold, L. R. 14 Ch. Div. 270; New York Life Ins. Co. v. Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494; Jackson v. Ligon, 30 Va. (3 Leigh) 161.

⁴ Arnold v. Arnold, L. R. 14 Ch. Div. 270; New York Life Ins. Co. v. Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494.

was so situated that persons could look from such tract into the windows of the residence.⁵ If the contract provides for the sale of a lot which is sixty feet wide by one hundred and ninety-five feet deep, and which is bounded by a street, failure of title to a twenty-foot strip along the street prevents substantial performance.⁶ Under a contract for the sale of forty-one acres, failure of title to seven acres which cuts the remaining tract off from a public road, prevents substantial performance.⁷ A contract for the sale of nearly seven hundred acres of land, is not performed substantially if the title to more than two hundred acres is substantially defective, although such two hundred-acre tract is separated from the rest of the land by a public road and although all the improvements are upon the tract, title to which is marketable.⁸ A contract to sell a freehold is not performed substantially if about a sixth of the land is copyhold.⁹ A contract to convey a tract of land in fee, is not performed substantially by an assignment of a lease of such realty for a term of four thousand years.¹⁰ Under a contract by which a city agrees to buy a tract of one hundred and fourteen acres to be used as a reservoir, for storing water for the water supply of the city, failure of title to ninety-two acres prevents substantial performance even if the tracts in question belonged originally to different owners.¹¹ Under a contract for the sale of seven hundred acres of land, a failure of title as to twelve acres was held to prevent substantial performance, if such twelve acres were underlaid with brick clay and there was a probability that the owner of such land might construct a brick kiln and buildings on such land.¹²

A contract to sell realty which implies a marketable title, is not performed substantially if windows and porticoes project into the street so that the city may require them to be removed at any time, and if such removal will be expensive and cause a substantial loss to the purchaser, although they have been constructed by permission of the city subject to such right of removal.¹³

⁵ *Perkins v. Ede*, 16 Beav. 193.

⁶ *New York Life Ins. Co. v. Gilhooly*, 61 N. J. Eq. 118, 47 Atl. 494.

⁷ *Arnold v. Arnold*, L. R. 14 Ch. Div. 270.

⁸ *Jackson v. Ligon*, 30 Va. (3 Leigh) 161.

⁹ *Hick v. Phillips*, Prec. Ch. 575.

¹⁰ *Drewe v. Corp*, 9 Ves. Jr. 368.

¹¹ *North Avenue Land Co. v. Baltimore*, 102 Md. 475, 63 Atl. 115; *Vickers v. Baltimore*, 102 Md. 487, 63 Atl. 120.

¹² *Knatchbull v. Grueber*, 1 Madd. Ch. 153.

¹³ *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

A contract for the sale of realty is not performed substantially if the grantor's wife refuses to release dower.¹⁴ A contract to convey realty subject to certain encumbrances is not performed substantially by offering to convey with greater encumbrances, but with a covenant in the deed to reduce them to the amount contracted for.¹⁵

§ 2791. Sale of realty—Performance less than substantial performance—Party not in default seeking to enforce contract. If the purchaser demands specific performance against a vendor who can perform in part only, the courts are much more ready to grant relief in spite of a material variance between the performance which the vendor can be compelled to give and the performance which he has agreed to give, and they are much more ready to grant compensation for such deficiency in performance than they are in cases in which the vendor is seeking relief against an unwilling purchaser.¹ Indeed, the doctrine of substantial performance does not, properly speaking, apply to cases of this sort. Since the plaintiff is the party who is not in default and since he seeks performance of as much of the contract as is practicable against one who has agreed to perform more than he can be compelled to perform specifically, the readiness of the courts to grant specific performance is not limited by the necessity of showing that the vendor can be compelled to perform substantially; but the limit is rather whether the remedy of specific performance can be given to the purchaser without imposing a hardship upon the vendor much greater than the benefit which such relief will confer upon the purchaser. If the land which is sold is encumbered by a party wall which is of no benefit to the purchaser, the purchaser may have specific performance with compensation for the damage done by such encumbrance.² If one of two or more tenants in common

¹⁴ *Vaughan v. Butterfield*, 85 Ark. 289, 122 Am. St. Rep. 31, 107 S. W. 993.

¹⁵ *Connor v. Buhl*, 115 Mich. 531, 73 N. W. 821.

¹ *England. Milligan v. Cooke*, 16 Ves. Jr. 1.

United States. Pratt v. Law, 13 U. S. (9 Cranch) 456, 3 L. ed. 791; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383.

Massachusetts. Cashman v. Bean, 226 Mass. 198, 115 N. E. 574.

Minnesota. Melin v. Woolley, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654, 946.

Missouri. Barthel v. Engle, 261 Mo. 307, 168 S. W. 1154 (obiter).

West Virginia. Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299.

Wisconsin. Docter v. Hellberg, 75 Wis. 415, 27 N. W. 176.

² *Cashman v. Bean*, 226 Mass. 198, 115 N. E. 574.

has agreed to convey the entire tract, specific performance can be given against such vendor with compensation for the value of the remaining interests.³ If a contract is made with two owners in severalty for the purchase of a tract of land from each of them, and such contract is unenforceable as against one, specific performance with compensation may, nevertheless, be compelled as against the other, although a gross amount was to be paid for the two tracts.⁴ If A, who is acting in two different capacities, agrees to sell to B a tract of a certain frontage, and by reason of his inability to act in one capacity such contract is unenforceable as to a quarter of such frontage, the purchaser may compel specific performance of compensation as to the rest of such tract.⁵ A contract for the sale of a specific lot which by the terms of the contract is to contain one hundred and forty-five acres, may be enforced with compensation against the vendor, although the tract in fact contains less than one hundred and twenty acres.⁶

Whether a purchaser of land free from all encumbrances may have specific performance with compensation if the wife of the vendor refuses to release her dower, is a question upon which there is a conflict of authority; some courts granting specific performance with compensation,⁷ and other courts denying it.⁸

§ 2792. Contracts for work, labor, services, etc.—Performance less than substantial. A contract of employment is not performed substantially where the employe, during each month of his employment, embezzles money belonging to his employer.¹ Hence, under a contract of hire from month to month, the employe can recover nothing. A contract to lay water pipes through the land of a person, and to close the trenches up well and sufficiently, and make good the land and premises, is not performed substantially where the trenches are so filled up that the ground there is in places two feet above the original level.² A contract to run a boundary line

³ *Melin v. Woolley*, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654, 946

⁴ *Milam v. Williams*, 73 W. Va. 467, 80 S. E. 770.

⁵ *Hazzard v. Morrison*, 104 Tex. 589, 143 S. W. 142.

⁶ *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351.

⁷ *Minge v. Green*, 176 Ala. 343, 58

So. 381; *Tebeau v. Ridge*, 261 Mo. 547, L. R. A. 1915C, 367, 170 So. 871.

⁸ *Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; *Lucas v. Scott*, 41 O. S. 636; *Kurath v. Jackson*, 60 Or. 203, 38 L. R. A. (N.S.) 1195, 118 Pac. 192; *Haden v. Falla*, 115 Va. 770, 80 S. E. 576.

¹ *Peterson v. Mayer*, 46 Minn. 468, 13 L. R. A. 72, 49 N. W. 245.

² *Chisholm v. Halifax*, 29 N. S. 402.

between two adjoining lots, and then to retrace it, is not substantially performed where it is run and the person running the line then sights back along the stakes and decides that the line is straight.³ A contract to perform work and labor for a specified compensation, must be performed substantially, at least in order to justify recovery.⁴ An architect who is to furnish plans and specifications for a building and an estimate of its probable cost, can not recover if the actual cost of the building greatly exceeds his estimate.⁵ So if he is employed to draw plans for a building at a cost not to exceed four thousand, five hundred dollars, he can not recover if he draws plans for a building estimated to cost more than eight thousand dollars.⁶ If the owner of realty has agreed to pay to a broker all in excess of a specified amount for which the broker can sell such realty, such contract is not performed substantially by exchanging such realty for other realty at an agreed valuation.⁷ A contract whereby the owner of land agrees to pay to an agent as commission everything in excess of ten dollars per acre for which such agent might be able to sell such land is an entire contract; and if the agent sells a part of such tract, he can not recover compensation at the contract rate until he has sold the entire tract.⁸ If an architect is employed to draw plans for a building, which is not to cost over twenty-five thousand dollars, such contract is not performed substantially if the plans are of such a character that the lowest bid is thirty-five thousand dollars.⁹ A contract of employment as manager is not performed substantially if the employer reduced the employe to a sales clerk, although he offers to pay the salary provided for in the original contract.¹⁰ Plans and specifications which do not show the quality of material and workmanship, which do not specify in what condition the concrete is to be measured, which does not indicate the materials to be used in electric wiring or the location of the wires, are so indef-

³ *Wheeler v. State*, 109 Ala. 56, 19 So. 993.

⁴ *Jordan v. Hill*, 172 Ia. 414, 154 N. W. 579; *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8.

⁵ *Feltham v. Sharp*, 99 Ga. 260, 25 S. E. 619; *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8.

⁶ *Emerson v. Kneezell* (Tex. Civ. App.), 62 S. W. 551.

⁷ *Jordan v. Hill*, 172 Ia. 414, 154 N. W. 579.

⁸ *Bentley v. Edwards*, 125 Minn. 179, 51 L. R. A. (N.S.) 254, 146 N. W. 347. (Since plaintiff did not plead or prove the reasonable value of his services, the court did not decide whether he could recover in quantum meruit.)

⁹ *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8.

¹⁰ *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N. W. 541.

inite that they could not be the basis of a valid contract; and the architect can not recover from the owner for preparing such plans.¹¹

§ 2793. Building contracts—Specific illustrations—Reconstruction not necessary—Immaterial variance. A study of the cases in which building contracts have been held to be performed substantially shows a wide range of variance between actual performance and the performance required by the terms of the contract, and an apparent lack of harmony in the application of the general principles of substantial performance. It is quite possible that a fuller presentation of the facts of each case would show that the lack of harmony was more apparent than real. Generally speaking, a distinction may be drawn between imperfect performance, on the one hand, which consists merely of omissions or superficial defects, which can be remedied by additions only, or at least by changes which are not structural in character, and structural defects, on the other hand, which can be remedied only by rebuilding or reconstructing in whole or in part. Failure to use the kind of lock required by the specifications does not prevent substantial performance.¹ Failure to remedy certain defects in painting and puttying in a wall, and failure to make certain changes in windows, do not prevent substantial performance of a contract to complete a house by a specified date if the defects are not of such a nature as to prevent the use of the house.² Substantial performance of a contract for constructing a building at a cost of about thirty-five hundred dollars may exist, although part of the brick work is unfinished and part of the rubbish is left on certain of the floors, if the cost of completion is about three dollars.³ Failure to construct the windows in the basement story in line with the windows in the upper story does not prevent substantial performance if such windows can be reset at a cost of about six dollars.⁴ A contract to perform for about thirty-eight hundred dollars is performed substantially if the cost of supplying the omissions is about

¹¹ Nave v. McGrane, 19 Ida. 111, 113 Pac. 82.

¹ Stewart v. Breckenridge, — Colo. —, 169 Pac. 543.

² Coen v. Birchard, 124 Ia. 394, 100 N. W. 48.

For a detailed discussion of substantial performance of a contract to

do plastering according to certain specifications, see Smith v. Mathews Const. Co., — Cal. —, 179 Pac. 205.

³ Hahn v. Bonacum, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368.

⁴ Schindler v. Green, 149 Cal. 752, 87 N. W. 626.

fifty dollars.¹ A contract for the construction of a building at a cost of almost forty-nine thousand dollars may be performed substantially although there are certain omissions which would cost over two thousand dollars to remedy.² Under a contract which involves an expenditure of twelve thousand dollars, an unintentional deficiency which can be remedied for five hundred dollars does not prevent substantial performance.³ A contract which is to be performed for six thousand dollars may be substantially performed, although the damage due to failure to perform literally is over two hundred dollars.⁴ A contract to decorate the walls of a room, do the woodwork and provide furniture for five thousand two hundred dollars is performed substantially where everything is done according to the terms of the contract except the woodwork; and the defects in that can be remedied for five hundred dollars.⁵ It is said that a contract to be performed for five thousand dollars may be performed substantially although the damage due to failure to perform literally is five hundred dollars.⁶ A contract which is to be performed for two hundred dollars may be performed substantially, although the damage due to failure to perform literally amounts to twenty-five dollars.⁷ A contract to construct certain work for thirty-five hundred dollars may be performed substantially if the damage due to defects and omissions is only thirty-three dollars.⁸ Recovery can be had in case of substantial performance of a contract to construct a heating apparatus.⁹ Under a contract to construct a steam heating plant at a cost of fourteen hundred dollars, inadvertent defects and omissions which can be remedied for less than two hundred dollars do not prevent such performance from being substantial.¹⁰ The act

¹ *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936.

² *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867.

³ *Daly v. New Haven Hotel Co.*, 91 Conn. 280, 90 Atl. 853.

⁴ *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271.

⁵ *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323 [reversing, 107 Fed. 425]. (The question was for the jury. The court could not say as a matter of law that such facts did not make substantial performance.)

⁶ *Ellis v. Lane*, 85 Pa. St. 265. (This statement was, however, an obiter, since the question of substantial performance was not raised in the trial-court.)

⁷ *Bergfors v. Caron*, 190 Mass. 168, 76 N. E. 655.

⁸ *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842.

⁹ *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709 [affirming, 70 Ill. App. 72].

¹⁰ *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253.

of the contractor in installing a certain system of heating is said to be substantial performance of his contract to install such system and to obtain a license from the holder of the patent thereon; but he will be required to obtain such license before he can take advantage of a judgment in his favor.¹⁵ A contract to furnish glass for a house is performed substantially where, of over a hundred panes, all but two are perfect, and those two are defective in a way not uncommon in glass of that kind.¹⁶ A contract to furnish window screens and screen doors may be substantially performed, although one screen is defective.¹⁷ A contract for plumbing is substantially performed where the only defects are in certain connections which can be completed for a small part of the contract price, even though the system is useless as he left it.¹⁸ Recovery may be had upon a contract to supervise the construction of a building if such contract has been performed substantially.¹⁹ If one who has agreed to supervise the construction of a building for another causes the front of the building to be constructed in a manner which is not provided for by the plans, and if such mistake can be remedied for a cost of about four hundred dollars, the supervising architect may recover the contract price less the amount necessary to repair such defect.²⁰ If a contract to construct a ditch in accordance with certain plans and specifications has been performed substantially, recovery may be had thereunder.²¹ A contract to construct a logging road is performed substantially if the road is ready for use by construction trains and for any traffic which the logging company may offer, although laying ties on the road is not complete, the ties being laid at double the proper distance for the straight portion of the track.²² If a contract to construct a logging road and to get ready for operation does not specifically require the contractor to buy or to furnish rolling stock, such contract is performed substantially, although he relies

¹⁵ *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842.

¹⁶ *Robert Mitchell Furniture Co. v. Monarch* (Ky.), 39 S. W. 823.

¹⁷ *E. T. Burrowes Co. v. Crittenden* (Miss.), 37 So. 504. (At least, such question is for the jury.)

¹⁸ *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028.

¹⁹ *Foeller v. Heintz*, 137 Wis. 169,

24 L. R. A. (N.S.) 327, 118 N. W. 543.

²⁰ *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

²¹ *Lombard v. Overland Ditch & Reservoir Co.*, 41 Colo. 253, 92 Pac. 605.

²² *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 154.

upon connecting carriers for supplies of freight cars.²³ A contract by which A agrees to construct a level to drain B's mine in consideration of one-eighth of the ore mined therefrom, may be enforced by A though the level is permitted to get out of repair, if the level is sufficient for practical purposes and B is in no way prejudiced thereby.²⁴ A contract for constructing waterworks, or furnishing water pressure, if substantially performed, entitles the contractor to a recovery, subject to recoupment for damages caused by failure to perform literally.²⁵ The contractor is not liable for damages resulting from defects after the owner has had a reasonable opportunity to remedy them.²⁶ A contract to sink a well is substantially performed in case of an oil well by drilling until oil is struck, even though the contractor loses his tools in the well, which is, on that account, somewhat less valuable.²⁷ One who contracts to drill a well and commences work, may abandon that well and drill another one if completion of the first becomes impracticable by reason of the breaking of the drill.²⁸ In case of a well for water, drilling till water is found is a substantial performance, although the contractor does not put a screen at the bottom of the well, because the other party orders him to stop work.²⁹ A contract by which owners of adjoining sections of low land agree to fill in the land owned by them as fast as adjoining land is filled in, so that it is unnecessary to have a barrier on the division line to retain the earth thus filled, and provide that if such filling is not made the adjoining owner may build the barrier at the expense of the former, is substantially performed where the former builds such barrier at his own expense.³⁰ A contract for constructing a public improvement is not discharged by the invalidity of a particular assessment which did not enter into the bid or contract.³¹ Under a building contract which requires the contractor to show that there are no outstanding claims which could be the basis of

²³ *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 154.

See also, *Courtright v. Deeds*, 37 Ia. 503, and *Manchester & Keene Ry. v. Keene*, 62 N. H. 81, 120.

²⁴ *Crawford v. Weatherbee*, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545.

²⁵ *Wiley v. Athol*, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311.

²⁶ *Hansen v. Beebe*, 111 Ia. 534, 82 N. W. 942.

²⁷ *Holmes v. Oil Co.*, 138 Pa. St. 546, 21 Am. St. Rep. 919, 2 Atl. 231.

²⁸ *Thompson v. Brown*, 106 Ia. 367, 76 N. W. 819.

²⁹ *Madden v. Oestrich*, 46 Minn. 538, 49 N. W. 301.

³⁰ *Commonwealth v. Wharf Co.*, 166 Mass. 395, 44 N. E. 350.

³¹ *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085.

a lien before payment is due, the act of the contractor in showing to the owner receipts and vouchers for all labor and material is at least substantial performance.³²

The performance of all of the covenants of the contract except certain minor covenants, the performance of which is prevented by the adversary party, is undoubtedly sufficient,³³ although this is rather an example of discharge by the act of the adversary party than an example of substantial performance.³⁴

§ 2794. Building contracts—Reconstruction necessary—Immaterial variance. A minor and immaterial variance may exist, which it may be impossible to remedy so as to make the building conform literally to the terms of the contract, without reconstruction, and yet it may be proper to hold that the contract is performed substantially.¹ A slight deviation from the plans caused by a mistake in measurement, not discovered by either party or the architect until the contract is completed, and not affecting the external appearance of the house or its usefulness, does not prevent the performance from being substantial.² Defects in hanging doors and in the construction of the roof of a building which sagged as a result of such defect, has been held not to prevent substantial performance if it was practicable to rehang such doors and to remedy the defects in the roof by raising it and putting supports under it, without interfering with the ordinary use of the house to any appreciable extent.³ Under a contract to construct a gas plant of common brick picked for evenness of color, the contractor performs at least substantially if such wall is of as even a color as it is possible out of common brick.⁴ If A and B have entered into a contract for the construction of a party wall between their respective tracts of land, and A lets such contract to X under plans and specifications which do not require the wall to be built of mortar made of hydraulic cement which was required

³² *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

³³ *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937.

³⁴ See ch. LXXXIV.

¹ *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264.

Substantial performance may exist "where the failure is merely incon-

siderable incompleteness and the expense of completion is easy of ascertainment." *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515 (obiter).

² *Oberlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999.

³ *Woodward v. Fuller*, 80 N. Y. 312.

⁴ *Birdsall v. Perry Gas Works*, 181 Ia. 1268, 161 N. W. 304.

by the original contract between A and B, A may recover under the original contract if B has known of such specifications and has not objected to such construction.⁵ This, however, is probably to be explained fully as much on the theory of waiver of strict performance,⁶ as on the theory of substantial performance.

§ 2795. Building contracts—Reconstruction necessary—Material variance. If the building is materially different from that contracted for, no substantial performance can be said to exist.¹ In building or construction contracts a deviation from the terms of the contract which can not be corrected without a partial² or total³ reconstruction of the building or work, can not be corrected by a mere recoupment of damages,⁴ and is not substantial performance.⁵ Thus a contract to build a building fifty feet by one hundred and fifty feet in size is not substantially performed by building one seventy-eight feet by one hundred feet, even if more valuable than the building contracted for, and even if the contract was merely for mortgage security.⁶ Where the girders are not of the length contracted for and a wooden partition is omitted there is no substantial performance.⁷ If the joists are farther apart than the contract requires, no recovery can be had on the contract, though the house is strong enough.⁸ If the roof is less than the required pitch, and the shingles are in part of

⁵ *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854.

⁶ See ch. LXXXIV.

¹ *Kentucky. Nance v. Patterson Building Co.*, 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484.

Minnesota. Uldrickson v. Samdahl, 92 Minn. 207, 100 N. W. 5.

North Carolina. Braddy v. Elliott, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

North Dakota. Braseth v. Bank (N. D.), 98 N. W. 79.

Wisconsin. Foeller v. Heintz, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543 (obiter).

See also, *Mehurin v. Stone*, 37 O. S. 49.

² *Sarrazin v. Adams*, 111 La. 124, 34 So. 301; *Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412.

See also, *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

³ *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 19 L. ed. 554; *Tennant Land Co. v. Nordeman*, 148 Ky. 361, 146 S. W. 756.

⁴ *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845.

⁵ *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412.

⁶ *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 19 L. ed. 554.

⁷ *Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412.

⁸ *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442.

inferior quality and poorly laid, leaving many holes in the roof, and the siding is unsound and split, leaving holes in the side of the building, the contract is not performed substantially.⁹ A contract to build a monument is not substantially performed if of different dimensions from those specified in the contract.¹⁰ A contract for constructing a burial vault, the ends of which are to be of solid pieces of stone, is not performed substantially by constructing a vault the ends of which are not solid blocks of stone, but are pieced together out of a number of small blocks.¹¹ A contract to construct a building is not performed substantially as a matter of law, if the wall is cracked and if parts of the building are out of plumb.¹² A contract for building a retaining wall is not substantially performed where it bulges nine inches.¹³ A contract to place dwelling-houses upon certain realty, is not performed substantially if the buildings which are placed thereon are not fit for use as dwellings.¹⁴ A contract to construct a system of water-works, to furnish two hundred and fifty thousand gallons a day, is not substantially performed by constructing a system which furnishes only fifty thousand gallons a day.¹⁵ A contract to construct an elevator with a capacity of four thousand bushels per hour, is not performed substantially by the construction of an elevator with a capacity of thirty-three hundred bushels per hour.¹⁶ A contract to make screens of bronze wire fitted with certain specified checks, is not performed substantially if the checks which are used are not of such specified kind and if the wire which is used is steel wire bronzed, which is worth a fifth as much as bronze wire.¹⁷ A contract to paint a house so as to do a first-class job, is not substantially performed if the old paint is not removed where such removal is necessary.¹⁸ A contract for furnishing

⁹ *Cornish, etc., Co. v. Dairy Association*, 82 Minn. 215, 84 N. W. 724. The contract is not performed even if it was for the erection of a creamery, and the building could be rebuilt for one-fifth of the entire cost of the creamery.

¹⁰ *Cutler v. Dix*, 67 Vt. 347, 31 Atl. 780.

¹¹ *Mehurin v. Stone*, 37 O. S. 40.

¹² *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408.

¹³ *Lynes v. Hall*, 60 Minn. 532, 63 N. W. 108. The wall was thirty feet

long. No adequate reason to rebut the inference of poor workmanship was shown for the bulging of the wall.

¹⁴ *Braddy v. Elliott*, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

¹⁵ *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

¹⁶ *Steel Storage & Elevator Const. Co. v. Stock*, 225 N. Y. 173, 121 N. E. 786.

¹⁷ *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 570.

¹⁸ *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

drain pipes and sewer pipes of iron and of certain specified dimensions, is not performed substantially if drain pipes of earthenware are used of smaller dimensions, although it is shown that the pipes actually used will render as satisfactory service as those contracted for.¹⁹ A contract for the construction of a bridge is not performed substantially if the steel legs on which it is supported are from seven to eleven feet short and the concrete bases are built up higher to support the bridge, and if the bridge is crooked and a foot and a half higher at one end than at the other, instead of being straight.²⁰ If a contract to drill a well is entire, no recovery can be had thereon unless it is performed at least substantially.²¹ A contract to sink a well to such a depth that water would be reached, is not performed substantially by sinking a shaft which is abandoned before water is reached.²²

§ 2796. Building contracts—Material deficiency not necessitating reconstruction. The relation between the contract price and the damage due to defective or incomplete performance may be so great, according to the test suggested in some jurisdictions, as to prevent performance from being substantial.¹ It is said that a contract to do certain excavation for thirty-five hundred dollars, is not performed substantially if the cost of completing the contract is six hundred dollars.² A contract for building a house at a cost of about four thousand dollars is not performed substantially if it will cost over two thousand dollars to supply the omissions.³ A contract for painting a building is not performed substantially if it is necessary to repaint about a third of the building

¹⁹ *Schultze v. Goodstein*, 180 N. Y. 248, 73 N. E. 21.

²⁰ *Vincennes Bridge Co. v. Walker*, 181 Ky. 651, 205 S. W. 778.

²¹ *Hartsell v. Turner*, 106 Ala. 290, 71 So. 658; *Connor v. Trapp*, 127 Ia. 742, 104 N. W. 333.

²² *Bates v. Harte*, 124 Ala. 427, 82 Am. St. Rep. 186, 26 So. 898.

¹ *United States. Bush v. Jones*, 144 Fed. 942, 6 L. R. A. (N.S.) 774.

Connecticut. Tice v. Moore, 82 Conn. 244, 73 Atl. 133.

Iowa. Connor v. Trapp, 127 Ia. 742, 104 N. W. 333.

Minnesota. Anderson v. Pringle,⁷⁹ Minn. 433, 82 N. W. 682.

New York. Flaherty v. Miner, 123 N. Y. 382 (obiter); *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017.

Pennsylvania. Gillespie Tool Co. v. Wilson, 123 Pa. St. 19, 16 Atl. 36.

South Dakota. Symms-Powers Co. v. Kennedy, 33 S. D. 355, 146 N. W. 570.

Wisconsin. Manthey v. Stock, 133 Wis. 107, 113 N. W. 443.

² *Flaherty v. Miner*, 123 N. Y. 382. (This statement was obiter, since the question of substantial performance was not raised in the trial-court.)

³ *Tice v. Moore*, 82 Conn. 244, 73 Atl. 133.

at a cost of about a third of the original contract price.⁴ If the contract calls for three coats of plaster, such contract is not performed substantially by putting on two coats only.⁵ If it is conceded or established that a contract to install a heating plant has been so defectively or imperfectly performed that it furnishes about three hundred feet of radiation less than that provided for by the contract, it has been said that such fact shows that there is no substantial performance and that a finding of the trial court that such contract has been performed substantially is inconsistent therewith.⁶ If a contract for remodeling a building is intended primarily to secure a level floor, failure to perform so as to secure this result substantially at least, prevents substantial performance of the entire contract, although a great many of the preliminary steps to obtaining this result had been taken.⁷ A contract to bore a well of a specified diameter is not performed substantially by boring a well of a less diameter, although such well may be of the same practical value as that required by the terms of the contract.⁸

§ 2797. Contracts for sale and manufacture of goods—Performance less than substantial. A contract to manufacture and install a boiler of a given capacity is not performed substantially by manufacturing and installing a boiler of half of the required capacity.¹ A contract requiring a shipment of goods between specified dates by "sailer or sailers," is not performed substantially by shipping such articles by steamer not within such dates.² A contract to sell and lay carpets and oilcloth in a house is not performed substantially if the carpet is laid in two of the rooms so that the figures run the wrong way and it can not be used; and the seller can not recover if the buyer returns the goods.³ A contract to deliver a number of articles for a lump sum, is not performed substantially by delivering some of such articles which

⁴ *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

⁵ *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017.

⁶ *Symms-Powers Co. v. Kennedy*, 33 S. D. 355, 146 N. W. 570.

⁷ *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682.

⁸ *Connor v. Trapp*, 127 Ia. 742, 104 N. W. 333.

See also, *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. 36.

¹ *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.

² *Ashmore v. Cox* [1899], 1 Q. B. 436.

³ *Husted v. Craig*, 36 N. Y. 221.

are equal in value to about a third of the entire contract price.⁴ Thus a contract to put in a steam plant is not substantially performed where an engine of specified horsepower, required by the contract, has not been set up.⁵ If the contract calls for a boiler of one hundred and fifty per cent. of the capacity of the boiler already in use, and the boiler actually furnished has only eighty-two per cent. of such capacity, there is no substantial performance.⁶ So a contract to put in an elevator to have a certain capacity to lift a certain number of feet and to be "suitable for passenger and freight service," is not substantially performed where it has considerably smaller capacity and will not come down to the first floor or go up to the top by four inches.⁷ A contract to provide boilers for heating, to have a capacity of one hundred and forty nominal horsepower, and to meet two other requirements, is not substantially performed by furnishing boilers of a capacity of one hundred and thirty nominal horsepower, though the other requirements are complied with.⁸ A contract to furnish a steam heating apparatus of a capacity to warm each room of a greenhouse to seventy degrees in the coldest weather, with a boiler of capacity for a continuous run for ten hours, is not substantially performed by raising the temperature to seventy degrees for a short time during very cold weather.⁹

§ 2798. Other contracts. A contract which provided for making compensation to the contractor for the transportation of his implements to a specified point, is performed substantially if the contractor finds that he can perform by having his implements transported to a different point; and he is entitled to compensation therefor under such contract if the freight to such point is less than it is to the point specified in the contract.¹ A contract to consolidate two corporations and to assign all the stock of one of them is substantially performed by transferring the assets, good will and three-fourths of the stock of such corporation, and suppressing its competition.² A contract by which a hospital

⁴ Petersburg Fire, Brick & Tile Co. v. American Clay Mach. Co., 80 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

⁵ North v. Mallory, 94 Md. 305, 51 Atl. 89.

⁶ Manitowoc, etc., Co. v. Glue Co., 120 Wis. 1, 97 N. W. 515.

⁷ Clarke v. Machine Co. (Ky.), 42 S. W. 844.

⁸ Heine Safety Boiler Co. v. Francis, 117 Fed. 235, 54 C. C. A. 267.

⁹ Kramer v. Messner, 101 Ia. 88, 69 N. W. 1142.

¹ Snyder v. Patton & Gibson Co., 143 Mich. 350, 106 N. W. 1106.

² German Savings Institution v. Refrigerating Co., 70 Fed. 146, 17 C. C. A. 34.

agrees to support three beds for use of soldiers, to be used by others when there are no soldier applicants, is substantially performed where the hospital accepts all applications for admission made by soldiers.³ A contract by which a wife agrees to pay premiums or assessments upon her husband's policy of life insurance, is performed substantially if such payments are in fact made, although part of them are made by the father of the husband who had promised the wife to make such payments if she was unable to do so, but who was not making such payments in performance of such promise.⁴ If a surrender of an insurance policy is required as a condition of obtaining a paid-up policy, the fact that the original policy has been stolen from the insured does not defeat his right, on complying with all the other requisites, to obtain a paid-up policy.⁵ The right of the insured to change the beneficiary is not defeated because the former beneficiary refuses to deliver up the original certificate, and he is therefore unable to comply with a provision requiring its surrender as a prerequisite to changing the beneficiary.⁶ A contract to keep buildings and machinery insured for not less than six thousand, two hundred dollars, payable to the lessors as their interests may appear, is substantially performed if the lessee obtains insurance upon the buildings amounting to more than three thousand dollars, and upon the machinery amounting to more than four thousand dollars, payable to the lessors as their interests should appear.⁷ In this case the machinery belonged to the lessees, but a provision of the lease gave the lessors a lien thereon for all unpaid rent. A contract by a bridge company with the city to sell a hundred tickets crossing the bridge for one dollar, is substantially performed if the bridge company sells five tickets for one dollar, each ticket good for twenty crossings.⁸

A contract to form a partnership is not substantially performed by forming a corporation.⁹ A contract for operating a mine in

³Cottage Hospital v. Merrill, 92 Ia. 649, 61 N. W. 490.

⁴Sipe v. Sipe, 102 Kan. 742, L. R. A. 1918E, 1029, 173 Pac. 13.

⁵Wilcox v. Assurance Society, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857.

⁶Lahey v. Lahey, 174 N. Y. 146, 95 Am. St. Rep. 554, 61 L. R. A. 791, 66 N. E. 670. (An action between the

former beneficiary and the new beneficiary.)

⁷Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 65 Am. St. Rep. 83, 72 N. W. 45.

⁸Newport v. Bridge Co., 90 Ky. 193, 8 L. R. A. 484, 13 S. W. 720.

⁹Knottsville Roller Mill Co. v. Mattingly (Ky.), 35 S. W. 1114.

one state, by a mining corporation, is not performed substantially by the formation of a corporation under the laws of another state.¹⁰ A contract by a warehouse company, to keep cotton of a bailee insured in his name, is not substantially performed by keeping all the cotton in the warehouse, including that of the bailee, insured by a policy taken out in the name of the warehouseman.¹¹ A contract to obtain an assignment of a note on deposit as collateral security for one debt, as further security for another, is not performed substantially where an assignment is made, valid as between parties but invalid as to attaching creditors.¹² A contract to bring suit to contest the legality of certain charges is not substantially performed where such suit is brought, but is dismissed before final judgment without the consent of the promisee.¹³ It has been held that if A agrees to support B for life on condition that B remains sober, in consideration of which B conveys certain property to A, such contract is not performed substantially if B at once resumes his habits of drunkenness which were well known to A, and A treats such contract as discharged by reason of the breach of such condition.¹⁴ If A conveys land to B in consideration of B's promise to give to A a home for life, and B immediately treats A with harshness and frightens him, and if B then removes from the house, leaving A alone, A may have rescission of such conveyance, although B invites A to go with him to the house to which A removes.¹⁵ A contract of fidelity insurance which provides that the accounts of the employe shall be examined and verified by his employer, at certain intervals, is not performed substantially if the employer relies upon the amount shown by his deposit book as the amount which he has on deposit.¹⁶

§ 2799. Contracts to be performed in the alternative. If one of the parties to a contract promises to do one of two or more specified things, and the contract contains no provision either in express terms or by fair implication as to which party has the right to determine which of such things shall be performed, the

¹⁰ *Olympia Mining Co. v. Kerns*, 13 Ida. 514, 91 Pac. 92.

¹¹ *Henderson Warehouse Co. v. Brand*, 105 Ga. 217, 31 S. E. 551.

¹² *First National Bank v. Park*, 117 Ia. 552, 91 N. W. 826.

¹³ *P. Dougherty Co. v. Gring*, 89 Md. 535, 43 Atl. 912.

¹⁴ *Roudebush v. Gannon*, 92 Wash. 508, 159 Pac. 680.

¹⁵ *Tysor v. Adams*, 116 Va. 230, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

¹⁶ *United States Fidelity & Guaranty Co. v. Downey*, 38 Colo. 414, 120 Am. St. Rep. 128, 10 L. R. A. (N.S.) 323, 88 Pac. 451.

right of election is in the promisor up to the time of the breach.¹ After the time for performing the contract has passed, the promisor loses the right of election,² and such right of election passes over to the promisee.³ Where a vendor agrees to deliver goods at one of three places by a certain time, he must exercise his option of delivering at the place of his choice before such time, or he loses the right of election.⁴ If A has the right to discharge his obligation to B within a certain time by conveying certain property or paying a certain sum of money and A does neither, B acquires the right of election.⁵ The notice of election must be sufficiently definite and certain to apprise the adversary party of the choice which has been made.⁶ If an election under a covenant reserving to the promisor the right to perform in the alternative has once been made, such election is final.⁷

The contract may, however, provide either in express terms or by fair implication that the promisee is to have the choice of determining which of the different things is to be done.⁸

§ 2800. Covenant prescribing duty in case of default. If a contract provides that in case of default the promisor shall take certain specified steps to remedy such default, the question frequently arises whether such provision precludes the promisee from bringing an action to recover damages for breach of such cove-

¹ California. *Dittrich v. Gobey*, 110 Cal. 599, 51 Pac. 962.

Massachusetts. *Mill Dam Foundry v. Hovey*, 38 Mass. (21 Pick.) 417.

New York. *Smith v. Sanborn*, 11 Johns. (N. Y.) 59.

Oklahoma. *Kramer v. Ewing*, 10 Okla. 357, 61 Pac. 1064.

Pennsylvania. *McMillan v. Philadelphia Co.*, 169 Pa. St. 142, 28 Atl. 220.

Utah. *Duke v. Griffith*, 13 Utah 361, 45 Pac. 276.

Vermont. *Patchin v. Swift*, 21 Vt. 202.

Wisconsin. *Dessert v. Scott*, 58 Wis. 390, 17 N. W. 14.

² *Mueller v. Pels*, 192 Ill. 76, 61 N. E. 472 [affirming, 94 Ill. App. 353]; *Fitzhugh v. Harrison*, 75 Minn. 481, 78

N. W. 95; *Kramer v. Ewing*, 10 Okla. 357, 61 Pac. 1064.

³ *Norris v. Harris*, 15 Cal. 226; *Patchin v. Smith*, 21 Vt. 202.

⁴ *Mueller v. Pels*, 192 Ill. 76, 61 N. E. 472 [affirming, 94 Ill. App. 353].

⁵ *Phillips v. Cornelius* (Miss.), 28 So. 871.

⁶ *German Ins. Co. v. Hazard Bank*, 126 Ky. 730, 104 S. W. 725.

⁷ *Twaiats v. Pennsylvania Ry.*, 77 N. J. Eq. 103, 75 Atl. 1010.

⁸ *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446; *Detwiler v. Downes*, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422; *Sanford v. Brown Brothers Co.*, 208 N. Y. 90, 50 L. R. A. (N.S.) 778, 101 N. E. 797; *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L. R. A. 1915B, 1216, 141 Pac. 6.

nant. This question is, however, one of construction. In cases of this sort, the parties have inserted express provisions in the contract as to the effect of the breach.¹ If such provision is intended by the parties to be exclusive, the promisee has no right of action for breach of such covenant, and his only right is to demand performance of the alternative covenant on the part of the promisor.² A contract for the sale of a machine may be so drawn that the sole liability of the vendor in case of defects is to remedy such defects by furnishing new parts.³ If A warrants a horse to B, but provides that in case the horse does not comply with the terms of the warranty B may return such horse to A within a specified time, B's sole remedy, if no fraud is shown, is to return such horse within such specified time.⁴

If there is an absolute warranty or an unconditional covenant on the part of the promisor, there is a strong tendency on the part of the courts to hold that the provisions for remedying defects is merely cumulative, and that in such cases the promisee may demand such action on the part of the promisor or may maintain an action for damages for breach of the covenant at his election.⁵ If a machine or appliance is sold under an express warranty, a covenant on the part of the seller to replace defective parts at his own expense, is generally regarded as merely cumulative and as giving to the buyer the election between such remedy and an action for damages.⁶ If machinery is sold under a warranty that it

¹ See §§ 2578 et seq.

² *Crouch v. Leake*, 108 Ark. 322, 50 L. R. A. (N.S.) 774, 157 S. W. 390; *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445, 42 S. E. 778; *Westbrook v. Reeves*, 133 Ia. 655, 111 N. W. 11.

³ *McCormick Harvesting Co. v. Allison*, 116 Ga. 445, 42 S. E. 778; *Westbrook v. Reeves*, 133 Ia. 655, 111 N. W. 11.

⁴ *Crouch v. Leake*, 108 Ark. 322, 50 L. R. A. (N.S.) 774, 157 S. W. 390.

⁵ *Massachusetts. C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446.

Minnesota. Detwiler v. Downes, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422.

New York. Sanford v. Brown Brothers Co., 208 N. Y. 90, 50 L. R. A. (N.S.) 778, 101 N. E. 797.

Oklahoma. Obenchain v. Roff, 29 Okla. 211, 116 Pac. 782; *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L. R. A. 1915B, 1216, 141 Pac. 6.

Wisconsin. Parry Manufacturing Co. v. Tobin, 106 Wis. 286, 82 N. W. 154; *Hammond v. Sandwich Mfg. Co.*, 146 Wis. 485, 131 N. W. 1097.

⁶ *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446; *Detwiler v. Downes*, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422; *Obenchain v. Roff*, 29 Okla. 211, 116 Pac. 782; *Parry Manufacturing Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154; *Hammond v. Sandwich Mfg. Co.*, 146 Wis. 485, 131 N. W. 1097.

should be of good material and capable of doing good work, and certain parts of such machinery are found not to be of the material required by the terms of such contract, the promise of the vendors to supply suitable parts, together with their act in sending parts which they claim to be suitable, prevents them from claiming that the sole right of the purchaser was to return such machinery within the time specified by the contract.⁷ If a horse is sold for breeding purposes under a warranty, a covenant on the part of the seller to replace such horse with another in case of breach of such warranty, is not exclusive; and the purchaser has the election between returning the horse and bringing an action for damages.⁸ If a contract for the sale of fruit trees provides that the seller will replace any trees which are not the kind specified in the contract or return the purchase price thereof, such provision does not prevent the buyer from recovering damages for loss and expense in case such trees are not of the kind specified.⁹

§ 2801. Effect of performance. Performance by one party has three results:

(1) It discharges the party who has thus performed from further liability under the contract.¹

(2) Performance gives to the party who has performed, the right to enforce the contract against the adversary party if the latter does not perform when performance from him is due.²

(3) If the contract has not already been broken by the adversary party so as to discharge it, the party performing may perform without the consent or acquiescence therein of such adversary party.³

In discussing the nature of performance, the question of its effect has been involved necessarily, and a detailed discussion thereof would merely be a repetition of the questions which have been considered already.⁴ Failure to perform, on the other hand,

⁷ *Detwiler v. Downes*, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422.

⁸ *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L. R. A. 1915B, 1216, 141 Pac. 6.

⁹ *Sanford v. Brown Brothers Co.*, 208 N. Y. 90, 50 L. R. A. (N.S.) 778, 101 N. E. 797.

¹ *Gottlieb v. Rinaldo*, 78 Ark. 123, 6 L. R. A. (N.S.) 273, 93 S. W. 750; *McGuire v. J. Neils Lumber Co.*, 97

Minn. 293, 107 N. W. 130; *Adams v. Tri-City Amusement Co.*, — Va. —, 98 S. E. 647; *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 55 L. R. A. 182, 86 N. W. 176.

² *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130. See ch. LXXXIV.

³ *Central Coal & Coke Co. v. Good*, 120 Fed. 793.

⁴ See §§ 2772 et seq.

amounts to breach, unless the contract has been discharged by some of the means, other than performance or breach, by which a contract may be discharged;⁵ and the nature and effect of breach is considered elsewhere.⁶

The distinction which our law draws between covenants for the payment of money only and other covenants is so marked for some purposes that it is necessary to treat payment as a subject separate and apart from performance in general.⁷

Attempted performance by one party, which is prevented from being complete performance by the refusal of the adversary party to accept it, has some of the consequences of performance, on the one side, and some of the consequences of breach on the other. It is accordingly treated separately under the heading of tender.⁸

⁵ See chs. LXXV to LXXIX and ch. LXXXV.

⁶ See ch. LXXXIV.

⁷ See ch. LXXXI.

⁸ See ch. LXXXIII.

CHAPTER LXXXI

PAYMENT

- § 2802. Nature of payment.
- § 2803. Method of payment—In general.
- § 2804. Delivery of money.
- § 2805. Medium of payment in absence of specific agreement.
- § 2806. Medium of payment—Specific agreement excluding certain kinds of money.
- § 2807. Payment in something other than money—Effect of express agreement in advance.
- § 2808. Contracts payable in something other than money—No valuation in money.
- § 2809. Valuation in money as means of fixing quantity.
- § 2810. Valuation in money as giving election as to medium of payment.
- § 2811. Payment of money debt in something other than money—Express agreement.
- § 2812. Presumption as to effect of assignment of non-negotiable right.
- § 2813. Presumption as to transfer of negotiable instrument—Absolute payment not presumed—Notes.
- § 2814. Absolute payment not presumed—Drafts, cashier's checks, etc.
- § 2815. Absolute payment not presumed—Checks.
- § 2816. Absolute payment presumed.
- § 2817. Payment in Confederate money or money of foreign country.
- § 2818. Payment in genuine but worthless bank-notes.
- § 2819. Payment in counterfeit money.
- § 2820. By whom payment may be made—Payment by debtor.
- § 2821. Payment by stranger to contract.
- § 2822. To whom payment may be made—Payment to creditor.
- § 2823. Payment to agent of creditor.
- § 2824. Place of payment.
- § 2825. Time of payment.
- § 2826. Payment by mail.
- § 2827. Effect of payment—Judgments.
- § 2828. Effect of payment—Obligations under seal.
- § 2829. Effect of payment—Simple debts.

§ 2802. Nature of payment. In the narrower sense of the term, "payment" is used of the performance of contracts which by their terms are to be performed by delivering money.¹ In this

¹The Anglo-American law, largely because of the influence of the law merchant, has made a sharp distinction for many purposes between contracts which by their terms provide for performance by delivering money and

sense, payment in contract law is that form of performance which consists in the delivery by the promisor and receipt by the promisee of money or something delivered and accepted as the equivalent thereof in discharge of a contractual obligation.² Payment is said to be "the discharge in money or its equivalent of an obligation or debt owing by one person to another."³ "Payment" is a term, however, which is used in a number of different meanings. In one sense it is restricted to the discharge of a debt; but it is also extended to include anything of value which the creditor accepts from the debtor as satisfaction.⁴

In the more restricted sense of the term, payment is limited to cases of performance of original obligation; and it is distinguished from cases of discharge by mutual agreement, such as by accord and satisfaction.⁵ Settlement of a debt has been said to be practically synonymous with payment,⁶ but this statement was made for the purpose of showing the necessity of pleading such definition especially as new matter, rather than for the purpose of comparing payment with accord and satisfaction. In the restrictive sense of the term, payment is so limited to performance of a contract for the payment of money that it can not be properly used for the satisfaction of an unliquidated claim by the payment of money.⁷

those which by their terms provide for any other kind of performance. As a result of this distinction, the performance of contracts for the payment of money is regarded as in some respects different from the performance of other contracts.

² *Bronson v. Rodes*, 74 U. S. (7 Wall.) 229, 19 L. ed. 141; *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538; *State v. Scarlett*, 91 N. J. L. 200, 2 A. L. R. 83, 102 Atl. 160.

"Payment" is generally understood as a discharge of the debt or obligation by a compliance with the terms of the obligation, and, if the obligation calls for a money discharge, then there can not be payment except by paying the full amount called for in money, or the representative of money." *Continental Gin Co. v. Arnold*, 52 Okla. 569, 153 Pac. 160.

³ *Morris v. Reyman* (Ind. App.), 103 N. E. 423.

See also, *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538.

⁴ "In its broader sense the word 'payment' includes money or anything else of value which the creditor accepts in satisfaction of his debt." *Roach v. McDonald*, 187 Ala. 64, 65 So. 823.

⁵ "The word 'payment'—which ordinarily conveys the idea of a money transaction—in its restricted sense means 'full satisfaction paid by money, not by exchange or compromise or an accord and satisfaction.'" *Roach v. McDonald*, 187 Ala. 64, 65 So. 823.

⁶ *Roniger v. McIntosh*, 91 Kan. 368, 137 Pac. 792.

⁷ "Payment is a mode of extinguishing a debt, and a plea of payment is not an appropriate answer to an unliquidated demand in tort such as was

Payment imports performance and does not apply to the breach of a condition which discharges the contract and makes performance unnecessary.⁸ Since payment is the discharge of an obligation for the payment of money by the performance thereof, it must be distinguished from assignment, by which the obligation is kept alive, but is transferred by the creditor to another person.⁹

Since payment is a form of performance,¹⁰ an executory agreement fixing the manner or medium of payment which is not itself performed does not amount to payment,¹¹ unless the parties have expressly agreed to accept such promise as payment, as distinguished from performance.¹² The execution and delivery of a renewal note is not payment of usury.¹³ If an executory contract to make payment by performing personal services is discharged by the death of the creditor before performance, the services which have been actually rendered have been treated as part payment.¹⁴

§ 2803. Method of payment—In general. If the contract prescribes the method of payment, such method must be followed, at least substantially, unless it is waived by the parties.¹ If the contract provides for making payment of a penalty by deducting from the last instalment due to the contractor, such penalty can not be enforced if such last payment is never made.² If by the terms of

claimed in the complaint. There was no error in sustaining the demurrer to these pleas." *Western Ry. v. Foshee*, 183 Ala. 182, 62 So. 500.

⁸ "The performance of a condition upon which, alone, the obligation of a promise to pay a certain sum on or by a certain day may be hinged, is not the legal equivalent of the 'payment' prescribed in the cited statute." *Ramsey v. Sibert*, 102 Ala. 176, 68 So. 349.

⁹ "Payment of the note means a discharge of the liability. A sale of a note implies a contract, and a sale can not occur without a contract between the parties—the owner of the note and the one desiring to purchase it." *Miller v. Del Rio Min. & Mill. Co.*, 25 Ida. 83, 136 Pac. 448.

¹⁰ See ch. LXXX.

¹¹ *Hayes v. Allen*, 160 Mass. 286, 39

Am. St. Rep. 474, 35 N. E. 852; *Coy v. DeWitt*, 19 Mo. 322.

¹² See §§ 2811 et seq.

¹³ *Driesbach v. National Bank*, 104 U. S. 52, 26 L. ed. 658; *Brown v. Marion National Bank*, 169 U. S. 416, 42 L. ed. 801; *First National Bank v. Lassater*, 196 U. S. 115, 49 L. ed. 408; *Rushing v. Bivens*, 132 N. Car. 273, 43 S. E. 798; *Anderson v. Tatro*, 44 Okla. 219, 144 Pac. 360.

¹⁴ *Patrick v. Petty*, 83 Ala. 420, 3 So. 779.

¹ *Bell v. Southern Home Bldg. & Loan Assn.*, 140 Ala. 371, 103 Am. St. Rep. 41, 37 So. 237; *Campbell v. Cove Ranch Land & Livestock Co.*, 28 Ida. 445, 155 Pac. 662; *Swift v. New York*, 83 N. Y. 528; *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006.

² *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

the contract between the principal and the agent, the agent is to be paid out of the last two instalments to be paid him by the adversary party, the agent has no claim against the principal unless such instalments are paid.³ If the contract between a building association and a borrowing member treats the amount borrowed as a separate debt from the subscription for the stock, payment upon the stock can not be regarded as a payment of the debt, although by the terms of the contract the stock, when fully paid up, is to be applied in payment of the debt.⁴ A party can not be deprived of a right given to him by contract to make payments in a specific manner. A, the owner, agreed with B, the contractor, that A should have the right to pay direct to laborers and material-men and have such payments credited to his account with B. A can not be deprived of this right by proceedings in garnishment instituted by B's creditors.⁵ The original debtor can not, therefore, be compelled to pay such debt.⁶

§ 2804. Delivery of money. By the terms of the definition of payment,¹ delivery of money is an essential element of payment; and unless there is such delivery of money or its agreed equivalent, there can be no payment.² The fact that an order or check is stamped "Paid" is not sufficient to constitute payment unless money or its agreed equivalent has been delivered.³ The reservation of usury from a loan is accordingly not payment of usury,⁴ while a note may be payment of a pre-existing debt if so agreed.⁵

³ *Campbell v. Cove Ranch Land & Livestock Co.*, 28 Ida. 445, 155 Pac. 662.

⁴ *Bell v. Southern Home Bldg. & Loan Assn.*, 140 Ala. 371, 103 Am. St. Rep. 41, 37 So. 237.

⁵ *Drake v. Harrison*, 69 Wis. 99, 2 Am. St. Rep. 717, 33 N. W. 81.

⁶ *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456; *Gray v. Herman*, 75 Wis. 453, 6 L. R. A. 691, 44 N. W. 248.

¹ See § 2802.

² *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523; *Holtz v. Peterson*, 98 Ia. 741, 62 N. W. 19; *Hanna v. McCrory*, 19 N. M. 183, 141 Pac. 996; *Baker v. Lynchburg National Bank*, 120 Va. 208, 91 S. E. 157.

³ "As to the first proposition, it must be apparent that the mere stamping of the word 'paid' on said orders or checks in and of itself amounted to nothing, and did not constitute payment. The payment could only be made by delivery of the actual cash, or an adjustment of accounts by agreement of the parties, so that the bank would be obligated to the holders of the checks." *Hanna v. McCrory*, 19 N. M. 183, 141 Pac. 996.

⁴ *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523; *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

⁵ See §§ 2811 et seq.

A set-off or counterclaim does not amount to payment, since there has been no delivery of money by the debtor to the creditor.⁶ An additional reason for holding that a set-off or counterclaim is not payment is that the parties did not intend that it should be payment when the transaction out of which the set-off or counterclaim arises was entered into.⁷

Since payment may be made to anyone whom the creditor designates to receive payment,⁸ and since the creditor may accept in payment whatever is agreed upon between himself and the debtor,⁹ the physical possession of money by the creditor is not an essential element of payment.¹⁰ If the creditor presents a check or note at the bank on which it is drawn, and expressly or impliedly authorizes such bank to receive payment on his behalf, such obligation is paid if the bank charges the amount against the debtor and credits it to the creditor, although the creditor may never in fact receive the payment.¹¹

§ 2805. Medium of payment in absence of specific agreement. Payment is presumed to be made in money unless an intent to the contrary is shown.¹ In the absence of some specific agreement between the parties, a contract for the payment of money may be

⁶ *St. Louis & Tennessee River Packet Co. v. McPeters*, 124 Ala. 451, 27 So. 518; *Commercial Bank v. Toklas*, 21 Wash. 36, 56 Pac. 927.

⁷ See §§ 2805 et seq.

⁸ See § 2822.

⁹ See §§ 2806 et seq.

¹⁰ *American National Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1310; *Peaslee-Gaulbert Co. v. Dixon*, 172 N. Car. 411, 90 S. E. 421.

¹¹ *United States. American National Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1310.

Georgia. *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47.

Iowa. *Harrison v. Legore*, 109 Ia. 618, 80 N. W. 670.

Minnesota. *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213.

New York. *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160.

North Carolina. *Peaslee-Gaulbert Co. v. Dixon*, 172 N. Car. 411, 90 S. E. 421.

North Dakota. *Schafer v. Olson*, 24 N. D. 542, 43 L. R. A. (N.S.) 762, 139 N. W. 983.

Tennessee. *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; *Sayles v. Cox*, 95 Tenn. 579, 32 L. R. A. 715, 49 Am. St. Rep. 940, 32 S. W. 626.

"There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting the transaction is closed and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *National Bank v. Burkhardt*, 100 U. S. 686, 689." *American National Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1310.

¹ *National Sewer Pipe Co. v. Smith-Jaycox Lumber Co.*, 183 Ia. 17, 166 N. W. 708; *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429, 55 Atl. 236.

discharged by the payment of any money which by law is legal tender.² The fact that money which by law is legal tender is worn, does not prevent it from being legal tender as long as it is not mutilated.³ At the same time, payment even in legal tender must be made in a reasonable manner.⁴ The act of a bank in redeeming its bills one at a time in dimes and half-dimes, so as to make an unreasonable delay, is a refusal to pay.⁵

The act of a public utilities commission in requiring a certain number of tickets to be sold for a certain price, in order to secure a lower rate of fare than would be charged if a single cash fare were paid, is not an attempt to make anything other than money of the United States legal tender.⁶

§ 2806. Medium of payment—Specific agreement excluding certain kinds of money. The parties to a contract may by express agreement limit the medium of payment so as to exclude certain kinds of money which by law are legal tender.¹ This is the result reached by the supreme court of the United States and followed by the state courts, although in earlier cases the opposite view was reached on the assumption that statutes which made certain forms of money legal tender were intended to protect the public interest, and that they could not accordingly be set aside even by the consent of the creditor.²

§ 2807. Payment in something other than money—Effect of express agreement in advance. If the creditor has not agreed to accept something other than money in payment of an obligation which by its terms is to be performed by the payment of money,

² *Knox v. Lee*, 79 U. S. (12 Wall.) 457, 20 L. ed. 287; *Cincinnati Northern Traction Co. v. Rosnagle*, 84 O. S. 310, 35 L. R. A. (N.S.) 1030, 95 N. E. 884; *Miller v. Lacy*, 33 Tex. 351.

³ *Mobile St. Ry. v. Watters*, 135 Ala. 227, 33 So. 42; *Cincinnati Northern Traction Co. v. Rosnagle*, 84 O. S. 310, 35 L. R. A. (N.S.) 1030, 95 N. E. 884.

⁴ *Reaper's Bank v. Willard*, 24 Ill. 440.

⁵ *Reaper's Bank v. Willard*, 24 Ill. 440.

⁶ *Fall River v. Public Service Commission*, — Mass. —, 122 N. E. 406.

¹ *Bronson v. Rodes*, 74 U. S. (7 Wall.) 229, 19 L. ed. 141; *Butler v. Horwitz*, 74 U. S. (7 Wall.) 258, 19 L. ed. 149; *Trebilcock v. Wilson*, 79 U. S. (12 Wall.) 687, 20 L. ed. 460; *Phillips v. Dugan*, 21 O. S. 466, 8 Am. Rep. 66; *Dennis v. Moses*, 18 Wash. 537, 40 L. R. A. 302, 52 Pac. 333.

See, *Can Contracts to Pay in Specific Coin (Gold) be Enforced?* by N. M. Thygeson, 30 *American Law Review*, 716.

² *Brown v. Welch*, 26 Ind. 116; *Shollenberger v. Brinton*, 52 Pa. St. 9; *Laughlin v. Harvey*, 52 Pa. St. 30.

he can not be compelled to accept anything but money in payment thereof.¹

While a creditor is not bound in the absence of specific agreement to accept anything but legal tender in payment of an obligation which by its terms is payable in money, he may agree to accept something other than legal tender in payment of a debt;² and if he makes a binding contract to accept such medium of payment, or if he actually accepts something other than legal tender in payment of a money debt, full effect is given to such payment.³ If the original contract provides for payment in something other than money, payment in the medium thus agreed upon is performance of the contract and is governed by the ordinary principles of performance. If, on the other hand, the contract originally provides for payment in money, and by subsequent agreement between the debtor and the creditor something other than money is accepted as performance of the contract, the transaction is rather the discharge of the original contract by a new contract,⁴ or by accord and satisfaction.⁵ A discharge of this sort is not a true case of performance or payment, since the thing which has been agreed upon has not been done; but, instead, something has been done which the parties by subsequent agreement substituted for the thing originally agreed upon.

By agreement between the debtor and the creditor, an obligation may be made payable in work and labor,⁶ or in property,⁷ such as land⁸ or water rights,⁹ or personal property,¹⁰ such as negotiable instruments.¹¹

¹ *National Sewer Pipe Co. v. Smith-Jaycox Lumber Co.*, 183 Ia. 17, 166 N. W. 708.

² *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538. See §§ 2808 et seq.

³ *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538; *Bernard v. Fisher*, — Ida. —, 177 Pac. 762.

⁴ See ch. LXXV.

⁵ See §§ 2501 et seq.

⁶ *Ross v. Crane*, 74 Ia. 375, 37 N. W. 950; *Allen v. Wall*, 7 Wash. 316, 35 Pac. 65.

For the distinction between a contract for payment in work and labor on the one hand and peonage on the

other, see *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726.

⁷ *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726; *Bassett v. Shepardson*, 52 Mich. 3, 17 N. W. 217; *Strong v. McConnell*, 10 Vt. 231.

⁸ *Hebard v. Reeves*, 112 Mich. 175, 70 N. W. 418.

⁹ *Bernard v. Fisher*, — Ida. —, 177 Pac. 762 (payment also to be made in part in mortgages).

¹⁰ *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538; *Bassett v. Shepardson*, 52 Mich. 3, 17 N. W. 217; *Strong v. McConnell*, 10 Vt. 231.

¹¹ *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538.

In a contract of indemnity insurance, a provision for "payment" by the insured as a basis for recovery against the insurer, includes a sale of the property of the insured on judicial process.¹²

§ 2808. Contracts payable in something other than money—No valuation in money. Special questions arise under contracts to pay in goods or in labor debts which are measured at a money value. The first question is whether, under such contracts, there is a right of election to perform such covenant or to pay money. If the contract is to deliver certain goods, or do certain work, for a consideration agreed upon, and no money value for such consideration is estimated, the debtor has no right of election.¹ A contract to pay a certain part of the crops received from realty leased, and a certain number of bushels of corn as rent for such realty, is a contract in which there is no right of election, and in case of breach the lessor is to recover the market value of such corn.² A contract to pay in two or more given kinds of articles, can not be performed by payment in articles of one kind alone.³

§ 2809. Valuation in money as means of fixing quantity. If the consideration is estimated at a money value and provision is made for payment of such consideration in goods at an estimated value, the rights of the parties depend upon the true meaning of such provision. The terms of the contract, together with the surrounding circumstances, may show that the parties have inserted such valuation in money and such valuation of goods as a means of

¹² "Stress is laid in the argument on the express provision of the policy that no action shall lie except for loss or expense 'actually sustained and paid in money,' but we think the payment in the sale of the property was equivalent to payment in money and fell within the terms of the policy. It is scarcely fair to construe the language to mean that it applied only to currency actually handed over and not to a bona fide payment made in other property. If that construction were put upon the policy it would be absolutely worthless to an assured who was unable to pay money and whose property would be subjected to sale,

and he would thus be deprived of the indemnity for which he had contracted. Such result should not be permitted to follow under the contract, unless the language admits of no other construction." *McBride v. Aetna Life Ins. Co.*, 126 Ark. 528, 191 S. W. 5.

¹ *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58; *Mason v. Warner*, 43 Mich. 439, 5 N. W. 429.

See also on contracts of this sort, *Reilly v. Reilly*, 135 Ia. 440, 110 N. W. 445.

² *Butler v. Baker*, 5 O. S. 584.

³ *Guthrie v. Wickliffe*, 6 Ky. (3 Bibb.) 81; *Bond v. Jackson*, 3 Tenn. (Cooke) 500.

determining the amount of goods to be delivered under the contract, and not for the purpose of giving to the debtor the election to pay in one or the other at his option. In cases of this sort, the debtor has no election and the contract is in legal effect a contract to deliver the quantity of goods which is thus prescribed by the contract.¹ Under a contract to excavate for a railroad for a certain sum, twenty-five per cent. of which is payable in the railroad's stock at par, does not create an election, and in case of breach, only seventy-five per cent. of the contract price, together with the market value of so much stock as at par would equal twenty-five per cent. of the contract price, can be recovered.² A contract for paying for land, the purchase price of which is estimated in money, in wheat at a certain price, is held to be a contract for delivering a specific amount of wheat if the contract requires the delivery of a certain amount annually, and furthermore provides expressly that the purchaser of the land may make additional payments, and that such payments shall be in wheat or in cash at the option of the vendor of the land.³

In cases of this sort, the creditor, in case of default on the part of the debtor, can recover only the market value of the goods which were to have been delivered by the terms of the contract; and he can not recover the money value at which the consideration was estimated.⁴ On the other hand, the debtor can not discharge his obligation by a payment in money, even if the condition of the market is such as to make it advantageous for him so to do; but he must deliver the goods which he has agreed to deliver or he must pay the actual value thereof.⁵ Under a contract of sale, the purchase price to be paid partly in interest-bearing notes, a tender of the face of the notes in cash is not sufficient.⁶

In an action upon a contract of this sort, it is therefore necessary to set up the special contract and the breach thereof; and in most jurisdictions it is not sufficient to resort to the common counts.⁷

¹ *Wilson v. George*, 10 N. H. 445; *Cleveland & Pittsburgh Ry. v. Kelley*, 5 O. S. 180; *Starr v. Light*, 22 Wis. 433, 99 Am. Dec. 55.

² *Cleveland & Pittsburgh Ry. v. Kelley*, 5 O. S. 180.

³ *Starr v. Light*, 22 Wis. 433, 99 Am. Dec. 55.

⁴ *O'Donaghue v. Jones*, 37 Mo. 371.

⁵ *Barbour v. Hickey*, 2 D. C. App. 207,

24 L. R. A. 763; *Morgan v. East*, 126 Ind. 42, 9 L. R. A. 558, 25 N. E. 867; *Williams v. Gilbert*, 6 Mart (La.) 553

⁶ Sale of land. *Barbour v. Hickey*, 2 D. C. App. 207, 24 L. R. A. 763.

Sale of cattle. *Morgan v. East*, 126 Ind. 42, 9 L. R. A. 558, 25 N. E. 867.

⁷ *Bank of England v. Glover*, 2 Ld Raym. 753; *Bromley v. Goff*, 75 Mich. 213, 42 N. W. 810; *Cook v. Dade*, 191

Even if the contract provides for paying an amount measured in money by delivering goods or performing services at a certain valuation, a minority of the courts treat such contract as merely one to deliver chattels, on the theory that the valuation of the consideration in money is introduced simply for determining the amount of the chattels which the debtor is to deliver.⁸ Where this view prevails the debtor has no election before breach to pay in money,⁹ and after breach the creditor can not recover the valuation of the consideration as estimated in money.¹⁰ His right of recovery is restricted to damages for non-delivery of the articles agreed to be delivered. Thus in a note "payable in Levee Bonds of Arkansas" at par, the word "payable" means "to be paid," and not "which may be paid." Hence, after the note is due only the value of the bonds can be recovered.¹¹ So he can recover the market value of the chattels of greater than the estimated amount in money.¹² At common law, where this theory prevails, recovery must be had on the special contract, and can not be had on the common counts.¹³ On rescission of a contract under which A has delivered horses to B at an agreed valuation in payment for land, B, having sold the horses, must account for them at the market price and not at the agreed valuation.¹⁴ Under a contract to accept a certain number of shares of stock in a given corporation in payment of a note, such payment must be made in stock as existing at the time of such contract. Tender of the specified number of shares after the stock has been greatly inflated is not sufficient.¹⁵ A note payable in trucking in monthly payments due twenty-four months after date requires trucking to be done each month.¹⁶

Mich. 561, 158 N. W. 175; *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651; *Bradley v. Levy*, 5 Wis. 400.

⁸ *Mattox v. Craig*, 5 Ky. (2 Bibb.) 584. (A contract for eighty-nine dollars "to be discharged" in brick at four dollars a thousand.)

For the view of the majority of the courts, see § 2810.

⁹ *Cole v. Ross*, 48 Ky. (9 B. Mon.) 393, 50 Am. Dec. 517. (A contract for over three thousand dollars payable in pig metal at twenty-nine dollars per ton.)

¹⁰ *Wilson v. George*, 10 N. H. 445.

¹¹ *Johnson v. Dooley*, 65 Ark. 71, 40 L. R. A. 74, 44 S. W. 1032.

¹² *McDonald v. Hodge*, 8 Tenn. (5 Hay) 85. (A contract to pay a certain sum "in potash at the price of five dollars per hundred.")

¹³ A certain amount payable in work. *Wilson v. George*, 10 N. H. 445.

A certain amount payable in goods. *Chickering v. Greenleaf*, 6 N. H. 51.

¹⁴ *Clover v. Gottlieb*, 50 La. Ann. 568, 23 So. 459.

¹⁵ *Tranter v. Hibberd*, 108 Ky. 265, 56 S. W. 169.

¹⁶ *Hobbs v. Moore*, 86 Me. 517, 30 Atl. 110.

§ 2810. Valuation in money as giving election as to medium of payment. If the primary object of the parties is to secure the payment of a debt, the amount of which is measured by money, and the provision for payment in work or articles at a specified valuation is inserted as an alternative method of payment, the debtor has the election of paying in money or such other medium of payment up to the time which is fixed by the contract for payment,¹ if the contract does not show either by express terms or by fair implication that the right of election is given to the creditor. Under such a contract, and before breach, the creditor can not elect to receive payment in money.² A contract to pay debts, estimated in money, by means of a certain amount of lumber to be delivered, one half during each of two years, no place of delivery being specified, gives the debtor the election to pay in lumber, and the creditor can not demand payment in money until he has made demand for the lumber, which has been refused.³ Under a contract to pay in bonds,⁴ or in lime,⁵ the creditor can not enforce payment in money before breach.

Before breach a contract to pay a certain debt in work can not give to the creditor a right of action to recover money. Thus a

¹ *Alabama.* *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305.

Georgia. *Sims v. Cox*, 40 Ga. 76, 2 Am. Rep. 560.

Illinois. *Owen v. Barnum*, 7 Ill. 461.

Indiana. *Leiter v. Emmons*, 20 Ind. App. 22, 50 N. E. 40.

Maine. *Strout v. Joy*, 108 Me. 267, 80 Atl. 830.

North Carolina. *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302.

South Carolina. *Choice v. Moseley*, 1 Bail. L. (S. Car.) 136, 19 Am. Dec. 661.

² *Alabama.* *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305.

Arkansas. *Bradley v. Farrington*, 4 Ark. 532.

Colorado. *Widner v. Walsh*, 3 Colo. 548.

Indiana. *Farmers' Loan & Trust Co. v. Canada & St. Louis Ry.*, 127 Ind. 250, 11 L. R. A. 740, 26 N. E. 784;

Leiter v. Emmons, 20 Ind. App. 22, 50 N. E. 40.

Maine. *American Gas & Ventilating Machine Co. v. Wood*, 90 Me. 516, 43 L. R. A. 449, 38 Atl. 548.

Minnesota. *Beede v. Proehl*, 34 Minn. 407, 27 N. W. 191.

Missouri. *State v. Mooney*, 65 Mo. 494.

Pennsylvania. *Pierce v. Marple*, 148 Pa. St. 69, 33 Am. St. Rep. 808, 23 Atl. 1008.

Wisconsin. *Drake v. Harrison*, 69 Wis. 99, 2 Am. St. Rep. 717, 33 N. W. 81.

For the minority view, see § 2809.

³ *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305.

⁴ *Farmers' Loan & Trust Co. v. Canada & St. Louis Ry.*, 127 Ind. 250, 11 L. R. A. 740, 26 N. E. 784.

⁵ *Pierce v. Marple*, 148 Pa. St. 69, 33 Am. St. Rep. 808, 23 Atl. 1008.

contract to pay a debt by grinding corn,⁶ or by sawing lumber,⁷ can not be collected in money where the payee refuses to furnish corn or lumber for such purpose.

Before the debt is due, the debtor may elect to pay in money. Thus a contract to deliver a certain amount of cotton at a certain price per pound, may be discharged by paying the amount of money obtained by multiplying this price by the number of pounds to be delivered.⁸ Under a contract to pay fifteen hundred dollars in wool at twenty cents a pound, the payor may pay the money at his election.⁹

If the contract is broken, the debtor loses his right to elect, and the creditor may enforce payment in money.¹⁰ After breach, the creditor may enforce payment in money under a contract to pay a certain sum in land,¹¹ or in merchandise.¹² A bought a bicycle of B, and subsequently, by agreement, returned it, and took from B a receipt for sixty dollars to apply on any new wheel which A should select from B's stock. Subsequently, A selected a wheel for which B refused to honor the receipt as a part payment. A then had a right to recover such amount of money.¹³ A agreed to pay for a certain amount of advertising, by allowing the price thereof as a credit upon any steam launch to be selected from such stock. The holder of the order which A gave for such price transferred it to X. X then bought the launch from A at a price estimated on a

⁶ *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302.

⁷ *Nipp v. Diskey*, 81 Ind. 214, 42 Am. Rep. 124.

⁸ *Sims v. Cox*, 40 Ga. 76, 2 Am. Rep. 560.

⁹ *Trowbridge v. Holcomb*, 4 O. S. 33.

¹⁰ *United States. McGillin v. Bennett*, 132 U. S. 445, 33 L. ed. 422; *Guss v. Nelson*, 200 U. S. 208, 50 L. ed. 489.

Colorado. Hannan v. Anderson, 15 Colo. App. 433, 62 Pac. 961.

Connecticut. Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154.

Indiana. Farmers' Loan & Trust Co. v. Canada & St. Louis Ry., 127 Ind. 250, 11 L. R. A. 740, 26 N. E. 784.

Iowa. Wroughton v. Waffle, 122 Ia. 486, 98 N. W. 307.

Kentucky. Guthrie v. Wickliffe, 6 Ky. (3 Bibb.) 81.

Maine. Wyman v. Winslow, 11 Me. 398, 26 Am. Dec. 542.

Michigan. Crowl v. Goodenberger, 112 Mich. 683, 71 N. W. 485.

New York. New York News Publishing Co. v. National Steamship Co., 148 N. Y. 30, 42 N. E. 514; *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425.

Utah. Haskins v. Dern, 19 Utah 89, 56 Pac. 953.

Vermont. Smith v. Coolidge, 68 Vt. 516, 54 Am. St. Rep. 902, 35 Atl. 432.

West Virginia. Womack v. Agee, 79 W. Va. 22, 90 S. E. 792.

¹¹ *McGillin v. Bennett*, 132 U. S. 445, 33 L. ed. 422.

¹² *Anderson v. Mason*, 36 Ky. (6 Dana) 217.

¹³ *Hannan v. Anderson*, 15 Colo. App. 433, 62 Pac. 961.

cash basis. When X offered the order in part payment, A refused to honor it. It was held that X could recover the amount of such order in money.¹⁴ A debt payable in confectionery becomes payable in money where an order for confectionery is not filled.¹⁵ A took a note from B, for value, payable one half in coin or cotton at twenty cents a pound, at the maker's option; and one half in coin or cotton at twenty cents a pound, at the payee's option. After the note fell due it was held that the creditor may recover the entire amount thereof in coin.¹⁶ A contract specifically giving a party the option to deliver a certain amount in bonds of a corporation to be organized, or of paying the amount in money, such option to be exercised by a certain date, must be performed by delivering the bonds by such date, or else the creditor will have the right to enforce payment in money. Accordingly, delivery of an order upon the treasurer of the company for certain bonds, is not performance where the corporation has not yet issued bonds, and the capital actually invested in the corporate business is very small.¹⁷ If an option given in a railroad bond, whereby the railroad may pay scrip for the interest on July 1st of each year, is not taken advantage of by that date, the creditor may enforce payment of the interest in money.¹⁸ If a note for one hundred bushels of corn containing a provision, "this corn is estimated at twenty dollars," is not paid at maturity, the creditor may recover twenty dollars, though corn is then worth only fifteen cents a bushel.¹⁹ On breach of a contract to pay a certain amount of money in labor or stock, the payee can on breach recover the amount of money specified.²⁰ B sold a printing outfit to A, agreeing to take payment in printing. A sold the outfit to a third person and refused to do the printing. It was held that B could recover the purchase price.²¹ If the creditor has a right, by reason of a breach of the contract, to demand payment in money, his act in subsequently accepting payment of part of the indebtedness in goods does not waive his right to enforce payment of the rest in money.²²

¹⁴ *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425.

¹⁵ *Smith v. Coolidge*, 68 Vt. 516, 54 Am. St. Rep. 902, 35 Atl. 432.

¹⁶ *Russell v. McCormick*, 45 Ala. 587, 6 Am. Rep. 707.

¹⁷ *Barrett v. Twin City Power Co.*, 118 Fed. 861.

So under a contract to pay money

or return stock. *Patent Tile Co. v. Stratton*, 89 Fed. 174.

¹⁸ *Texas & Pacific Ry. v. Marlor*, 123 U. S. 687, 31 L. ed. 303.

¹⁹ *Hise v. Foster*, 17 Ia. 23.

²⁰ *Sperry v. Johnson*, 11 Ohio 452.

²¹ *Wroughton v. Waffle*, 122 Ia. 496, 98 N. W. 307.

²² *Smith v. Coolidge*, 68 Vt. 516, 54 Am. St. Rep. 902, 35 Atl. 432.

§ 2811. Payment of money debt in something other than money—Express agreement. If something other than money is delivered by the debtor to the creditor it is possible that it may be delivered as absolute payment, or as collateral security, or as conditional payment. If there is an agreement that it is taken as payment, it has such effect.¹ By express agreement between the parties a note may be taken as payment of an obligation;² and by such agreement the note of a third person may be accepted as payment.³ If a note of the maker is taken as payment by agreement between the debtor and the creditor, the effect of such payment is not altered by the fact that the note is made payable to the maker's order and that it is not endorsed by the maker to the creditor, so that it is not negotiable.⁴ By agreement between the parties a draft or order,⁵

¹ **United States.** *A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co.*, 173 Fed. 855, 35 L. R. A. (N.S.) 1.

Colorado. *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538.

Indiana. *Roberts v. Vonnegut*, 58 Ind. App. 142, 104 N. E. 321.

Iowa. *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Ia. 223, 45 L. R. A. (N.S.) 743, 138 N. W. 459.

Oklahoma. *Mutual Life Ins. Co. v. Chattanooga Sav. Bank*, 47 Okla. 748, L. R. A. 1916A, 669, 150 Pac. 190.

West Virginia. *Garrett v. Patton*, 81 W. Va. 771, 95 S. E. 437.

"It may also be mentioned in this connection that while payment ordinarily means in money and he to whom it is due may insist that nothing else is payment, yet 'the payment of a debt need not necessarily be in money, but anything of value which the parties agree shall be accepted or go in payment of a debt will be treated accordingly. Thus it is that a check or the note of a third person will, when so expressly agreed, be treated as payment or satisfaction of a debt.'" *McCormick v. Obanion*, 168 Mo. App. 606, 153 S. W. 267.

Railroad bonds may be taken as payment. *Reynolds v. Ry.*, 143 Ind. 579, 40 N. E. 410

County warrants and promissory

notes may be taken as payment. *Pase-walk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

² **United States.** *Sheehy v. Mandeville*, 10 U. S. (6 Cranch) 253, 3 L. ed. 215.

Colorado. *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538.

Idaho. *Fidelity State Bank v. Miller*, 20 Ida. 777, 162 Pac. 244.

Iowa. *Dille v. White*, 132 Ia. 327, 109 N. W. 909.

New York. *Meyer v. Lathrop*, 73 N. Y. 315.

Ohio. *Athens First National Bank v. Greene*, 40 O. S. 431.

South Dakota. *Grissel v. Woonsocket Bank*, 12 S. D. 93, 80 N. W. 161.

West Virginia. *Plumley v. First Nat. Bank*, 16 W. Va. 635, 87 S. E. 94.

³ *Bartholomew v. Emerson-Brantingham Implement Co.*, — Colo. —, 187 Pac. 538; *Burlington Gaslight Co. v. Greene*, 22 Ia. 508; *Grubbe v. Pierce*, 156 Wis. 29, 145 N. W. 207.

Note of one of joint debtors. *Sheehy v. Mandeville*, 10 U. S. (6 Cranch) 253, 3 L. ed. 215.

⁴ *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Ia. 223, 45 L. R. A. (N.S.) 743, 138 N. W. 459.

⁵ *Wilton v. Weston*, 48 Conn. 325; *Mutual Ins. Co. v. Chattanooga Sav. Bank*, 47 Okla. 748, L. R. A. 1916A, 669,

or a check,⁶ may be accepted as payment in the absence of some rule of positive law requiring payment in money. Under the statutes in force in some jurisdictions, certain classes of debts,⁷ such as a debt to a corporation for stock which is issued by such corporation,⁸ can not be paid by the note of the debtor. By agreement between the debtor and the creditor, mutual claims held by each against the other may be regarded as extinguished; and under such agreement the claim which is thus extinguished by agreement is regarded as paid.⁹

On the other hand, it may be understood between the parties that whatever has been delivered is not intended as payment, but as collateral security.¹⁰

It is a question of fact whether the thing delivered by the debtor to the creditor is delivered as payment or not.¹¹ Where a mortgagor gives his bond for an overdue payment on a mortgage debt,¹²

150 Pac. 190; *Holmes v. Laraway*, 64 Vt. 175, 23 Atl. 726; *Garrett v. Patton*, 81 W. Va. 771, 95 S. E. 437.

⁶ *United States*. *Taylor v. Merchants' Fire Ins. Co.*, 50 U. S. (9 How.) 390, 13 L. ed. 187.

Arkansas. *Rose v. Lilly* (Ark.), 170 S. W. 483.

Iowa. *Rohrbach v. Hammill*, 162 Ia. 131, 143 N. W. 872.

Oklahoma. *Bowles v. Biffles*, 50 Okla. 587, 151 Pac. 193.

Virginia. *Main Street Bank v. Planters' National Bank*, 116 Va. 137, 81 S. E. 24.

Wisconsin. *LaFayette County Monument Corporation v. Magoon*, 73 Wis. 627, 3 L. R. A. 761, 42 N. W. 17.

Check of debtor. *LaFayette County Monument Corporation v. Magoon*, 73 Wis. 627, 3 L. R. A. 761, 42 N. W. 17.

Check of debtor in hands of bona-fide holder. *National Park Bank v. Levy Bros.*, 17 R. I. 746, 19 L. R. A. 475, 24 Atl. 777.

⁷ *German Mercantile Co. v. Wanner*, 25 N. D. 479, 142 N. W. 463.

⁸ *German Mercantile Co. v. Wanner*, 25 N. D. 479, 142 N. W. 463.

⁹ *England*. *Smith v. Winter*, 12 C. B. 487.

Iowa. *State v. Chambers*, 179 Ia. 436, 161 N. W. 470.

Massachusetts. *Hill v. Fuller*, 188 Mass. 195, 74 N. E. 361.

New York. *In re Rochester, Hornellsville & Lackawanna Ry.*, 110 N. Y. 119, 17 N. E. 678.

Wisconsin. *National Cash Register Co. v. Bonneville*, 119 Wis. 222, 96 N. W. 558.

¹⁰ *Granite National Bank v. Fitch*, 145 Mass. 567, 1 Am. St. Rep. 484, 14 N. E. 650.

¹¹ *United States*. *Layman v. Bank*, 53 U. S. (12 How.) 225, 13 L. ed. 965; *The Kimball*, 70 U. S. (3 Wall.) 37, 18 L. ed. 50.

Massachusetts. *Quimby v. Durgin*, 148 Mass. 104, 1 L. R. A. 514, 19 N. E. 14.

Minnesota. *Goodall v. Norton*, 88 Minn. 1, 92 N. W. 445.

North Carolina. *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

Pennsylvania. *Shepherd v. Busch*, 154 Pa. St. 149, 35 Am. St. Rep. 815, 26 Atl. 363.

Wisconsin. *Rogers-Ruger Co. v. McCord*, 115 Wis. 261, 91 N. W. 685.

¹² *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

or notes of a third person,¹³ as where the note of a third person is given for an indebtedness under a building contract,¹⁴ the question is ultimately one of fact. Railroad coupons secured by first mortgage, which are accepted at par in buying third mortgage bonds at sixty cents on the dollar, the interest on which is guaranteed by a third party, are to be considered as paid.¹⁵

§ 2812. Presumption as to effect of assignment of non-negotiable right. The greatest difficulty involved in this topic is to determine what presumption arises when the debtor delivers a thing of value other than money to his creditor. Upon this question there is the greatest divergence of authority. The same state may, furthermore, treat one kind of instrument as *prima facie* payment and another kind as *prima facie* collateral security only. The general weight of authority is that anything of value other than money delivered by the debtor to the creditor is *prima facie* collateral security only, or conditional payment, and not absolute payment.¹ If the debtor delivers property to his creditor or performs services for him, this is not *prima facie* payment.² If the debtor voluntarily conveys realty to his creditor,³ or if the debtor buys realty in the name of his creditor and pays for it, this is not *prima facie* payment of the debt.⁴

If the delivery of the property is on account of the debt, it is *prima facie* collateral security,⁵ and if not, the delivery of the property or rendition of the services may give a right of action to the debtor, but does not amount to payment.⁶

Independent demands in favor of a debtor as against a creditor may give the right of set-off, but do not by operation of law amount to payment.⁷ Assignments of non-negotiable choses in

¹³ *Lyons v. Bank*, 86 Ga. 485, 12 L. R. A. 155, 12 S. E. 882; *Shepherd v. Busch*, 154 Pa. St. 119, 35 Am. St. Rep. 815, 20 Atl. 363.

¹⁴ *Quimby v. Durgin*, 148 Mass. 104, 1 L. R. A. 514, 19 N. E. 14.

¹⁵ *Fidelity Ins., Trust & Safe Deposit Co. v. Shenandoah Valley Ry.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759.

¹ *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496.

² *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

³ *Barris v. Emmons*, 173 Mich. 590, 139 N. W. 872.

⁴ *Feder v. Ervin* (Tenn. Ch. App.), 36 L. R. A. 335.

⁵ *Grant v. School Town*, 71 Ind. 58.

⁶ *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496.

⁷ *California. Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

Delaware. Burton v. Willin, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363.

Minnesota. Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604.

New York. White v. Benjamin, 138 N. Y. 623, 33 N. E. 1037.

Vermont. Blair v. White, 61 Vt. 110, 17 Atl. 49.

action are prima facie, not absolute payment.⁸ So a non-negotiable order is not prima facie absolute payment.⁹

§ 2813. Presumption as to transfer of negotiable instrument—Absolute payment not presumed—Notes. Delivery of a promissory note,¹ whether executed by the debtor,² or by one of two or more

*Sutphen v. Cushman, 35 Ill. 186;
Wade v. Curtis, 96 Me 309, 52 Atl 762;
Leas v James, 10 S. & R (Pa.) 307.

9 Georgia. Darby v. Miller, 116 Ga.
952, 43 S E. 374

Kentucky. Proctor v. Mather, 42 Ky.
(3 B Mon) 353.

Michigan. Bond v McMahon, 94
Mich 557, 54 N. W. 281.

Nebraska. Chicago, Burlington &
Quincy Ry v Burns, 61 Neb 793, 86
N W. 483; Colby v. Maw, 1 Neb.
(unoff) 478, 95 N W 677

Ohio. Weller Co. v. Gordon, 7 Ohio
C. C. (N.S.) 303, 14 Ohio C. D. 407.

South Dakota. Estey v. Birnbaum,
9 S. D. 174, 68 N. W. 290.

Wisconsin. Cliver v. Heil, 95 Wis.
364, 70 N W. 346.

1 United States. Atlas Steamship Co.
v. Land Co., 102 Fed. 358, 42 C. C. A.
398.

California. London & San Francisco
Bank v. Parrott, 125 Cal. 472, 73 Am.
St. Rep. 64, 58 Pac. 164.

Illinois. Jansen v. Grimshaw, 125
Ill 468, 17 N. E. 850; Stone v. Church,
92 Ill. App. 77.

Iowa. Dean v. Ridgeway, 82 Ia. 757,
48 N. W. 923.

Kentucky. Kibbey v. Jones, 70 Ky.
(7 Bush.) 243.

Michigan. Germain v. Central Lum-
ber Co., 116 Mich. 245, 74 N. W. 644;
Valade v. Masson, 135 Mich. 41, 97
N. W. 59.

Nebraska. H. F. Cady Lumber Co. v.
Exposition Co. (Neb.), 93 N. W. 961.

North Dakota. Lokken v. Miller, 9
N. D. 512, 84 N. W. 368.

Ohio. Sutliff v. Atwood, 15 O. S. 186;
Price v. Coblitz, 21 Ohio C. C. 732, 12
Ohio C. D. 34.

Pennsylvania. Berlin Iron Bridge Co.
v. Bonta, 180 Pa. St. 448, 36 Atl. 867.

South Dakota. Baker v. Baker, 2 S.

D 261, 39 Am. St. Rep. 776, 40 N. W.
1064; Grissel v. Bank, 12 S. D. 93, 80
N W. 161.

West Virginia. Cushwa v. Improve-
ment Loan & Building Association, 45
W. Va. 490, 32 S. E. 259.

Wisconsin. Nash v. Meggett, 89 Wis.
496, 61 N. W. 283.

"A promissory note does not dis-
charge the debt for which it is given
unless such be the express agreement
of the parties; it only operates to ex-
tend until its maturity the period for
the payment of the debt. The creditor
may return the note when dishonored
and proceed upon the original debt.
The acceptance of the note is consid-
ered as accompanied with the condition
of its payment."

United States. The Kimball, 70 U.
S (3 Wall.) 37, 45, 18 L. ed. 50 [quoted
in Segrist v. Crabtree, 131 U. S. 287,
200, 33 L. ed. 125;] A Leschen & Sons
Rope Co. v. Mayflower Gold Min. & R.
Co., 173 Fed. 855, 35 L. R. A. (N.S.) 1.
Connecticut. Ferrigno v. Keasbey,
— Conn. —, 106 Atl. 445.

Kansas. Moody v. Stubbs, 94 Kan
250, 146 Pac. 346.

Minnesota. Way v. Movers, 135
Minn. 339, 160 N. W. 1014.

North Dakota. Anderson v. Kain, —
N. D. —, 169 N. W. 501.

Oregon. Johnston v. Barrills, 27 Or.
251, 50 Am. St. Rep. 717, 41 Pac. 656;
Johnson v. Paulson, 83 Or. 238, 154 Pac.
685, 163 Pac. 435.

Wisconsin. McDonald v. Provident
Savings Life Assurance Society, 108
Wis. 213, 81 Am. St. Rep. 885, 84 N.
W. 154; Wagener v. Old Colony Life
Ins. Co., — Wis. —, 172 N. W. 729.

2 United States. A. Leschen & Sons
Rope Co. v. Mayflower Gold Min. & R.
Co., 173 Fed. 855, 35 L. R. A. (N.S.) 1.

joint debtors,³ or by a third person,⁴ as the executor of the debtor,⁵ has been held not to be prima facie absolute payment of an antecedent debt. If the creditor refuses to accept the maker of the note as his debtor, delivery by the debtor to the creditor of such note of a third person is not payment.⁶ The fact that a member of a partnership gives his individual note for a partnership debt does not

Arkansas. *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64, 1 S. W. 62; *Churchill v. Yeatman-Gray Grocer Co.*, 111 Ark. 520, 164 S. W. 283

California. *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

Connecticut. *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Ferrigino v. Keasbey*, — Conn. —, 106 Atl. 445.

Florida. *Our Home Life Ins. Co. v. Peacock*, 71 Fla. 35, 70 So 775.

Kansas. *Bradley v. Harwi*, 43 Kan. 314, 23 Pac. 506; *Topeka Capital Co. v. Merriam*, 60 Kan 397, 56 Pac. 757.

Minnesota. *Miller v. McCarty*, 47 Minn. 321, 28 Am. St. Rep. 375, 50 N. W. 235; *Way v. Movers*, 135 Minn. 339, 160 N. W. 1014.

Mississippi. *Starling v. Wyatt* (Miss.), 27 So. 526.

North Dakota. *Anderson v. Kain*, — N. D. —, 169 N. W. 501.

New Jersey. *Fry v. Patterson*, 49 N. J. L. 612, 10 Atl. 390.

Ohio. *Merrick v. Boury*, 4 O. S. 60.

Tennessee. *Columbia Grocery Co. v. Marshall*, 131 Tenn. 270, 174 S. W. 1108.

West Virginia. *Burdett v. Hayman*, 63 W. Va. 515, 15 L. R. A. (N.S.) 1019, 60 S. E. 497; *Bailey v. Riffe*, 79 W. Va. 194, 90 S. E. 791.

Wisconsin. *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766.

³ *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517, 20 Atl. 322.

⁴ *England. Belshaw v. Bush*, 11 C. B. 191.

Arkansas. *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64, 1 S. W. 62.

Illinois. *Wilhelm v. Schmidt*, 84 Ill. 183.

Iowa. *Kruse v. Seiffert & Weise Lumber Co.*, 108 Ia. 352, 79 N. W. 118.

Kansas. *Webb v. National Bank*, 67 Kan. 62, 72 Pac. 520.

Michigan. *Gillett v. Knowles*, 108 Mich. 602, 66 N. W. 497; *Swan v. Gregory*, 195 Mich. 457, 161 N. W. 933.

Nebraska. *Chamberlain Banking House v. Wolsey*, 60 Neb. 516, 83 N. W. 729; *Edwards & Bradford Lumber Co. v. Lamb*, 95 Neb. 263, 145 N. W. 703.

New Jersey. *American Brick & Tile Co. v. Drinkhouse*, 59 N. J. L. 462, 36 Atl. 1034.

New York. *Smith v. Ryan*, 66 N. Y. 352, 23 Am. Rep. 60.

North Carolina. *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

Pennsylvania. *Shepherd v. Busch*, 154 Pa. St. 140, 35 Am. St. Rep. 815, 26 Atl. 363; *Collins v. Busch*, 191 Pa. St. 549, 43 Atl. 378.

Rhode Island. *Sanderson Fertilizer & Chemical Co. v. Tatlas*, — R. I. —, 103 Atl. 780.

Tennessee. *Perry v. Williamson* (Tenn.), 56 S. W. 826.

Washington. *Duggan v. Broom Co.*, 6 Wash. 593, 36 Am. St. Rep. 182, 34 Pac. 157.

West Virginia. *Mansfield v. Dameron*, 42 W. Va. 704, 57 Am. St. Rep. 884, 26 S. E. 527.

Wisconsin. *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. 762.

⁵ *Peter v. Beverly*, 35 U. S. (10 Pet.) 532, 9 L. ed. 522.

⁶ *Sanderson Fertilizer & Chemical Co. v. Tatlas*, — R. I. —, 103 Atl. 780.

operate as payment unless the creditor has agreed to accept it as payment; and unless the creditor has agreed to accept it as payment, the delivery of such note does not discharge the other partner from liability on the original indebtedness.⁷ Where A was indebted to B on a contract for plastering and paid four hundred and twenty-five dollars in cash and gave two notes executed by C, and B gave to A his receipt for fourteen hundred and five dollars "on account contract for plastering," it was held that the notes were prima facie conditional payment only, and the verdict of the jury that they were not taken in absolute payment will not be disturbed.⁸ Delivery of a note and chattel mortgage has been held not prima facie payment of a debt secured by mortgage;⁹ nor is delivery of a bond prima facie payment of an overdue instalment of interest on a debt secured by mortgage.¹⁰ Even if the instrument is taken as conditional payment only, failure to present it to the maker at maturity converts it into absolute payment.¹¹

Delivery of negotiable instrument has been held not to be payment of a contemporaneously created debt,¹² whether the notes were executed by the debtor¹³ or by a third party.¹⁴

In the absence of specific agreement as to its effect, a note given by the debtor for a pre-existing debt is regarded as conditional payment in many jurisdictions.¹⁵

⁷ *Burdett v. Hayman*, 63 W. Va. 515, 15 L. R. A. (N.S.) 1019, 60 S. E. 407.

⁸ *Shepherd v. Busch*, 154 Pa. St. 149, 35 Am. St. Rep. 815, 26 Atl. 363.

⁹ *Baker v. Baker*, 2 S. D. 261, 39 Am. St. Rep. 776, 49 N. W. 1064.

¹⁰ *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

¹¹ *Coleman v. Lewis*, 183 Mass. 485, 97 Am. St. Rep. 450, 67 N. E. 603.

¹² *Segrist v. Crabtree*, 131 U. S. 287, 33 L. ed. 125; *Carlin v. Heller*, 34 Ia. 256; *Hoeflinger v. Wells*, 47 Wis. 623, 3 N. W. 589; *Wagener v. Old Colony Life Ins. Co.*, — Wis. —, 172 N. W. 729.

¹³ *Lyman v. Bank*, 53 U. S. (12 How.) 225, 13 L. ed. 965; *Segrist v. Crabtree*, 131 U. S. 287, 33 L. ed. 125; *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303.

¹⁴ *Shriner v. Keller*, 25 Pa. St. 61.

¹⁵ *United States. Peter v. Beverly*, 35 U. S. (10 Pet.) 532, 568, 9 L. ed. 522, 536; *Lyman v. Bank of United States*, 53 U. S. (12 How.) 225, 243, 13 L. ed. 965, 972; *Downey v. Hicks*, 55 U. S.

(14 How.) 240, 243, 14 L. ed. 401, 405; *The Kimball (Duncan v. Kimball)*, 70 U. S. (3 Wall.) 37, 45, 18 L. ed. 50, 54; *The Emily Souder*, 84 U. S. (17 Wall.) 666, 670, 21 L. ed. 683, 684; *A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co.*, 173 Fed. 855, 35 L. R. A. (N.S.) 1.

California. *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. 28.

Connecticut. *Hine v. Roberts*, 48 Conn. 267, 271, 40 Am. Rep. 170.

Illinois. *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623, 626, 16 N. E. 923.

Minnesota. *Combination Steel & Iron Co. v. St. Paul City R. Co.*, 47 Minn. 207, 209, 49 N. W. 744.

New York. *Tobey v. Barber*, 5 Johns. (N. Y.) 68, 72, 4 Am. Dec. 326; *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279.

Wisconsin. *Eastman v. Porter*, 14 Wis. 40.

§ 2814. Absolute payment not presumed—Drafts, cashier's checks, etc. Delivery of a draft,¹ whether drawn by the debtor,² or by a third person,³ is not according to the weight of authority *prima facie* payment of an antecedent debt. Even if the creditor marks a note and mortgage as paid and delivers them to the debtor on receipt of a draft from the debtor, such conduct is not of itself sufficient to show that the draft was taken as absolute payment.⁴

Omission of the creditor to use proper diligence in collecting the draft,⁵ will make the draft operate as a payment to the extent of the injury thus caused.

A cashier's check⁶ is not *prima facie* payment, though if there is any evidence tending to show that it was so accepted it is error to withdraw such question from the jury.⁷ One who has accepted a cashier's check, not as absolute payment, and believing it to be a draft, does not accept it as absolute payment by exchanging it for a draft so as to carry out the intention of the parties.⁸ The fact that the creditor does not give immediate notice of dishonor, but waits and collects a dividend out of the estate of the drawer bank, is not conclusive that payment was intended.⁹ A certificate of deposit, indorsed by the debtor to the creditor, is not *prima facie* payment,¹⁰ and the creditor need not protest such certificate for

¹ Dille v. White, 132 Ia. 327, 10 L. R. A. (N.S.) 510, 109 N. W. 909; Mutual Benefit Life Ins. Co. v. Chattanooga Savings Bank, 47 Okla. 748, L. R. A. 1916A, 669, 150 Pac. 190.

² United States. The Bird of Paradise, 72 U. S. (5 Wall.) 545, 18 L. ed. 662; The Emily Souder, 84 U. S. (17 Wall.) 666, 21 L. ed. 683.

Georgia. Flannery v. Harley, 117 Ga. 483, 43 S. E. 765; Kinard v. First National Bank, 125 Ga. 228, 114 Am. St. Rep. 201, 53 S. E. 1018.

Illinois. Hodgen v. Latham, 33 Ill. 344.

Louisiana. Bank v. Knobloch, 144 La. 100, 80 So. 214.

New York. Holdsworth v. De Be-launzaran, 106 N. Y. 119, 12 N. E. 615.

Oklahoma. Mutual Benefit Life Ins. Co. v. Chattanooga Savings Bank, 47 Okla. 748, L. R. A. 1916A, 669, 150 Pac. 190.

Pennsylvania. League v. Waring, 85 Pa. St. 244.

South Dakota. Estey v. Birnbaum, 9 S. D. 174, 68 N. W. 290.

³ Brown v. Olmstead, 50 Cal. 162; Bank v. Knobloch, 144 La. 100, 80 So. 214; National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503.

⁴ Kinard v. First National Bank, 125 Ga. 228, 114 Am. St. Rep. 201, 53 S. E. 1018.

⁵ Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762; Phoenix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756; Allan v. Eldred, 50 Wis. 132, 6 N. W. 565.

⁶ Dille v. White, 132 Ia. 327, 10 L. R. A. (N.S.) 510, 109 N. W. 909; Seamen v. Muir, 72 Or. 583, 144 Pac. 121; Holmes v. Briggs, 131 Pa. St. 233, 17 Am. St. Rep. 804, 18 Atl. 928 [s. c., sub nomine, Briggs v. Holmes, 118 Pa. St. 283, 4 Am. St. Rep. 597, 12 Atl. 355].

⁷ Briggs v. Holmes, 118 Pa. St. 283, 4 Am. St. Rep. 597, 12 Atl. 355.

⁸ Dille v. White, 132 Ia. 327, 10 L. R. A. (N.S.) 510, 109 N. W. 909.

⁹ Holmes v. Briggs, 131 Pa. St. 233, 17 Am. St. Rep. 804, 18 Atl. 928.

¹⁰ United States. Downey v. Hicks, 55 U. S. (14 How.) 240, 14 L. ed. 404.

non-payment to hold the debtor.¹¹ Delivery of a time certificate, as where it is executed by one of several joint debtors,¹² is not prima facie payment.

§ 2815. Absolute payment not presumed—Checks. Delivery of a check,¹ either one drawn by the debtor,² even if certified,³ or by

Illinois. Leake v. Brown, 43 Ill. 372.
Iowa. Park v. Best, 176 Ia. 7, 157 N. W. 233.

Michigan. Duquette v. Richar, 102 Mich. 483, 60 N. W. 974.

Wisconsin. Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117.

¹¹ Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117.

¹² Chase v. Brundage, 58 O. S. 517, 51 N. E. 31.

¹ Interstate National Bank v. Ringo, 72 Kan. 116, 115 Am. St. Rep. 176, 3 L. R. A. (N.S.) 1179, 83 Pac. 119; First National Bank v. McConnell, 103 Minn. 340, 14 L. R. A. (N.S.) 616, 114 N. W. 1129; United States National Bank v. Shupak, 54 Mont. 542, 172 Pac. 324; Mutual Ben. L. Ins. Co. v. Chattanooga Sav. Bank, 47 Okla. 748, L. R. A. 1916A, 669, 150 Pac. 190.

² United States, In re Perpall, 256 Fed. 758.

Alabama. Steiner v. Jeffries, 118 Ala. 573, 24 So. 37; Morris v. Bank, 122 Ala. 580, 25 So. 499.

Arizona. Empire-Arizona Copper Co. v. Shaw, — Ariz. —, 181 Pac. 464.

California. Steinhart v. Bank, 94 Cal. 362, 28 Am. St. Rep. 132, 29 Pac. 717.

Georgia. Kirby Planing Mill Co. v. Titus, 14 Ga. App. 1, 80 S. E. 18.

Illinois. Angus v. Chicago Trust & Savings Bank, 170 Ill. 298, 48 N. E. 946 [affirming, 68 Ill. App. 425].

Indiana. Burrows v. State, 137 Ind. 474, 45 Am. St. Rep. 210, 37 N. E. 271.

Iowa. People's Savings Bank v. Gifford, 108 Ia. 277, 79 N. W. 63.

Kansas. Interstate National Bank v. Ringo, 72 Kan. 116, 115 Am. St. Rep. 176, 3 L. R. A. (N.S.) 1179, 83 Pac. 119.

Kentucky. Carter v. Richardson (Ky.), 60 S. W. 397.

Maryland. American Agricultural

Chemical Co. v. Scrimger, 130 Md. 389, L. R. A. 1917F, 394, 100 Atl. 774 (obiter).

Massachusetts. Wilkinson v. Blount Mfg. Co., 169 Mass. 374, 47 N. E. 1020.

Michigan. Baumgardner v. Henry, 131 Mich. 240, 91 N. W. 169.

Minnesota. National Bank v. Chicago, Burlington & Northern Ry., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560; Goodall v. Norton, 88 Minn. 1, 92 N. W. 445; First National Bank v. McConnell, 103 Minn. 340, 14 L. R. A. (N.S.) 616, 114 N. W. 1129; McFadden v. Follrath, 114 Minn. 85, 37 L. R. A. (N.S.) 201, 130 N. W. 542.

Missouri. Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813.

Montana. United States National Bank v. Shupak, 54 Mont. 512, 172 Pac. 324.

Nebraska. National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503.

New Hampshire. Nason v. Fowler, 70 N. H. 291, 47 Atl. 263.

New York. Thomson v. Bank, 82 N. Y. 1; Thomas v. Westchester County, 115 N. Y. 47, 4 L. R. A. 477, 21 N. E. 674.

Ohio. Fleig v. Sleet, 43 O. S. 53, 54 Am. Rep. 800, 1 N. E. 24; Hilsinger v. Trickett, 86 O. S. 286, 99 N. E. 305.

Oklahoma. Mutual Life Ins. Co. v. Chattanooga Sav. Bank, 47 Okla. 748, L. R. A. 1916A, 669, 150 Pac. 190; Wheeler & Motter Mercantile Co. v. Kitchen, — Okla. —, 169 Pac. 877.

Pennsylvania. Loux v. Fox, 171 Pa. St. 68, 33 Atl. 190.

Tennessee. Springfield v. Green, 66 Tenn. (7 Baxt.) 301.

³ Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436; Cincinnati Oyster & Fish Co. v. Bank, 51 O. S. 106, 46 Am. St. Rep.

a third person,⁴ is prima facie not payment. Even if a check is drawn upon the bank which accepts it in reliance upon the apparent condition of the drawer's account, such acceptance is not an absolute payment if the drawer's account proves to be insufficient because of the refusal of other banks to pay checks which he has deposited with the bank on which he has drawn his own check.⁵ If a bank which holds a note for collection surrenders it on receipt of a check in reliance upon a statement of the drawee bank that such check was good, such surrender of the note and receipt of such check do not amount to payment if the statement of the drawee bank was made under a mistake as to the check intended and if the check which was given was not paid for want of funds.⁶ If the seller of goods accepts the buyer's check for such goods, the check does not of itself operate as absolute payment; and if it is not paid, the seller may recover the goods.⁷ A sold wheat to B and gave B a bill of lading. B delivered to A therefor his check on a bank in which he had not funds to meet such check. B indorsed the bill of lading over to the bank, which took with knowledge of the facts. The check was not paid. It was held that the vendor could retake the goods from the bank.⁸ Under somewhat similar facts the vendor was allowed to retake the goods even from an innocent holder of the bill of lading.⁹ If, however, the payee of a check has it certified,¹⁰ or fails to present it for payment promptly, whereby the indorser is damaged through the subsequent

560, 36 N. E. 833; *Born v. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, 7 L. R. A. 442, 24 N. E. 173; *Andrews v. Bank*, 56 Tenn. (9 Heisk.) 211, 24 Am. Rep. 300.

⁴ *Colorado*. *Snyder v. Hamilton National Bank*, — Colo. —, L. R. A. 1018F, 807, 172 Pac. 1069.

Kansas. *Mordis v. Kennedy*, 23 Kan. 408, 33 Am. Rep. 169.

Massachusetts. *Weddigen v. Fabric Co.*, 100 Mass. 422.

New York. *Carroll v. Sweet*, 128 N. Y. 19, 13 L. R. A. 43, 27 N. E. 763.

Pennsylvania. *Holmes v. Briggs*, 131 Pa. St. 233, 17 Am. St. Rep. 804, 18 Atl. 928.

⁵ *Snyder v. Hamilton National Bank*, — Colo. —, L. R. A. 1018F, 807, 172 Pac. 1069.

Whether a bank may recover a payment which it has made in reliance upon the account of the drawer or upon his credit, is discussed in § 1559.

⁶ *Interstate National Bank v. Ringo*, 72 Kan. 116, 115 Am. St. Rep. 176, 3 L. R. A. (N.S.) 1179, 83 Pac. 119.

⁷ *In re Perpall*, 256 Fed. 758.

⁸ *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813.

⁹ *National Bank v. Chicago, Burlington & Northern Ry.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

¹⁰ *Metropolitan National Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 12 L. R. A. 492, 27 N. E. 533.

insolvency of the maker,¹¹ or deposits the check to his own credit, even though he does not check against it,¹² he thereby accepts it in payment. The creditor must therefore show either that the check was returned or that it was duly presented but not paid,¹³ unless he is able to show some valid excuse for his failure to do either. Whether a check is to be regarded as an equitable assignment between the debtor and the payee, or not, the loss of a check, especially if without the fault of the drawee, excuses him from presenting it for payment; and accordingly such check is not regarded as payment, although it is neither presented for payment nor returned,¹⁴ at least if the drawee bank remains solvent and no injury will be done to the drawer of the check by requiring him to pay the original indebtedness.¹⁵ If, however, the creditor expresses his willingness to accept a check of a certain amount as part payment only, his failure to return a check which is sent to him as payment in full does not make his receipt of the check acceptance if he did not cash it.¹⁶ If a draft which is drawn on A is sent to the X bank as agent for the holder of the draft, and A, who has a deposit in the X bank in excess of the amount of such draft, gives his check to the X bank therefor and receives the draft, marked "Paid," and the X bank sends its check for the amount of the draft to its correspondent by which the draft was forwarded for collection, such transaction amounts to a payment of the draft, although the X bank became insolvent and was unable to pay its own check.¹⁷ Payment was held to exist where A gave B a check on a bank, Y, in which A had funds; and B deposited it in his bank, X, which

¹¹ *United States*. *Downey v. Hicks*, 55 U. S. (14 How.) 240, 14 L. ed. 404.

Alabama. *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011.

Illinois. *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172.

Maryland. *Anderson v. Gill*, 79 Md. 312, 47 Am. St. Rep. 402, 25 L. R. A. 200, 29 Atl. 527.

New York. *Carroll v. Sweet*, 128 N. Y. 19, 13 L. R. A. 43, 27 N. E. 763.

Ohio. *Hodgson v. Barrett*, 33 O. S. 63, 31 Am. Rep. 527.

¹² *Board of Education v. Robinson*, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105. (In this case the check was deposited in the bank on which it was drawn, which was then insolvent, but a

going concern, and which failed before such deposit was checked out.)

See also, *Knafl v. Knoxville Banking & Trust Co.*, 130 Tenn. 336, L. R. A. 1915D, 402, 170 S. W. 476.

¹³ *Goodall v. Norton*, 88 Minn. 1, 92 N. W. 445.

¹⁴ *First National Bank v. McConnell*, 103 Minn. 340, 14 L. R. A. (N.S.) 606, 114 N. W. 1129.

¹⁵ *First National Bank v. McConnell*, 103 Minn. 340, 14 L. R. A. (N.S.) 606, 114 N. W. 1129.

¹⁶ *Wheeler & Motter Mercantile Co. v. Kitchen*, — Okla. —, 169 Pac. 877.

¹⁷ *Pollak v. Niall-Herlin Co.*, 137 Ga. 23, 35 L. R. A. (N.S.) 13, 72 S. E. 415.

gave him credit therefor and sent it to Y, which gave X credit therefor.¹⁸ If A, an attorney for a creditor, receives funds from the debtor and the debtor agrees that the attorney shall send his check to the creditor for such debt, this constitutes payment.¹⁹ If a note is indorsed to a bank for collection, a check on the indorsing bank drawn by one who has an account therein is payment.²⁰ If the debtor gives his check to an agent of the creditor who is authorized to receive it, and such agent indorses such check in excess of his authority and receives the money thereon from the drawee bank, the transaction amounts to a payment as between the debtor and the creditor.²¹ Although the act of a bank in giving credit on its books does not of itself amount to payment, the further act of the bank in paying a substantial amount of such

¹⁸ *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47. (The fact that after the canceled check had been surrendered to A by Y, Y asked for it, received it from A, and then protested it, does not destroy the effect of payment.)

¹⁹ *Millhiser v. Marr*, 128 N. Car. 318, 38 S. E. 887.

²⁰ *Sayles v. Cox*, 95 Tenn. 579, 49 Am. St. Rep. 940, 32 L. R. A. 715, 32 S. W. 628.

See also, *Pollak v. Niall-Herlin Co.*, 137 Ga. 23, 35 L. R. A. (N.S.) 13, 72 S. E. 415.

²¹ *McFadden v. Follrath*, 114 Minn. 85, 37 L. R. A. (N.S.) 201, 130 N. W. 542.

"Under these same circumstances, the liability of the drawer of the check upon the original account, to pay which the check is drawn, should be held discharged, having regard to the general rules of law governing the correlated duties and rights of the parties, and to commercial usage and custom. The defendant gave his check to pay his account owing plaintiff. He delivered the check to the agent to whom the plaintiff had requested him to make delivery. When the check was given, and thereafter, the defendant had money to meet it on deposit in a sol-

vent bank. In the usual course of business, he would not be called upon to do any other act for the benefit or protection of the payee, and the check would serve to pay the account. It does not seem that the defendant, in allowing his account to be charged with the amount of the check given the authorized agent of plaintiff, violated any commercial usage or legal duty. It would be a novel burden if the drawer of a check, given in the usual course of business, to the authorized agent of the payee, upon such check being indorsed by such agent, were charged with the duty of determining that the indorsement on the check was authorized. To establish such a rule would make payment by check a matter of uncertainty and some risk. Under the usual method of transacting business, the drawer of a check has no means of determining when the check is returned to him, stamped 'Paid,' whether the indorsement of the payee thereon was authorized or not. Whether a check is delivered to an agent or sent by mail, it usually comes into the hands of employees of the payee, who are not given the right, but are given the opportunity by the payee to indorse the check and receive the money, provided the bank neglects its duty to see that

credit to the creditor amounts to payment.²² If checks are deposited in a bank which is insolvent and are forwarded by such bank to another bank with which it has dealings, and they are credited to the account of the insolvent bank, such transaction does not prevent the depositor of such checks from stopping payment thereon and recovering the checks from the receiver of the insolvent bank, at least if the bank to which they were forwarded acquiesces.²³

Even if a check is not absolute payment, it is negotiable and thus represents the debt for which it is given; and accordingly a debtor who has given his check for a debt is not subject to garnishment as the debtor of the original creditor.²⁴

payment is made to the payee or his order. If the check is improperly paid, because of the dishonesty of the agent that the payee intrusts with the check, and the negligence of the bank, there would seem to be no sufficient reason for placing the responsibility therefor on the drawer of the check. The drawer of the check parted with control over it in the usual course of business, and in this case in the exact manner the payee requested. If either the drawer or payee must suffer because of the dishonesty of the agent, the one who designated him to receive the check, and intrusted him with it, should suffer, rather than the drawer, who had no voice in the selection of such agent, and who is in no way responsible for his acts.

"It is urged that under the facts herein the defendant, if he is obliged to pay this account, can recover from the bank the amount of the check cashed without authority and charged by the bank to defendant's account. But the liability of the defendant on the account must be determined by a constant rule. In this case the only question involved may perhaps be whether the payee or the drawer shall proceed against the bank. If, however, the bank, paying a check under circumstances such as here exist, and charg-

ing it to the account of the drawer, should thereafter become insolvent, either the drawer or payee of the check would suffer loss. Such loss should fall on the party more directly responsible for, and having control of, the agent whose dishonest use of the check made the loss possible." *McFadden v. Foll-rath*, 114 Minn. 85, 37 L. R. A. (N.S.) 201, 130 N. W. 542.

²² *Bland v. Fidelity Trust Co.*, 71 Fla. 499, L. R. A. 1916F, 209, 71 So. 630; *First National Bank v. Persall*, 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675; *First National Bank v. McNairy*, 122 Minn. 215, Ann. Cas. 1914D, 977, 142 N. W. 139; *United States National Bank v. McNair*, 114 N. Car. 335, 19 S. E. 361.

²³ *Knaffl v. Knoxville Banking & Trust Co.*, 130 Tenn. 336, L. R. A. 1915D, 402, 170 S. W. 476.

²⁴ *England. Pearce v. Davis*, 1 Moody & R. 365.

Maryland. American Agricultural Chemical Co. v. Scrimger, 130 Md. 389, L. R. A. 1917F, 394, 100 Atl. 774.

Massachusetts. Getchell v. Chase, 124 Mass. 366.

Rhode Island. National Park Bank v. Levy, 17 R. I. 746, 19 L. R. A. 475, 24 Atl. 777.

South Dakota. Moreau River State Bank v. Japinga, 37 S. D. 44, 2 A. L. R. 504, 158 N. W. 786.

§ 2816. Absolute payment presumed. In other jurisdictions a negotiable instrument,¹ executed by the debtor or by another person,² as at a higher rate of interest than the original indebtedness,³ has been held to be prima facie payment of an antecedent debt. A note given for a contemporaneous debt has been held in these jurisdictions to be prima facie payment.⁴ Even in such jurisdictions it is not a matter of law, but of fact, to go to the jury with the evidence.⁵ Even where the debtor's notes are prima facie payment the vendor who has taken such notes may still exercise the right of stoppage in transitu if the vendee becomes insolvent.⁶ It is necessary for the vendor only to tender such note in court. Even where a note is prima facie payment in most instances, it is not so where the original debt is secured by mortgage.⁷ Even in jurisdictions which treat a note as ordinarily not prima facie payment, a note of a third person given by the holder thereof for a debt created by himself at the time of such transfer is held to be prima facie payment.⁸

Washington. *Larsen v. Allan Line Steam Ship Co.*, 45 Wash. 406, 122 Am. St. Rep. 926, 9 L. R. A. (N.S.) 1258, 88 Pac. 753.

¹ **Indiana.** *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518; *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434; *Scott v. Edgar* (Ind. App.), 60 N. E. 468; *Roberts v. Vonnegut* (Ind. App.), 104 N. E. 321.

Maine. *Bunker v. Barron*, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253; *Bryant v. Grady*, 98 Me. 389, 57 Atl. 92.

Massachusetts. *Quimby v. Durgin*, 148 Mass. 104, 1 L. R. A. 514, 19 N. E. 14; *Davis v. Parsons*, 157 Mass. 584, 32 N. E. 1117; *Baldwin v. Porter*, 217 Mass. 15, 104 N. E. 492.

Vermont. *Wemet v. Lime Co.*, 46 Vt. 460; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476.

See also, *Moreau River State Bank v. Japinga*, 37 S. D. 404, 2 A. L. R. 504, 158 N. W. 786.

² *Dick v. Flanagan*, 122 Ind. 277, 7 L. R. A. 590, 23 N. E. 765; *Union Ins. Co. v. Grant*, 68 Ma. 229, 28 Am. Rep. 42;

Goodnow v. Hill, 125 Mass. 587; *Brown v. Bishop*, 225 Mass. 276, 114 N. E. 316.

³ *Dick v. Flanagan*, 122 Ind. 277, 7 L. R. A. 590, 23 N. E. 765.

⁴ *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201, 18 N. E. 16; *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434.

⁵ *Quimby v. Durgin*, 148 Mass. 104, 1 L. R. A. 514, 19 N. E. 14; *Brown v. Bishop*, 225 Mass. 276, 114 N. E. 316.

⁶ *Brewer Lumber Co. v. Boston & Albany Ry.*, 179 Mass. 228, 88 Am. St. Rep. 375, 54 L. R. A. 435, 60 N. E. 548.

⁷ *Bunker v. Barron*, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253.

⁸ *Wright v. Crockery Ware Co.*, 1 N. H. 281, 8 Am. Dec. 68; *Youngs v. Stahelin*, 34 N. Y. 258; *Hall v. Stevens*, 116 N. Y. 201, 5 L. R. A. 802, 22 N. E. 374; *DeLafield v. Lewis Mercer Construction Co.*, 118 N. Car. 105, 24 S. E. 10; *Challoner v. Boyington*, 91 Wis. 27, 64 N. W. 422 [s. c., 83 Wis. 309, 53 N. W. 604]; *Gallagher v. Ruffing*, 118 Wis. 234, 95 N. W. 117.

Some courts treat a draft as *prima facie* payment of an antecedent debt.⁹ Delivery of a draft has been held to be *prima facie* payment of a contemporaneous debt.¹⁰

§ 2817. Payment in Confederate money or money of foreign country. The Confederate government maintained a *de facto* existence for several years and was recognized as a belligerent by foreign powers. The result of the Civil War was to end its existence as a *de facto* government. After the war full effect was given to the acts of the various states of the Confederacy, other than those which were intended to aid in the prosecution of war against the United States. No recognition was given to the public acts of the Confederacy after its *de facto* existence was terminated, especially since its public acts were intended as a means of carrying on war against the United States. At the same time, Confederate currency was the only circulating medium in the greater part of the South for the greater part of the Civil War. Because of these reasons, a number of different questions were presented for determination after the end of the Civil War had terminated the existence of the Confederacy. Since the public acts of the Confederacy were not recognized, a creditor who had not agreed to accept Confederate money was not bound to accept it in payment of a debt; and if he refused to accept it, the debt was not paid, no matter what provisions for compelling creditors to accept Confederate money had been made by the Confederacy.¹ On the other hand, if the creditor had made an express agreement to accept payment in Confederate money, such provision was not illegal, since it aided the Confederacy in carrying on the war only as a mere incident to doing business within the limits of the Confederacy; and payment of such debt could be made in Confederate money.² Even if the debt was not made payable in Confederate money by its terms, a payment in Confederate money where such money was current which was received by the creditor

⁹ *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Arnold v. Sprague*, 34 Vt. 402; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724.

¹⁰ *Hall v. Stevens*, 116 N. Y. 201, 5 L. R. A. 802, 22 N. E. 374.

¹ *Love v. Johnston*, 72 N. Car. 415; *Alley v. Rogers*, 60 Va. (19 Gratt.) 366.

² *Planters' Bank v. Union Bank*, 83 U. S. (16 Wall.) 483, 21 L. ed. 473; *Rives v. Duke*, 105 U. S. 132, 26 L. ed. 1031; *Wintz v. Weakes*, 57 Tenn. (10 Heisk.) 593.

as payment, was a discharge of the obligation,³ as long as the creditor's acceptance of it as payment was not due to duress on the part of the Confederacy or on the part of the debtor. If payment in Confederate money was accepted by the creditor under duress, he could avoid such transaction in the same way that transactions entered into under duress could be avoided; that is, as soon as the duress ceased to operate, the creditor could return the money which was paid to him, repudiate such payment, and demand payment in legal tender of the United States.⁴ The right of the debtor to avoid payments in Confederate currency was greatly limited by the fact that the courts held that military and executive orders requiring creditors to accept payment in Confederate currency did not of themselves amount to duress,⁵ even though very serious consequences might follow refusal to accept Confederate money in payment and although the creditor might not venture to incur such consequences. It was also held that the creditor could not avoid the payment unless he returned the identical bills which were paid over to him.⁶ A combination of these two rules made it practically impossible, in many cases, for the creditor to avoid the consequences of payment wherever he had accepted Confederate money as payment of an obligation.

If a contract provides for the payment of money in a foreign country, and especially if such contract is made in such foreign country, it will be presumed that payment is to be made in the medium which is current in such country at the time of payment.⁷ If an action is brought in this country upon such a contract, the amount for which judgment should be rendered is the value of the payment in such foreign currency, reduced to terms of legal tender of the United States.⁸ If an action is brought in the United States to recover a deposit of Mexican currency, made in Mexico, judg-

³ Van Hoose v. Bush, 54 Ala. 342; Ewing v. Litsey, 70 Ky. (7 Bush.) 496; Robinson v. International Life Assurance Society, 42 N. Y. 54, 1 Am. Rep. 400; Ritchie v. Sweet, 32 Tex. 333, 5 Am. Rep. 245.

⁴ McCartney v. Wade, 49 Tenn. (2 Heisk.) 369; Mann v. Lewis, 3 W. Va. 215, 100 Am. Dec. 747.

⁵ Glenn v. Case, 25 Ark. 616; Davis v. Mississippi Central Ry., 46 Miss. 552.

⁶ Emerson v. Lee, 18 La. Ann. 134, 89 Am. Dec. 648.

⁷ San Juan v. St. John's Gas Co., 195 U. S. 510, 49 L. ed. 299; Wormser v. Marroquin, 249 Fed. 428; Comstock v. Smith, 20 Mich. 338; Rasst v. Morris, 133 Md. 187, 108 Atl. 787.

⁸ San Juan v. St. John's Gas Co., 195 U. S. 510, 49 L. ed. 299; Rasst v. Morris, 133 Md. 187, 108 Atl. 787; Comstock v. Smith, 20 Mich. 338; Stewart v. Chambers, 2 Sandf. Ch. (N. Y.) 382.

ment should be rendered for the value of such currency in United States money.⁹ No effect will be given to the decree of a foreign government, fixing the rate at which such money is to be taken,¹⁰ at least if such government is not recognized by the government of the United States.¹¹

It has been said that a contract made in Porto Rico before its annexation to the United States, which provides for the payment of dollars "in the circulating foreign money in commerce," requires payment in money of the United States after the annexation of Porto Rico to the United States;¹² and the subsequent use of the term "currency" in the same contract, and apparently referring to the same kind of money, must be given the same meaning.¹³

If, on the other hand, the contract evidently contemplated payment in the kind of money then in general circulation, and, by the subsequent conquest or annexation of such country, a different kind of money is circulated, though bearing in part, at least, the same name, the contract will be construed as providing for payment in the kind of money in general circulation when the contract was made.¹⁴

§ 2818. Payment in genuine but worthless bank-notes. If the debtor makes payment to his creditor in genuine bank-notes which are, however, worthless, usually because of the insolvency of the bank issuing them, where neither debtor nor creditor know of the insolvency of the bank, a conflict of authority as to the validity of such payment exists. The weight of authority holds that such payment is a nullity, if made after the bank has stopped payment,¹ provided the creditor gives reasonable notice to the debtor of the

⁹ *Wormser v. Marroquin*, 249 Fed. 428; *Rasst v. Morris*, 133 Md. 187, 108 Atl. 787.

¹⁰ *Rasst v. Morris*, 133 Md. 187, 108 Atl. 787.

¹¹ *Rasst v. Morris*, 133 Md. 187, 108 Atl. 787.

¹² *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. ed. 209.

¹³ *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. ed. 209.

¹⁴ *Succession of Serralles v. Esbri*, 200 U. S. 103, 50 L. ed. 391.

¹ *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Ontario Bank v.*

Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179 [affirming, *Lightbody v. Bank*, 11 Wend. (N. Y.) 9]; *Westfall v. Braley*, 10 O. S. 188, 75 Am. Dec. 509; *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707; *Townsend v. Bank*, 7 Wis. 185.

"So long as they (bank-notes) are in fact what they purport to be, payable on demand, common consent gives them the ordinary attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed, and its inability to redeem its bills is openly avowed, they instantly

fact that such notes are worthless.² A strong minority of the courts, however, hold that such a payment is valid, and that the loss must fall upon the creditor.³ If the debtor knows that the bank is insolvent and the creditor is ignorant of such fact, the loss must fall on the debtor, and the payment is in legal effect a nullity.⁴

§ 2819. Payment in counterfeit money. Payment in counterfeit money is no payment in law and the debtor is not thereby discharged from his indebtedness though he pays it in good faith.¹ The same principle applies to payment in canceled United States Treasury notes.² The exception to this rule is the case where a bank receives counterfeit notes which purport to be its own issue. As it is bound to know its own currency, it is bound by such payment.³ While this principle is recognized in all the books, the

lose the character of money, their circulation as currency ceases with the usage and consent upon which it rested and the notes become the mere dishonored and depreciated evidence of debt. When this change in their character takes place, the loss must necessarily fall upon him who is the owner of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance of the fact can give him no right to throw the loss which he has already incurred upon an innocent third party." *Westfall v. Braley*, 10 O. S. 188, 75 Am. Dec. 509.

²*Corbit v. Bank*, 2 Harr. (Del.) 235, 30 Am. Dec. 635; *Magee v. Carmack*, 13 Ill. 289.

³*Lowrey v. Murrell*, 2 Port. (Ala.) 280, 27 Am. Dec. 651; *Bayard v. Shunk*, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; *Scruggs v. Cass*, 14 Tenn. (8 Yerg.) 175, 29 Am. Dec. 114; *Ware v. Street*, 39 Tenn. (2 Head.) 609, 75 Am. Dec. 755.

See obiter, *Young v. Adams*, 6 Mass. 182.

⁴*Commonwealth v. Stone*, 45 Mass. (4 Met.) 45; *Hellings v. Hamilton*, 4 W. & S. (Pa.) 462.

¹*England. Jones v. Ryde*, 5 Taunt. 488.

Kentucky. Watson v. Cresap, 40 Ky. (1 B. Mon.) 195, 36 Am. Dec. 572.

Maryland. Rasat v. Morris, 133 Md. 187, 108 Atl. 787 (payment in foreign money).

Michigan. Atwood v. Cornwall, 28 Mich. 336, 15 Am. Rep. 219 [s. c., 25 Mich. 142].

New York. Markle v. Hatfield, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446.

Tennessee. Ware v. Street, 39 Tenn. (2 Head.) 609, 75 Am. Dec. 755.

The fact that the contract provides that the debtor does not guarantee the value in United States money, of foreign money in which payment is to be made, does not entitle him to make payment in counterfeit money. *Rasat v. Morris*, 133 Md. 187, 108 Atl. 787.

²*United States v. Morgan*, 52 U. S. (11 How.) 154, 13 L. ed. 643. (The customs collector was here held liable to the United States for such payments received by him.)

³*United States Bank v. Bank*, 23 U. S. (10 Wheat.) 333, 6 L. ed. 334. In this case there is the complicating

cases cited in its support are those in which, as indicated below, the same result might have been reached had the notes been those of another bank. In any event the creditor must give notice to the debtor within a reasonable time that the money was counterfeit, to prevent the payment from binding him.⁴ Even under an agreement to receive a note⁵ as payment, delivery of a forged instrument is no payment. The surety on the original instrument is therefore not discharged.⁶

§ 2820. By whom payment may be made—Payment by debtor. Payment is usually made by a party who is primarily liable for the debt; and if such party makes or tenders payment, the creditor is bound to accept it.¹ Even if the maker of a note is insolvent, and a payment by him will be an unlawful preference, the holder of a note must accept such payment if tendered in order to prevent release of the indorsers.² Payment may be made by one of two or more joint debtors.³

Payment by one debtor under one contract does not discharge the liability of another debtor under another contract, although for the same obligation.⁴

§ 2821. Payment by stranger to contract. A stranger to the contract who does not act as the agent of the debtor, can not discharge the debt by paying it unless the creditor assents.¹ Since this question usually arises in cases in which the creditor has refused to accept the payment, it is discussed under the subject of

fact that the receiving bank was negligent, as examination of the notes would have shown that they bore serial numbers different from any of that denomination issued by that bank. In *Gloucester Bank v. Bank*, 17 Mass. 33, the additional fact existed that no notice was given of the doubtful character of the notes for fifteen days and no actual averment of forgery for fifty days.

⁴*Lawrenceburgh National Bank v. Stevenson*, 51 Ind. 504; *Raymond v. Baar*, 13 S. & R. (Pa.) 318, 15 Am. Dec. 603; *McDonald v. Allen*, 67 Tenn. (8 Baxt.) 446.

⁵*West Philadelphia National Bank v. Field*, 143 Pa. St. 473, 24 Am. St.

Rep. 502, 22 Atl. 829; *Bank v. Buchanan*, 87 Tenn. 32, 10 Am. St. Rep. 616, 1 L. R. A. 199, 9 S. W. 202.

⁶*Bank v. Buchanan*, 87 Tenn. 32, 10 Am. St. Rep. 616, 1 L. R. A. 199, 9 S. W. 202.

¹*Second National Bank v. Prewitt*, 117 Tenn. 1, 119 Am. St. Rep. 987, 9 L. R. A. (N.S.) 581, 96 S. W. 334.

See ch. LXXXIII.

²*Second National Bank v. Prewitt*, 117 Tenn. 1, 119 Am. St. Rep. 987, 9 L. R. A. (N.S.) 581, 96 S. W. 334.

³*Green v. Bolster*, — Mass. —, 122 N. E. 740 (obiter).

⁴*In re Kruger's Estate*, — Pa. St. —, 107 Atl. 379.

¹See ch. LXXXIII.

tender.² It has been said, however, that at least in cases in which the party who offers payment has a financial interest growing out of the transaction between the debtor and the creditor, he may make such payment as is necessary to protect his own interest, and the creditor is bound to accept it.³ If A sells property to B on credit, and B resells such property to C, it is held that C may make payment of B's debt to A.⁴

The civil law, as codified in Louisiana, takes a view of the right of a third party to make payment on behalf of the debtor, radically different from that of the common law. The Louisiana Code provides: "A third person may, for the advantage of the obligor, put the obligee in default by offering to perform the obligation on the part of the debtor, even without his knowledge; but it must be for the advantage of the obligor, not merely to change the creditor."⁵

It is generally held that if payment which is made by one who is not a party to the transaction and who is not the agent of the debtor, is accepted by the creditor in satisfaction of the obligation, the contract is discharged,⁶ even if there is no privity between the party making the payment and the debtor, and if the debtor is therefore under no obligation to reimburse such third party.⁷ A,

² See ch. LXXXIII.

³ Yeager v. Groves, 78 Ky. 278.

⁴ Yeager v. Groves, 78 Ky. 278.

⁵ Article 2131 of the civil code of Louisiana.

For an application of this rule, see *State v. Pillsbury*, 29 La. Ann. 787.

⁶ Idaho. *Donaldson v. Thousand Springs Power Co.*, 20 Ida. 735, 162 Pac. 334.

Minnesota. *Clark v. Abbott*, 53 Minn. 88, 30 Am. St. Rep. 577, 55 N. W. 542.

Montana. *Tanner v. Bowen*, 34 Mont. 121, 7 L. R. A. (N.S.) 534, 85 Pac. 876; *Penwell v. Flickinger*, 46 Mont. 526, 129 Pac. 323.

Ohio. *People's & Drovers' Bank v. Craig*, 63 O. S. 374, 81 Am. St. Rep. 639, 52 L. R. A. 872, 50 N. E. 102.

South Dakota. *Charnock v. Jones*, 22 S. D. 132, 16 L. R. A. (N.S.) 233, 115 N. W. 1072.

Utah. *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397.

West Virginia. *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

Wisconsin. *Gray v. Herman*, 75 Wis. 453, 6 L. R. A. 691, 44 N. W. 248.

The same principle applies to accord and satisfaction received from a stranger. *Leavitt v. Morrow*, 6 O. S. 71, 67 Am. Dec. 334. See § 2511.

It has been held in England that payment by a stranger is not a discharge. *Jones v. Broadhurst*, 9 C. B. 173.

This view has been criticized in a later case. See *Coak v. Lister*, 13 C. B. (N.S.) 543 (594).

⁷ *Gray v. Herman*, 75 Wis. 453, 6 L. R. A. 691, 44 N. W. 248.

who had a judgment against B, attached certain bonds of a railroad company. The railroad company wished to retire such bonds and so made an arrangement by which A had the bonds sold, bought them in himself, and transferred to X, who, acting on behalf of the railroad company, paid part of the judgment in cash and gave notes for the balance. Whatever might be the nature of the transaction between B and X, A was paid and could not recover again from B.⁸ A gave a note which was subsequently indorsed by the holder thereof to a bank "for collection." The bank paid the note without consulting A, and then sought to recover from A. As the agreement between the bank and the holder of the note was for payment and not for assignment, the bank could not be treated as the holder of the note.⁹ Neither could the bank recover from A for money expended on his behalf.¹⁰ Even if A has paid B's note by mistake to one who holds it for collection, such payment operates as a discharge of the note, and the agent who holds it for collection can not indorse it over to A and thus pass title thereto.¹¹

If payment is a condition precedent, payment by a third person if accepted in satisfaction is sufficient.¹² If the premium on an insurance policy must be paid before the policy takes effect, this condition is performed if the agent advances the premium out of his own funds.¹³ But where A agreed severally with X and Y to construct a building for each, adjoining that of the other, and X agreed to pay A half the cost of the party wall, while Y agreed to pay A the entire cost of such wall, X's payment of his proportion does not discharge Y from paying the entire amount.¹⁴

In other jurisdictions, however, it has been said that the debtor can not take advantage of a payment which is made by a stranger to the transaction,¹⁵ especially in the absence of evidence showing

⁸ *Crumlish v. Improvement Co.*, 38 W. Va. 300, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

⁹ *People's & Drivers' Bank v. Craig*, 63 O. S. 374, 81 Am. St. Rep. 639, 52 L. R. A. 872, 59 N. E. 102.

¹⁰ See § 1520.

¹¹ *Charnock v. Jones*, 22 S. D. 132, 16 L. R. A. (N.S.) 233, 115 N. W. 1072.

See also, *Hamilton Machine Tool Co. v. Memphis National Bank*, 84 O. S. 184, 95 N. E. 777.

¹² *Lehman v. Gunn*, 124 Ala. 213, 82

Am. St. Rep. 159, 5 L. R. A. 112, 27 So. 475.

¹³ *Lehman v. Gunn*, 124 Ala. 213, 82 Am. St. Rep. 159, 51 L. R. A. 112, 27 So. 475.

¹⁴ *Meyer v. Stadler*, 23 Tex. Civ. App. 432, 56 S. W. 108.

¹⁵ *Benson v. Arkansas Abstract Co.*, 123 Ark. 620, 185 S. W. 1059; *Clow v. Borst*, 6 Johns. (N. Y.) 37; *Bleakley v. White*, 4 Paige (N. Y.) 654; *Muller v. Eno*, 14 N. Y. 597; *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 523, 100 N. E. 457.

that the creditor and the stranger intended that the transaction between them should discharge the debtor.¹⁶ A note which is given by a stranger to the transaction who is a mere volunteer and which is accepted as such by the creditor, does not amount to payment, at least if the note is not paid at maturity.¹⁷ If the manager of the creditor corporation advanced money to induce it to enter into the transaction with the debtor, the debtor can not treat such advance as payment.¹⁸ If C, who is indebted to B, attempts to pay A, to whom B is indebted, and on B's objection A pays such sum to B, the transaction between A and C is not a payment of which D, a subsequent mortgagee whose mortgage is inferior to A's, can take advantage.¹⁹

Since payment must be intended by both parties as such,²⁰ a transaction between the creditor and a stranger which is intended to operate as an assignment of the claim can not be treated as payment.²¹

Where the holder, A, indorsed "for collection" to B, and B sold to C after canceling such indorsement, but leaving it still legible, C took with notice and acquired no greater right than B had; but the transaction was not payment.²²

The fact that attorney's fees are allowed to one of the parties to litigation, does not operate as a discharge of his liability to his attorney upon the contract of employment.²³ This principle has been applied in cases in which a married woman was held liable upon her contract by which she employed an attorney, although the court made an allowance for her attorney's fees in such action.²⁴

§ 2822. To whom payment may be made—Payment to creditor.

Payment, in order to have its intended legal consequences, must be made to the creditor or to his authorized agent;¹ although in this

¹⁶ King v. Barnes, 100 N. Y. 267, 16 N. E. 332.

¹⁷ Thomas Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 N. E. 457.

¹⁸ Benson v. Arkansas Abstract Co., 123 Ark. 620, 185 S. W. 1089.

¹⁹ Gordon v. Ware Savings Bank, 115 Mass. 588.

²⁰ See §§ 2802 et seq.

²¹ Cussen v. Brandt, 97 Va. 1, 75 Am. St. Rep. 762, 32 S. E. 701.

²² Cussen v. Brandt, 97 Va. 1, 75 Am. St. Rep. 762, 32 S. E. 701.

²³ Culley v. Badgley, 196 Mich. 414, L. R. A. 1917F, 359, 163 N. W. 33.

²⁴ Culley v. Badgley, 196 Mich. 414, L. R. A. 1917F, 359, 163 N. W. 33; State v. Superior Court, 58 Wash. 97, 107 Pac. 876.

¹ Calhoun v. Ainsworth, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316; Jens-Marie Oil Co. v. Rixse, — Okla. —, 178 Pac. 658; Golden v. O'Connell,

case, as in others,² the principal may be bound by estoppel for the unauthorized acts of an agent or even for the acts of one who was not in fact his agent. Since a release by one of two or more joint promisees or joint creditors acts as a discharge,³ payment to one of two or more joint creditors operates as a discharge of the debt.⁴ The question, who is authorized to receive payment so as to discharge the obligation, usually turns on questions of ownership and agency, and is related to contract only collaterally.

Payment to the original payee of a negotiable instrument is not discharged as to an indorsee for value before maturity and without notice.⁵ The maker is not discharged by payment to the payee without surrender of the note, even if the indorsee and payee had agreed to conceal the fact of the transfer from such maker.⁶ Even if the note is secured by a mortgage and the mortgage provides that if the mortgaged goods are sold the proceeds of such sale shall be paid to the mortgagees, payment does not discharge the mortgage notes if such notes had been duly transferred by such mortgagees before such payment.⁷ The maker can not pay the original payee after maturity after notice to the maker of assignment.⁸ If a note is assigned but not indorsed, it has been held that payment to the original payee is a discharge, although the note is not produced.⁹

If a receiver for the property of the creditor has been appointed, the debtor can not discharge his obligation by paying the original

76 W. Va. 232, 2 A. L. R. 460, 85 S. E. 533; *Marling v. Nommerisen*, 127 Wis. 363, 115 Am. St. Rep. 1017, 106 N. W. 844 [sub nomine, *Marling v. Milwaukee Realty Co.*, 5 L. R. A. (N.S.) 412].

² See § 1760.

³ See § 2081.

⁴ *Jens-Marie Oil Co. v. Rixse*, — Okla. —, 178 Pac. 658.

⁵ *Arkansas*. *Calhoun v. Ainsworth*, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316.

Michigan. *Wilson v. Campbell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278.

North Dakota. *Hollinshead v. Stuart*, 8 N. D. 35, 42 L. R. A. 659, 77 N. W. 89.

Oklahoma. *Smith v. First National Bank*, 23 Okla. 411, 29 L. R. A. (N.S.) 576, 104 Pac. 1080.

Wisconsin. *Marling v. Nommensen*, 127 Wis. 363, 115 Am. St. Rep. 1017, 106 N. W. 844 [sub nomine, *Marling v. Milwaukee Realty Co.*, 5 L. R. A. (N.S.) 412].

⁶ *Tuck v. National Bank*, 108 Ga. 446, 75 Am. St. Rep. 69, 33 S. E. 983.

⁷ *Smith v. First National Bank*, 23 Okla. 411, 29 L. R. A. (N.S.) 576, 104 Pac. 1080.

⁸ *Mackay v. Church*, 15 R. I. 121, 2 Am. St. Rep. 881, 23 Atl. 108.

⁹ *Vann v. Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70, 23 L. R. A. 325, 14 So. 273.

creditor.¹⁰ Even if the debtor has sent his check in payment after the receiver was appointed, but before he had notice thereof, the collection of such check does not operate as a discharge of the obligation if the debtor had an opportunity to stop payment thereon.¹¹ Payment of a salary to a de facto officer is no discharge of the liability of the public corporation to the de jure officer entitled thereto.¹² Payment to an administrator of the creditor appointed by the probate court of decedent's domicile is a discharge of the debt. An executor under a will made during a temporary visit to another state, to whom the note has been given for safe-keeping, can not enforce payment thereof.¹³ Since the statute forbidding assignments of claims against the government in certain cases is intended solely for the benefit of the government, payment by the government to the assignee will discharge its liability to the assignor.¹⁴

§ 2823. Payment to agent of creditor. Whether one who accepts a payment is authorized to bind the creditor by the receipt thereof, is a question which depends upon the general principles of the law of agency, including estoppel.¹ If authority is given to the agent to accept payment, payment is complete and operative when made to the agent without regard to the ultimate disposition of the fund.² If a public corporation has power to appoint an agent to receive payments, it is bound by payments made to him, even under a contract which provides in general terms that money which has been advanced must be paid into the treasury of such corporation.³ If one who claims to act as agent for the creditor has received money from the debtor and has embezzled it, it is said that subsequent authority from the creditor to him to collect the debt has no effect, since the agent has authority under such grant of power to

¹⁰ *Buchanan v. Hicks*, 98 Ark. 370, 34 L. R. A. (N.S.) 1200, 136 S. W. 177.

¹¹ *Buchanan v. Hicks*, 98 Ark. 370, 34 L. R. A. (N.S.) 1200, 136 S. W. 177.

¹² *Rasmussen v. Carbon County*, 8 Wyo. 277, 44 L. R. A. 295, 56 Pac. 1098.

Contra, *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025. (An action by the de jure officer against the de facto officer.)

¹³ *Bull v. Fuller*, 78 Ia. 20, 16 Am. St. Rep. 419, 42 N. W. 572.

¹⁴ *Lopez v. United States*, 24 Ct. Cl. 84, 2 L. R. A. 571.

¹ See ch. LIV.

² *Seattle v. Stirrat*, 55 Wash. 560, 24 L. R. A. (N.S.) 1275, 104 Pac. 834; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707; *Golden v. O'Connell*, 76 W. Va. 282, 2 A. L. R. 460, 85 S. E. 533.

See also, §§ 1751 et seq.

³ *Seattle v. Stirrat*, 55 Wash. 560, 24 L. R. A. (N.S.) 1275, 104 Pac. 834.

receive nothing but money in payment of the debt; and he can not receive on behalf of the principal the claim of the debtor against the alleged agent for the embezzlement of such fund.⁴

If the creditor has acquiesced in the assumption of authority of another to accept payment, the creditor is bound by payments made to such person.⁵ If the assignee of a number of debts has permitted the assignor to receive payment thereon, he is bound by payments made to the assignor.⁶ If a broker has been permitted to represent the creditor throughout the transaction and to receive interest thereon, the principal is bound by payment to such broker.⁷ It is said, however, that acquiescence in the receipt of payments of interest does not estop the creditor from denying authority to receive the principal.⁸ The possession by the alleged agent of securities may operate so as to estop the principal from denying that the agent had authority to accept payment.⁹ The fact that the agent has not the securities in his possession is not of itself conclusive as to his lack of authority to accept payment.¹⁰

Payment to an unauthorized agent does not operate as a discharge if such agent does not pay over the fund to his principal and if no estoppel exists.¹¹ If an agent is not authorized by the creditor to discharge a debt, his assumption of a debt due from a third person to his principal does not operate as a discharge thereof.¹² If an agent authorized to collect overdue interest, does not have possession of the instrument evidencing the indebtedness, and has no authority to receive payment of the debt, payment to him is not a discharge. The bank at which a note is made payable is

⁴ *Gallagher v. Conner*, 138 La. 633, 70 So. 539.

⁵ *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428; *Harrison National Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639, 59 L. R. A. 294, 91 N. W. 540; *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397; *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

⁶ *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428; *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

⁷ *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397.

⁸ *Hoffmaster v. Black*, 78 O. S. 1, 21 L. R. A. (N.S.) 52, 84 N. E. 423.

⁹ *Marling v. Nommensen*, 127 Wis. 363, 115 Am. St. Rep. 1017, 106 N. W. 844 [sub nomine, *Marling v. Milwaukee Realty Co.*, 5 L. R. A. (N.S.) 412].

See also, §§ 1751 et seq. and § 1760.

¹⁰ *Harrison National Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639, 59 L. R. A. 294, 91 N. W. 540; *Campbell v. Gowans*, 35 Utah 268, 23 L. R. A. (N.S.) 414, 100 Pac. 397.

¹¹ *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L. R. A. (N.S.) 606, 116 N. W. 529; *Hoffmaster v. Black*, 78 O. S. 1, 21 L. R. A. (N.S.) 52, 84 N. E. 423.

¹² *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L. R. A. (N.S.) 606, 116 N. W. 529.

not thereby made an agent of the creditor. Accordingly, a deposit in such bank by the debtor for the purpose of paying such note is not of itself payment.¹³ A deposit by a debtor in a bank to the account of his creditor, is not payment unless the creditor consents thereto, since the bank is the agent of the debtor.¹⁴

An agent authorized to receive payment has no authority to accept payment in anything but money. Hence, he can not receive corporate stock.¹⁵

Payment made in accordance with the terms of the original contract operates as a discharge, even if it was made in fact to one who is not authorized to receive it.¹⁶ If a contract under which money is deposited to a savings account provides that payment may be made to any one who produces the pass-book, payment made to one who produces the pass-book operates as a discharge in the absence of negligence on the part of the bank, although such person had no right to the possession of the pass-book and had no right to receive such payment.¹⁷

§ 2824. Place of payment. If the debtor and creditor have agreed upon the place at which payment is to be made, the debtor must make payment at such place and the creditor must receive payment at such place in the absence of some other or further agreement.¹ If, by the agreement of the parties, the note is payable at some bank in a specified place and the creditor leaves the state without taking the note with him and refusing to designate a bank at which such payment is to be made, the debtor may select the bank at which he will make payment;² and payment thus made prevents the creditor from exercising his option under the original contract to declare all the notes of a series due upon default in the payment of one.³

¹³ *St. Paul National Bank v. Cannon*, 46 Minn. 95, 24 Am. St. Rep. 189, 48 N. W. 526; *Kohl v. Beach*, 107 Wis. 409, 50 L. R. A. 600, 83 N. W. 657.

¹⁴ *Hill v. Arnold*, 116 Ga. 45, 42 S. E. 475; *Moore v. Tate*, 63 Va. (22 Gratt.) 351.

¹⁵ *Bank v. Hart*, 37 Neb. 197, 40 Am. St. Rep. 479, 20 L. R. A. 780, 55 N. W. 631.

¹⁶ *Langdale v. Citizens' Bank*, 121 Ga. 105, 104 Am. St. Rep. 94, 69 L. R. A. 341, 48 S. E. 708.

¹⁷ *Langdale v. Citizens' Bank*, 121 Ga. 105, 104 Am. St. Rep. 94, 69 L. R. A. 341, 48 S. E. 708.

¹ *Thorn v. City Rice Mills*, 40 Ch. D. 357; *Taylor v. Munger*, 169 N. Car. 727, 86 S. E. 626; *Stansbury v. Embrey*, 128 Tenn. 103, 47 L. R. A. (N.S.) 980, 158 S. W. 991.

² *Stansbury v. Embrey*, 128 Tenn. 103, 47 L. R. A. (N.S.) 980, 158 S. W. 991.

³ *Stansbury v. Embrey*, 128 Tenn. 103, 47 L. R. A. (N.S.) 980, 158 S. W. 991.

If no place for the payment of the debt has been agreed upon, the debt is said to be payable at the domicile of the creditor,⁴ or at his place of business,⁵ or at his domicile or place of business at the election of the debtor.⁶ While the rights of the parties on questions of this sort have not been worked out in detail, the debtor has probably the right to pay any debt at the creditor's place of business if he has a place of business; if it is a business debt as distinguished from a personal debt, the debtor is probably bound to pay at the place of business and he has no right to pay at the creditor's domicile; while if it is a personal debt as distinguished from a business debt, the debtor has probably a right to pay the creditor at his domicile if he selects a reasonable time for making such payment. In any event, if the debtor wishes to avoid default, it is his duty to seek the creditor either at his place of business or domicile, as the case may be, and to make payment there.⁷ The fact that he is ready and willing to pay will not prevent him from being in default.

The fact that the creditor has been in the habit of coming to collect debts from the debtor does not give the debtor any vested right in such method of collection; and upon reasonable notice of change in the method of doing business the creditor may require the debtor to pay a business debt at the creditor's place of business.⁸ Unless notice of such change in the method of collecting debts is given, however, the creditor can not forfeit the rights of the debtor by omitting to come to the debtor to receive payment,⁹ although it is possible that for other purposes the debtor might be treated as being in default.

It is also said that the debtor may pay the creditor wherever he may find the creditor;¹⁰ and this is probably true if a reasonable

⁴German National Bank v. Zimmer, 141 Ky. 401, 132 S. W. 1023; State v. District Court, 55 Mont. 330, 176 Pac. 613; Jones v. Main Island Creek Coal Co., — W. Va. —, 99 S. E. 462.

⁵Magruder v. Cumberland Telephone & Telegraph Co., 92 Miss. 716, 16 L. R. A. (N.S.) 560, 46 So. 404; State v. Kenosha Home Telephone Co., 158 Wis. 371, 148 N. W. 877.

⁶Esmay v. Gordon, 18 Ill. 483. So by statute, State v. District Court, 55 Mont. 330, 176 Pac. 613.

⁷Danser v. Dorr, 72 W. Va. 430, 78 S. E. 367; Jones v. Main Island Creek

Coal Co., — W. Va. —, 99 S. E. 462.

⁸Magruder v. Cumberland Telephone & Telegraph Co., 92 Miss. 716, 16 L. R. A. (N.S.) 560, 46 So. 404; State v. Kenosha Home Telephone Co., 158 Wis. 371, 148 N. W. 877.

⁹Union Central Life Ins. Co. v. Pottker, 33 O. S. 459.

See also, Manhattan Life Ins. Co. v. Smith, 44 O. S. 156.

¹⁰Wiener v. American Ins. Co., 224 Pa. St. 202, 73 Atl. 443.

See also, Chicago, Rock Island & Pacific Ry. v. Sturm, 174 U. S. 710, 43 L. ed. 1144.

time and place are selected by the debtor for the purpose of making such payment.

In most of the foregoing cases the rule that the debt is payable at the domicile of the creditor or at his place of business was laid down without discussing the duty of the debtor to leave the state and to seek the creditor elsewhere. It has been said that if the creditor leaves the state and does not appoint an agent in the state to receive payment, the debtor is not bound to follow him outside of the state in order to make payment.¹¹ This principle has been applied for the purpose of declaring that interest upon the debt stops if the creditor has left the state before the maturity of the debt and has left no agent to receive payment.¹² This principle has also been applied where the creditor was a non-resident when the debt was incurred;¹³ and it is held that the failure of the debtor to leave the state and to tender payment at the residence of the creditor does not authorize the creditor to exercise an option to declare the entire debt due upon default in payment of interest.¹⁴

§ 2825. Time of payment. If a contract for the payment of money does not specify the time at which such payment is to be made, the ordinary rules of construction apply; and the contract will be construed as though it required payment in a reasonable time.¹ If the contract specifies a certain time at which payment is to be made, and payment is not made at such time, such covenant is broken so as to give to the creditor a right of action.² Whether such breach operates as a discharge depends in part on whether time is of the essence of the contract or not,³ and in part on whether the covenant for such payment is an independent covenant or a dependent covenant, and, if a dependent covenant, whether it is a concurrent covenant or whether it is either a precedent or subsequent covenant.⁴

¹¹ *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168.

"If he [the mortgagee] be out of the realm of England, he [the mortgagor] is not bound to seek him, or go out of the realm unto him." Coke on Littleton, 210b.

See contrary (obiter) in *Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810.

¹² *Laura Jane v. Hagen*, 29 Tenn. (10 Humph.) 332.

See also, *Stansbury v. Embrey*, 128 Tenn. 103, 47 L. R. A. (N.S.) 980, 158 S. W. 991.

¹³ *Weyand v. Park Terrace Co.*, 202 N. Y. 231, 36 L. R. A. (N.S.) 308, 95 N. E. 723.

¹⁴ *Weyand v. Park Terrace Co.*, 202 N. Y. 231, 36 L. R. A. (N.S.) 308, 95 N. E. 723.

¹ See § 2098.

² See ch. LXXXIV.

³ See §§ 2103 et seq.

⁴ See ch. LXXXIV.

If payment is tendered before the time fixed for payment, the creditor is not bound to accept such payment.⁵ Since the creditor is entitled to interest for the entire period named in the contract, the offer of the debtor to pay the principal before maturity with interest down to the date of such tender, is one which the creditor may refuse to accept.⁶ From the nature of the case it is rare that the creditor refuses the debtor's offer to pay before maturity if the debtor offers to pay the amount due with interest down to maturity,⁷ but if the creditor wishes to refuse such payment, he has the legal right so to do and such offer of payment is without legal effect.⁸

It has been said, however, that a different rule applies where the creditor has designated a bank as his agent for the purpose of receiving payment. In such case payment by the debtor to the bank before maturity is legally operative, at least if no prejudice is done to the creditor by such premature payment.⁹ If the bank accepts such payment before maturity and retains the funds until maturity, the fact that the creditor fails to collect such payment from the bank and the fact that the bank finally becomes insolvent while it still has such funds in its hands, does not prevent the payment from being operative.¹⁰

If a premature attempt to redeem certain property is made, an objection as to the condition of the property is said to waive the objection that the payment was premature.¹¹

⁵ England. *Brown v. Cole*, 14 Sim. 427.

Alabama. *Caldwell v. Caldwell*, 157 Ala. 119, 47 So. 268.

Connecticut. *Abbe v. Goodwin*, 7 Conn. 377.

Indiana. *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700.

Nebraska. *Moore v. Kime*, 43 Neb. 517, 61 N. W. 736.

The question was avoided in *Moore v. Cord*, 14 Wis. 213.

A payment before maturity to the trustee who is named in the mortgage, has no legal effect if he is not given authority to collect such payment and if he is not given possession of the securities. *Weldon v. Tollman*, 67 Fed. 986.

⁶ *Abbe v. Goodwin*, 7 Conn. 377.

See also, *Graeme v. Adams*, 64 Va. (23 Gratt.) 225, 14 Am. Rep. 130.

⁷ *Pyross v. Fraser*, 82 S. Car. 498, 64 S. E. 407.

⁸ *Brown v. Cole*, 14 Sim. 427; *Quynn v. Whetcroft*, 3 Harris & McH. (Md.) 136. (Reversed, but ground of reversal not given.) *Pyross v. Fraser*, 82 S. Car. 498, 64 S. E. 407.

See also, *Smiddy v. Grafton*, 163 Cal. 16, 124 Pac. 433.

⁹ *Virginia Exchange Bank v. Cookman*, 1 W. Va. 69.

¹⁰ *Virginia Exchange Bank v. Cookman*, 1 W. Va. 69.

¹¹ *Rosenthal v. Rambo*, 165 Ind. 584, 3 L. R. A. (N.S.) 678, 76 N. E. 404.

If a contract of indorsement is entered into in consideration of the agreement of the indorsee to accept payment from the maker before maturity, the indorsee must accept payment from the maker, even before maturity,¹² and even if he knows that the maker is then insolvent;¹³ and if he refuses such payment, he releases the indorsers.

§ 2826. Payment by mail. In the absence of specific authority from the creditor to make payment by mail, and in the absence of a usage or custom of making payments in this manner, the debtor can not make payment by mail so as to impose the risk of loss in the mail upon the creditor.¹ A direction as to the manner of making one payment is not authority to make successive payments in such manner.² A single prior instance is not sufficient to show a similar custom between the parties, authorizing the debtor to remit by mail.³ A general direction to remit does not give to the debtor authority to remit by mail in such a manner as to impose the risk of loss upon the creditor,⁴ as by remitting money by registered mail.⁵ In some cases, however, it has been held that a direction given by mail to remit is equivalent to instruction to make payment through the mail at the risk of the creditor.⁶ Payment by mail, in accordance with the instructions of the creditor, operates as a discharge although the creditor does not receive the money.⁷

If the payment is sent by mail in such form that the loss of the letter containing such remittance does not prejudice either party's position as far as eventual payment is delayed, or if the remittance

¹² *Second National Bank v. Prewitt*, 117 Tenn. 1, 119 Am. St. Rep. 987, 9 L. R. A. (N.S.) 581, 96 S. W. 334.

¹³ *Second National Bank v. Prewitt*, 117 Tenn. 1, 119 Am. St. Rep. 987, 9 L. R. A. (N.S.) 581, 96 S. W. 334.

¹ *England. Thairwall v. Great Northern Ry. Co.* [1910], 2 K. B. 500; *Mitchell-Henry v. Norwich Union Life Ins. Co.* [1918], 2 K. B. 67, 2 A. L. R. 1644.

Arkansas. Burr v. Sickles, 17 Ark. 428, 65 Am. Dec. 437.

Iowa. Gaar, Scott & Co. v. Taylor, 128 Ia. 636, 105 N. W. 125.

Massachusetts. Gurney v. Howe, 75 Mass. (9 Gray) 404, 69 Am. Dec. 299.

Washington. Masterson v. Union

Bank & Trust Co., 86 Wash. 560, L. R. A. 1918A, 531, 150 Pac. 1126.

² *Dodge v. Smith*, 34 Vt. 178.

³ *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437.

⁴ *Mitchell-Henry v. Norwich Union Life Ins. Co.* [1918], 2 K. B. 67, 2 A. L. R. 1644; *Masterson v. Union Bank & Trust Co.*, 86 Wash. 560, L. R. A. 1918A, 531, 150 Pac. 1126.

⁵ *Mitchell-Henry v. Norwich Union Life Ins. Society* [1918], 2 K. B. 67, 2 A. L. R. 1644.

⁶ *Morgan v. Richardson*, 95 Mass. (13 All.) 410; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58.

⁷ *Jung v. Second Ward Savings Bank*, 55 Wis. 364, 42 Am. Rep. 719, 13 N. W. 235.

which is made by mail is not lost, but is merely delayed, a somewhat different question is presented as to the effect of such delay in making payment. If failure to make payment at a specified time will result in the forfeiture of the rights of the debtor, it is held that the date of the payment, for the purpose of preserving such rights, is the date of the receipt of the payment and not the date of mailing it in the absence of authority from the creditor to make payment in such manner, and in the absence of a general custom to that effect.⁸ It has been held, however, that equity will not cancel a lease which contains a condition subsequent to the fact that failure to make payment on time shall terminate the rights of the lessee, if the lessee had sent payment in proper form by registered mail properly addressed and in ample time, if the lessor is not prejudiced by the loss of the remittance except through such delay.⁹ If the debtor is authorized by the creditor to make payment by mail, or if the creditor has acquiesced in such method of payment, or if there is a general custom authorizing such method of payment, delay in the transmission of such payment does not operate as forfeiture of the rights of the debtor.¹⁰ If a debtor has been in the habit of making payments to his creditor by mail, an act of bankruptcy on the part of the debtor after such payment has been mailed and before it has been received, is treated as an act of bankruptcy after payment is made.¹¹ If the debtor is authorized to make payment by mail, such payment is regarded as completed when the letter which contains the check, draft, or other proper medium of payment, is deposited in the post-office, if, by the rules of the postal authorities, the party who has deposited such letter is not allowed to reclaim it.¹² If, however, the postal regulations allow the party who has deposited the letter to claim it, and such party does in fact claim such letter, it is held that such payment has not been made;¹³ and the party who had

⁸ *Beeman v. Supreme Lodge, Shield of Honor*, 215 Pa. St. 627, 64 Atl. 792.

⁹ *Kays v. Little*, 103 Kan. 461, 1 A. L. R. 675, 175 Pac. 149.

¹⁰ *Mutual Reserve Fund Life Association v. Tuchfeld*, 159 Fed. 833; *Colle v. Order of United Commercial Travelers*, 161 N. Car. 104, 76 S. E. 622.

¹¹ *McDonald v. Chemical National Bank*, 174 U. S. 610, 43 L. ed. 1106.

¹² *Security National Bank v. Old*

National Bank, 241 Fed. 9; *Chapman v. Mills*, 241 Fed. 717; *Kirkman v. Bank of America*, 42 Tenn. (2 Cold.) 397; *Canterbury v. Bank*, 91 Wis. 53, 51 Am. St. Rep. 870, 30 L. R. A. 845, 64 N. W. 311.

This is analogous to the rule which governs acceptance by mail. See §§ 199 et seq.

¹³ *Ex parte Cote*, L. R. 9 Ch. App. 27; *Traders' National Bank v. First*

drawn a draft,¹⁴ or who has indorsed a bill of exchange,¹⁵ as payment of an obligation, may avoid liability upon such instrument if he recovers it from the mail under such circumstances.¹⁶

§ 2827. Effect of payment—Judgments. It seems to us axiomatic that payment should operate as a discharge; but the common law had great difficulty in reaching this conclusion in cases involving payment of formal obligations.

Since a judgment was a so-called obligation of record,¹ its existence could be proved only by the record, and the record was conclusive as to all matters existing at the date of the rendition of the judgment.² According to the original common-law theory of the nature of the judgment and of the effect of the record, payment of a judgment could be shown only by satisfaction entered on the record itself; and if satisfaction were not entered on the record, payment could not be shown by the judgment debtor.³ Upon showing the fact of payment to the court which had rendered the judgment, a warrant would issue to any attorney to enter satisfaction on the record.

Because of the peculiar nature of the judgment, the courts of equity at first hesitated to give relief to a judgment debtor who had paid a judgment without securing the entry of satisfaction on the record.⁴ Such an inequitable abuse of a legal right was so unethical that equity finally gave relief in cases of this sort.⁵

The equitable theory of the effect of the payment of a judgment has been adopted in many jurisdictions by the courts of law, and in a proceeding upon a judgment, such as an action thereon, payment may be shown although it has not been entered on the record.⁶

National Bank, — Tenn. —, 217 S. W. 977.

¹⁴ *Traders' National Bank v. First National Bank*, — Tenn. —, 217 S. W. 977.

¹⁵ *Ex parte Cote*, L. R. 9 Ch. App. 27.

¹⁶ For discussion of the effect of such a regulation upon acceptance by mail, see § 208.

¹ See ch. XXXVIII.

² See §§ 1136 et seq.

³ *Y. B.*, 22 Ed. 4, 6 pl. 18. (On request of the chancellor for the opinion of the justices on a question of law.)

Briley v. Sugg, 21 N. Car. (1 Dev. & Battles. Eq.) 366, 30 Am. Dec. 172 (obiter).

⁴ *Y. B.* 22 Ed. 4, 6 pl. 18.

⁵ *Clethero v. Beckingham*, Toth. 152 (p. 178). (A statute merchant or a statute staple.)

See also, *Humphreys v. Leggett*, 50 U. S. (9 How.) 297, 13 L. ed. 145; *Florat v. Handy*, 35 La. Ann. 816.

⁶ *Harding v. Hawkins*, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

Whether the adoption of the equitable rule by the courts of common law has ousted the jurisdiction of equity in cases of this sort, or whether equity may continue to enjoin the enforcement of a judgment which has been paid, in spite of the fact that payment may now be shown at common law, is a question upon which there is some conflict of authority. In some jurisdictions a judgment creditor will be enjoined from collecting a judgment which has once been paid,⁷ especially if such judgment has not been paid in full.⁸ In other jurisdictions the fact that a full, adequate and complete remedy can be had at law is regarded as using the jurisdiction of equity to give relief in cases of this sort.⁹

§ 2828. Effect of payment—Obligations under seal. If the original obligation was under seal, a distinction seems to have been drawn between the so-called single bonds which were unconditional obligations and the bonds which were given upon condition.¹ If the sealed obligation was unconditional, payment without a specialty²—that is, without a quittance under seal³—or as it was said in an earlier case, without “either a writing or a tally,”⁴ was inoperative and the obligee could maintain an action upon the sealed instrument, to which action such payment would not be a defense. This result was justified by the court on the ground of the solemnity of the sealed instrument and the danger which would follow if its obligation could be avoided by oral evidence.⁵ The rule that payment did not operate as a discharge of an unconditional obligation under seal was carried to such an extent that the obligee was allowed to enforce the obligation although he had surrendered it

⁷ *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Marks v. Willis*, 36 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526.

⁸ *Johnson v. Huber*, 106 Wis. 282, 82 N. W. 137. (A case of accord and partial satisfaction.)

⁹ *Robinson v. McDowell*, 125 N. Car. 337, 34 S. E. 550; *Rollins v. National Casket Co.*, 40 W. Va. 590, 21 S. E. 722.

¹ 1 Dyer 25b (160).

² Y. B., 22 Ed. 4, 51 pl. 8; *Etnam v. Tottam*, Croke Eliz. 157.

³ 48 Ed. 3, 2 pl. 6; 1 Dyer 25b (160); *Chamberlayn v. Nichols*, Croke Eliz. 455; *Nichol's Case*, 5 Coke 43a.

⁴ Y. B., 20 Ed. 1, 304 (Horwood's translation).

⁵ “And in account upon receipt by indenture, the defendant shall not plead against it unques son receiver, etc. And in a writ of annuity, payment is plea, if it be granted out of the land, otherwise not. And although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law.” *Waberley v. Cockerel*, 1 Dyer 51a (12, 15).

to the obligor, provided the obligee had regained possession of it at a later time, no matter how wrongfully.⁶

If the obligation were a penal bond given upon condition, an action could not be maintained upon such bond without showing a breach of such condition; and accordingly it was said that payment would be a sufficient defense, since it would show that the condition had not been broken.⁷

The conduct of an obligee in enforcing payment of a sealed obligation a second time was immoral and unethical; and after some hesitation equity interfered and enjoined the obligee from enforcing a sealed obligation under such circumstances.⁸ Relief of this sort was given in equity upon the oath of the party and not by witnesses.⁹

The rule that payment of a judgment or an obligation under seal could not be shown at common law worked so unjustly when it had any effect except that of driving the debtor to seek relief in equity, that the entire doctrine was finally abolished by legislation and the opposite rule, permitting payment to be shown at law in actions of this sort, was established.¹⁰

⁶ Y. B., 5 Hen. 4, 2 pl. 6; Waberley v. Cockerell. 1 Dyer 51, pl. 12; Cross v. Powell, Croke Eliz. 483; Lacey v. Lacey, 7 Barr. 251 (obiter).

⁷ 1 Dyer 25b (160).

While the court enforced a covenant which purported to bind the obligor for the payment of forty pounds on breach of the remaining covenants in the indenture, the reporter noted that apparently the opposite result had been reached at the same term, and that this question was likely to be a matter of law in the King's Bench. 1 Dyer 6a (3).

The difficulty in this case seems to have been in determining whether the covenant was absolute or conditional.

⁸ Anonymous, Cary 2; Cavendish v. Forth, Toth. 24 (p. 28); Huet v. De la Fontaine, Toth. 148 (p. 175); Dowdenay v. Oland, Croke Eliz. 768.

⁹ Anonymous, Cary 2.

¹⁰ "And be it further enacted by the authority aforesaid, That from and

after the said first day of Trinity term, where any action of debt shall be brought upon any single bill, or where action of debt, or scire facias, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid

§ 2829. Effect of payment—Simple debts. Apart from the difficulty of discharging a formal instrument by any means less formal than the instrument which it is sought to discharge, payment which is a form of performance operates as a discharge of the obligation either in whole or in part; and accordingly a payment of an obligation which is not of record and not under seal, if made by a debtor who is primarily liable thereon, operates as a total or partial discharge, as the case may be.¹ A maker of a note who has paid it without having it surrendered to him may maintain an action to secure possession of it.² If money is delivered by a bank to the holder of a check against the order embodied in such check, the check is paid although it is not stamped "Paid" after it is received by the officers of the bank, and although it is kept in a safe-deposit box.³ Payment may be set up as against a subsequent transferee of an instrument⁴ unless the instrument is negotiable and the holder thereof is protected as a holder in due course.⁵ A payment by a debtor who is primarily liable upon the obligation operates as a discharge even if he attempts to take an assignment of the claim instead of making payment of it.⁶ On the other hand, the payment may be made by one who is secondarily liable on the instrument, and who accordingly is bound to the creditor to make the payment and yet has a right to require payment to be made by the party who is primarily liable. In cases of this sort, payment by a party who is secondarily liable operates as a discharge of the instrument as between himself and the creditor;

at the day and place, according to the condition or defeazance, and had been so pleaded." 4 Anne, ch. XVI, § 12.

¹ Kentucky. Fennell v. Fechter, 181 Ky. 101, 203 S. W. 879.

New York. Jefferson County National Bank v. Dewey, 181 N. Y. 98, 73 N. E. 596.

North Carolina. Walter v. Earnhardt, 171 N. Car. 731, L. R. A. 1916E, 536, 88 S. E. 753.

Ohio. People's & Drovers' Bank v. Craig, 63 O. S. 374, 52 L. R. A. 872, 59 N. E. 102.

Virginia. Smith v. Waugh, 84 Va. 806, 6 S. E. 132.

Payment by a joint debtor is a dis-

charge as to all. Green v. Bolster, — Mass. —, 122 N. E. 740.

See, Defense of Payment Under Code Procedure, by Carlos C. Alden, 19 Yale Law Journal, 650.

² Walter v. Earnhardt, 171 N. Car. 731, L. R. A. 1916E, 536, 88 S. E. 753.

³ State v. Scarlett, 91 N. J. L. 200, 2 A. L. R. 83, 102 Atl. 160.

⁴ Bank v. Pennsylvania & Kentucky Fire Brick Co., 175 Ky. 192, L. R. A. 1918E, 165, 194 S. W. 110.

⁵ See §§ 2346 et seq.

⁶ Martin v. Chambers, 214 Fed. 769 (obiter). See to the same effect, People's & Drovers' Bank v. Craig, 63 O. S. 374, 52 L. R. A. 872, 59 N. E. 102.

but as between himself and the primary debtor such payment does not operate as discharge, but rather as a subrogation of the party who made such payment to the rights of the creditor against the debtor who is liable thereon primarily.⁷ If a party who is liable on an unliquidated claim makes payment thereof, the claim is discharged, and the party who has made such payment can not enforce it as against another party liable thereon, although the party who makes such payment attempts to take an assignment of the claim.⁸ Payment of an amount due under one contract is not a discharge of the amount due under another contract, although for the same debt.⁹

⁷ *Louviere v. Laubray*, 10 Mod. 36; *McCarty v. Roots*, 62 U. S. (21 How.) 432, 16 L. ed. 162; *Norton v. Downer*, 33 Vt. 26.

⁸ *Tanner v. Bowen*, 34 Mont. 121, 7 L. R. A. (N.S.) 534, 85 Pac. 876.

⁹ *In re Kruger's Estate*, — Pa. St. —, 107 Atl. 379.

CHAPTER LXXXII

APPROPRIATION OF PAYMENTS

- § 2830. Nature of appropriation of payments.
- § 2831. Appropriation by mutual consent.
- § 2832. Voluntary payments—Appropriation by debtor.
- § 2833. When debtor can make appropriation.
- § 2834. Appropriation by creditor—Common-law rule—Appropriation among valid debts.
- § 2835. Appropriation to unenforceable or invalid debts.
- § 2836. Civil-law rule.
- § 2837. When creditor can make appropriation
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- § 2839. Appropriation in order of maturity of debt.
- § 2840. Appropriation as between principal and interest.
- § 2841. Conflict between interests of debtor and creditor—Common-law rule.
- § 2842. Civil-law rule.
- § 2843. Interest of third persons in fund used for payment.
- § 2844. Source of payment as affecting appropriation.
- § 2845. Creditor's ignorance or knowledge of interest of third person or source of fund.
- § 2846. Appropriation, when immaterial.
- § 2847. Involuntary payments.
- § 2848. What amounts to appropriation by debtor.
- § 2849. What amounts to appropriation by creditor.
- § 2850. What amounts to appropriation by act of the law.
- § 2851. Effect of appropriation.

§ 2830. Nature of appropriation of payments. The problem of the appropriation of payments, or as it is sometimes called, application of payments, or imputation of payments, arises where a debtor owes two or more distinct debts to his creditor, or where he owes a single debt which consists of two or more items or which consists of a principal debt and one or more incidents thereto, such as interest. If, under such circumstances, a payment is made by the debtor or by some one on his behalf to the creditor, the legal rights of the debtor and creditor, or the legal rights of third persons, are often affected seriously by the application of such payment to one of such debts or items or incidents, or by its application to the other item or incident, or by a pro rata application of the payment among

the different debts. In determining what application is to be made of such payment it is necessary to ascertain whether the payment is a voluntary payment or an involuntary one; and if it is a voluntary payment, whether an application of the payment was agreed upon in advance, or whether it was directed by the debtor, or made by the creditor. It may also be necessary to ascertain the source of the fund from which the payment is made, for the purpose of effecting justice between the parties in carrying out their probable intention.

The doctrine of appropriation of payments has no application where there is but one debt owing by a debtor to a given creditor.¹ The fact that a debtor owes two debts to two different creditors, one of whom is the agent of the other, may raise a question as to the right between the two creditors; but it does not raise a question of the appropriation of a payment if the debtor has indicated his intention as to which of the debts his payment was intended to discharge.²

§ 2831. Appropriation by mutual consent. If the parties have made an agreement as to the application of a payment before such payment is made, the parties are bound thereby.¹ If by a provision in a mortgage, payments from a specified source are to be applied upon the mortgage debt, payments from such source must be so applied unless the parties modify such provision by a later agreement.² If a mortgage contains a provision securing to the mortgagee the right to elect what application of payments shall be made as between a number of notes secured by the mortgage in case the proceeds of the mortgaged property prove insufficient to pay all of the notes in full, such provision secures an election to the mortgagee which he may exercise up to the time of the trial.³ If a bank accepts a deposit under an agreement that it is to be used

¹ *Artificial Ice Co v. Pratt*, — S. D. —, 176 N. W. 45.

² *Artificial Ice Co v. Pratt*, — S. D. —, 176 N. W. 45.

¹ *Alabama. Bell v. Southern Home Building & Loan Association*, 140 Ala 371, 103 Am St Rep. 41, 37 So 237.

Ohio. Advance Thresher Co. v. Hogan, 74 O. S. 307, 78 N. E. 436.

South Dakota. Artificial Ice Co v. Pratt, — S. D. —, 176 N. W. 45.

Washington. Simpson v. Combes, — Wash. —, 182 Pac. 566.

West Virginia. Lutz v. Williams, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

² *Simpson v. Combes*, — Wash. —, 182 Pac. 566.

³ *Advance Thresher Co. v. Hogan*, 74 O. S. 307, 78 N. E. 436.

for a certain specified purpose, the bank foregoes the right which it otherwise would have had to apply such deposit as a set-off against a debt which is due from the depositor to the bank.⁴ If a debtor owes debts to two different creditors, one of whom is the agent of the other, and if he makes a payment which he declares to be in satisfaction of a certain debt, such payment can not be appropriated to the other debt by reason of the fact that it was the personal claim of the creditor to whom such payment was made; and that it was not to be applied on the debt which he had authority to collect as agent for the other creditor.⁵

§ 2832. Voluntary payments—Appropriation by debtor. If the debtor makes the payment voluntarily and out of his own funds, he has the right to direct the application of such payment.¹ He may direct the payment to be applied to an illegal demand in prefer-

⁴ *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460

⁵ *Artificial Ice Co. v. Pratt*, — S. D. —, 176 N. W. 45.

¹ *England. The Mecca* [1897], App. Cas. 286.

United States. Alexandria v. Patten, 8 U. S. (4 Cranch) 317, 2 L. ed. 633 (obiter); *Tayloe v. Sandford*, 20 U. S. (7 Wheat) 13, 5 L. ed. 384; *United States v. Kirkpatrick*, 22 U. S. (9 Wheat) 720, 6 L. ed. 199 (obiter); *National Bank v. Mechanics' National Bank*, 94 U. S. 437, 24 L. ed. 176

Alabama. Pearce v. Walker, 103 Ala. 250, 15 So. 568; *Turrentine v. Grigsby*, 118 Ala. 380, 23 So. 666.

Arkansas. Terry v. Klein, 133 Ark. 366, 201 S. W. 801; *Augusta Cooperage Co. v. Parham*, — Ark. —, 213 S. W. 737.

California. Murdock v. Clarke, 88 Cal. 384, 26 Pac. 601.

Colorado. Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

Connecticut. Cavanaugh v. Marble, 80 Conn. 389, 15 L. R. A. (NS) 127, 68 Atl. 853.

Delaware. Lodge v. Ainscow, 1 Penn. (Del) 327, 41 Atl. 187.

Florida. Petroutsas v. H. C. Schrader Co., — Fla. —, 80 So. 486.

Idaho. Shull v. Lawrence, — Ida. —, 186 Pac. 246.

Illinois. Royal Colliery Co. v. The Alwart Bros. Coal Co., 276 Ill. 193, 114 N. E. 499.

Iowa. First National Bank v. Hollinsworth, 78 Ia. 575, 6 L. R. A. 92, 43 N. W. 536.

Kentucky. Haynes v. Wilson (Ky.), 55 S. W. 209; *Howard v. London Mfg. Co.* (Ky.), 72 S. W. 771; *McDaniel v. Barnes*, 68 Ky. (5 Bush.) 183.

Massachusetts. Hall v. Marston, 17 Mass. 575; *Richardson v. Woodbury*, 66 Mass. (12 Cush.) 279; *Spinney v. Freeman*, 230 Mass. 356, 119 N. E. 798.

Michigan. Grasser & Brand Brewing Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445.

Missouri. Beck v. Haas, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19.

Nebraska. Murray v. Schneider, 64 Neb. 484, 90 N. W. 206; *City of Lincoln v. Lincoln Street Ry.*, 67 Neb. 469, 93 N. W. 766.

New Jersey. Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795.

ence to a legal one,² or to a debt which is secured,³ as by mortgage, or by personal security of others,⁵ in preference to an unsecured debt, or contrary to equitable principles.⁶ The debtor may, if he wishes, apply a payment to the principal of a debt instead of applying it to the interest thereon.⁷ If the debtor directs a payment to be appropriated to a debt not yet due, the creditor may refuse to accept such payment; but if he accepts it, it must be appropriated as directed.⁸ If the holder of an option on realty has agreed to pay the purchase price in instalments, and the vendor thereafter gives a mortgage upon such realty, which mortgage the holder of the option eventually assumes and agrees to pay as part of the purchase price when he elects to purchase the realty, the purchaser may apply the assumption of such mortgage debt to such of these instalments as he may elect.⁹

North Dakota. Herold v. Hill, — N. D. —, 169 N. W. 592.

Ohio. Stewart v. Hopkins, 30 O. S. 502.

Oklahoma. Carson v. Cook County Liquor Co., 37 Okla. 12, 130 Pac. 303; D'Yarmett v. Cobe, 51 Okla. 113, 151 Pac. 589.

Oregon. Trullinger v. Kofoed, 7 Or. 228, 33 Am. Rep. 708.

Pennsylvania. Kann v. Kann, 259 Pa. St. 583, 103 Atl. 369.

South Dakota. Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Artificial Ice Co. v. Pratt, — S. D. —, 176 N. W. 45.

Texas. Phillips v. Herndon, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857.

Virginia. Pope v. Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

Washington. Simpson v. Combes, — Wash. —, 182 Pac. 506 (obiter).

West Virginia. Farr v. Weaver, — W. Va. —, 99 S. E. 395.

Wisconsin. Hassard v. Tomkins, 108 Wis. 186, 84 N. W. 174.

² Iowa. Smith v. Coopers, 9 Ia. 376.

Maine. Phillips v. Moses, 65 Me. 70.

Massachusetts. Richardson v. Woodbury, 66 Mass. (12 Cush.) 279.

New Hampshire. Lauten v. Rowan, 59 N. H. 215.

New Jersey. Feldman v. Gamble, 26 N. J. Eq. 494.

³ Augusta Cooperage Co. v. Parham, — Ark. —, 213 S. W. 737.

⁴ Georgia. Massengale v. Pounds, 108 Ga. 762, 33 S. E. 72.

Illinois. Plain v. Roth, 107 Ill. 588.

North Dakota. First National Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

Ohio. Stewart v. Hopkins, 30 O. S. 502.

Pennsylvania. Patterson v. Van Loon, 186 Pa. St. 367, 40 Atl. 495.

⁵ Eppinger v. Kendrick, 114 Cal. 620, 46 Pac. 613 [affirming in banc, 44 Pac. 234]; Huntington County Loan & Savings Association v. Cast, 160 Ind. 701, 67 N. E. 921.

⁶ Lincoln v. Lincoln Street Ry., 67 Neb. 467, 93 N. W. 766.

⁷ Kann v. Kann, 259 Pa. St. 583, 103 Atl. 369.

⁸ Royal Colliery Co. v. Alwart Bros. Coal Co., 276 Ill. 193, 114 N. E. 499; Wetherell v. Joy, 40 Me. 325.

⁹ Shull v. Lawrence, — Ida. —, 186 Pac. 246.

§ 2833. When debtor can make appropriation. The debtor's right to make application of the payment is lost if he makes the payment voluntarily without directing the application,¹ or at any rate if the creditor makes application before the debtor does.² If the debtor does not make the application when he makes the payment and the creditor then makes application, the debtor's right is lost.³ The debtor loses his right to make application, if suit is brought before the debtor makes the application, even if the creditor does not make any application.⁴ If a vendee makes a payment to bind the bargain, he can have it applied to the price of any goods which he accepts.⁵

In some jurisdictions it has been held that the debtor's right is lost absolutely upon making payment without regard to a subsequent application by the creditor.⁶

§ 2834. Appropriation by creditor—Common-law rule—Appropriation among valid debts. When the debtor loses his right to make an application of a payment, the creditor acquires such right.¹ Upon the question of the extent of his right there is a conflict of

¹ Florida. *Petroutsa v. H. C. Schrader Co.*, — Fla. —, 80 So. 486 (obiter).

Missouri. *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626.

New York. *California Bank v. Webb*, 94 N. Y. 467.

North Carolina. *Long v. Miller*, 93 N. Car. 233; *Stone Co. v. Rich*, 160 N. Car. 161, 75 S. E. 1077.

North Dakota. *Fargo First National Bank v. Roberts*, 2 N. D. 195, 33 Am. St. Rep. 768, 49 N. W. 722.

Virginia. *Culpeper National Bank v. Walter*, 114 Va. 522, 77 S. E. 484.

² *Dent v. Bank*, 12 Ala. 275; *Risher v. Risher*, 194 Pa. St. 164, 45 Atl. 71.

³ *Field v. Holland*, 10 U. S. (6 Cranch) 8, 3 L. ed. 136.

⁴ *In re American Paper Co.*, 255 Fed. 121; *Raymond v. Newman*, 122 N. Car. 52, 29 S. E. 353.

⁵ *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27.

⁶ *Moss v. Adams*, 39 N. Car. (4 Ired. Eq.) 42.

¹ *United States. United States v. Kirkpatrick*, 22 U. S. (9 Wheat.) 720, 6 L. ed. 199 (obiter).

Connecticut. *American Woollen Co. v. Maaget*, 86 Conn. 234, 85 Atl. 583.

Florida. *Petroutsa v. H. C. Schrader Co.*, — Fla. —, 80 So. 486 (obiter).

Iowa. *Mitchell v. Wheeler*, 122 Ia. 368, 98 N. W. 152.

Michigan. *Grace Harbor Lumber Co. v. Ordman*, 190 Mich. 429, 157 N. W. 96.

Missouri. *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626.

Washington. *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740; *Simpson v. Combes*, — Wash. —, 182 Pac. 566 (obiter).

West Virginia. *Farr v. Weaver*, — W. Va. —, 99 S. E. 395 (obiter).

Wisconsin. *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641.

authority. The common-law rule as enforced in the majority of American states is that the creditor may apply the payments so as to protect his own interests, as long as he does not inflict positive injustice on the debtor.² The creditor may apply a payment to the oldest claim,³ so as to prevent it from being barred subsequently by the Statute of Limitations,⁴ or a later claim in preference to an earlier claim,⁵ or he may pro rate the payment among a number of items.⁶ The creditor is not bound to apply the payment to the debts in the order in which they have become due.⁷ If A sold his business to B under a contract by which A was to retain all unpaid accounts, and C, who was indebted to A before such sale, and who has also become indebted to B after such sale, sends a check to B

²Alabama. *Pearce v. Walker*, 103 Ala. 230, 15 So. 568.

California. *Murdock v. Clarke*, 88 Cal. 394, 26 Pac. 601.

Illinois. *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609.

Iowa. *Heaton v. Ainley*, 103 Ia. 112, 78 N. W. 798 [superseding, 74 N. W. 766]; *Keairnes v. Durst*, 110 Ia. 114, 81 N. W. 238.

Kansas. *First Presbyterian Church v. Santy*, 52 Kan. 402, 34 Pac. 974.

Michigan. *Shelden v. Bennett*, 44 Mich. 634, 7 N. W. 223; *Wood v. Genett*, 120 Mich. 222, 79 N. W. 199; *Harper v. Concrete Publishing Co.*, 106 Mich. 429, 131 N. W. 1112; *Van Sceiver v. King*, 176 Mich. 605, 142 N. W. 1069 (obiter).

Missouri. *Cox v. Sloan*, 158 Mo. 411, 57 S. W. 1052; *Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank*, 158 Mo. 272, 59 S. W. 109.

Nebraska. *Lenzen v. Miller*, 53 Neb. 137, 73 N. W. 460 [modifying on rehearing, 51 Neb. 855, 71 N. W. 715].

New Jersey. *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137.

North Carolina. *Burnett v. Sledge*, 129 N. Car. 114, 39 S. E. 775; *Stone Co. v. Rich*, 160 N. Car. 161, 75 S. E. 1077.

Oklahoma. *Jackson v. Moore*, 39 Okla. 234, 134 Pac. 1114.

South Carolina. *Pelzer v. Steadman*, 22 S. Car. 279.

South Dakota. *Fargo v. Jennings*, 8 S. D. 99, 65 N. W. 433.

Vermont. *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422.

Virginia. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940.

Washington. *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561; *Crane Co. v. United States Fidelity & Guaranty Co.*, 74 Wash. 91, 132 Pac. 872; *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740.

West Virginia. *Buster v. Holland*, 27 W. Va. 510.

Wisconsin. *Nelson v. Davison*, 152 Wis. 567, 140 N. W. 334.

³Holloway v. White-Dunham Shoe Co., 151 Fed. 216, 10 L. R. A. (N.S.) 704; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Bourne v. Repass*, 2 Va. Dec. 694, 34 S. E. 623.

⁴Blair v. Carpenter, 75 Mich. 167, 42 N. W. 790.

⁵Nelson v. Davison, 152 Wis. 567, 140 N. W. 334.

⁶Bishop v. T. Ryan Construction Co., — Wash. —, 180 Pac. 126.

⁷Nelson v. Davison, 152 Wis. 567, 140 N. W. 334.

without direction as to its application, B may apply such check to the payment of the account which is due to B, leaving A unpaid.⁸ The creditor may apply payments thus made to an open account in preference to one evidenced by a note;⁹ to an unsecured debt in preference to one secured,¹⁰ such as a debt secured by a mortgage,¹¹ or a lien;¹² or by personal security;¹³ or to a debt insufficiently secured in preference to one fully secured,¹⁴ or to a debt against the debtor alone in preference to one secured by additional personal security.¹⁵ A bank which holds A's note for a debt which B has guaranteed, may apply A's deposits to the payment of checks drawn by A.¹⁶ The creditor may appropriate one payment among two or more debts.¹⁷

⁸ *Harper v. Concrete Publishing Co.*, 166 Mich. 429, 131 N. W. 1112. See to the same effect, *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 10 L. R. A. (N.S.) 704.

⁹ *Whittaker v. Groover*, 54 Ga. 174; *Bell v. Bell*, 20 S. Car. 34; *Fargo v. Jennings*, 8 S. D. 99, 65 N. W. 433.

¹⁰ *Connecticut. Sagal v. Mann*, 89 Conn. 576, 95 Atl. 6.

Indiana. M. A. Sweeney Co. v. Fry, 151 Ind. 178, 51 N. E. 234.

Massachusetts. Henry Bill Publishing Co. v. Utley, 155 Mass. 366, 29 N. E. 635.

Michigan. Gardner v. Le Fevre, 180 Mich. 219, 146 N. W. 653.

Washington. Kelso v. Russell, 33 Wash. 474, 74 Pac. 561; *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698; *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740.

Wisconsin. Northern National Bank v. Lewis, 78 Wis. 475, 47 N. W. 834.

¹¹ *Lewis v. Hartford Silk Mfg. Co.*, 56 Conn. 25, 12 Atl. 637; *Bird v. Davis*, 14 N. J. Eq. 467; *Wadlinger v. Washington German Building & Loan Association*, 153 Pa. St. 622, 26 Atl. 647; *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641.

¹² *Bean v. Brown*, 54 N. H. 395; *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

¹³ *People v. Powers*, 108 Mich. 339,

66 N. W. 215; *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174.

¹⁴ *Hanson v. Manley*, 72 Ia. 48, 33 N. W. 357.

¹⁵ *Illinois. Plain v. Roth*, 107 Ill. 588.

Iowa. Hanson v. Manley, 72 Ia. 48, 33 N. W. 357.

Kentucky. Burks v. Albert, 27 Ky. (4 J. J. Mar.) 97, 20 Am. Dec. 209.

Michigan. Wood v. Callaghan, 61 Mich. 402, 1 Am. St. Rep. 597, 28 N. W. 162.

New York. Harding v. Tift, 75 N. Y. 461.

Vermont. Fair Haven First National Bank v. Johnson, 65 Vt. 382, 26 Atl. 634.

¹⁶ *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

¹⁷ *Beck v. Haas*, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19; *Young v. Alford*, 118 N. Car. 215, 23 S. E. 973.

Contra, in Vermont. Wheeler v. House, 27 Vt. 735.

As where such debts are barred by limitations. *Ayer v. Hawkins*, 19 Vt. 26.

If the debtor has treated all the notes as equivalent to a single debt (as where the notes are all written on the same sheet of paper), the creditor may pro-rate the payment among the different notes. *Sanborn v. Cole*, 63 Vt. 590, 14 L. R. A. 208, 22 Atl. 716.

§ 2835. Appropriation to unenforceable or invalid debts. The creditor may even apply payments to debts which for some technical reason are unenforceable, but are on valuable consideration and are not tainted with illegality. Thus he may apply a payment to a debt unenforceable because of non-compliance with the Statute of Frauds,¹ or the stamp act,² or a debt barred by the Statute of Limitations,³ or unenforceable because contracted when the debtor was an infant.⁴

The creditor can not, however, make any application of such payment as will be unfair or unjust to the debtor. He can not apply the payment to a claim which is in dispute in preference to one whose correctness is conceded,⁵ or to a claim which has been paid before,⁶ or to an illegal claim instead of a legal one,⁷ even if such legal and illegal items are in one account,⁸ as to an usurious contract in preference to a legal one.⁹ So the creditor can not apply the payment to a debt which can not have been contemplated by the creditor, as to a debt not due when the payment was made,¹⁰ or to a debt incurred after such payment was made.¹¹

¹ Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109.

² Biggs v. Dwight, 1 M. & R. 308.

³ England. Williams v. Griffith, 5 M. & W. 300.

Arkansas. Armistead v. Brooke, 18 Ark. 521.

Massachusetts. Pond v Williams, 67 Mass. (1 Gray) 630; Ramsey v. Warner, 97 Mass. 8, 93 Am. Dec. 49.

Pennsylvania. Moore v. Kiff, 78 Pa. St. 96.

South Carolina. Hopper v Hopper, 61 S. Car. 124, 39 S. E. 366.

⁴ Thurlow v. Gilmore, 40 Me. 378.

⁵ Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; Stones v. Talbot, 4 Wis. 442.

This is sometimes explained on the theory that the debtor impliedly directs such application. Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

⁶ Lyon v. Witters, 65 Vt. 396, 26 Atl. 588.

⁷ Maine. Phillips v. Moses, 65 Me. 70 (obiter).

Massachusetts. Rohan v. Hanson, 65 Mass. (11 Cush.) 44; Bondy v. Hardina, 216 Mass. 44, 102 N. E. 935.

Pennsylvania. Greene v. Tyler, 39 Pa. St. 368.

Vermont. Bancroft v. Dumas, 21 Vt. 456; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187.

⁸ Dunbar v. Garrity, 58 N. H. 575; Storer v. Haskell, 50 Vt. 341.

⁹ North Bend First National Bank v. Miltonberger, 33 Neb. 847, 51 N. W. 232; Adams v. Mahnken, 41 N. J. Eq. 332, 7 Atl. 435; Fay v. Lovejoy, 20 Wis. 403.

¹⁰ Byrnes v. Claffey, 69 Cal. 120, 10 Pac. 321; Heintz v. Cahn, 29 Ill. 308; Bacon v. Brown, 4 Ky. (1 Bibb.) 334, 4 Am. Dec. 640; Petroutsa v. H. C. Schrader Co., — Fla. —, 80 So. 486.

¹¹ Niagara Bank v. Roosevelt, 9 Cow. (N. Y.) 409; Donally v. Wilson, 32 Va. (5 Leigh) 329.

§ 2836. Civil-law rule. In other states the civil-law rule, that the creditor must apply payments so as to discharge that debt which it is most for the debtor's interest to have discharged, is followed.¹

§ 2837. When creditor can make appropriation. There is a conflict of authority as to the time at which the creditor may exercise his right of appropriating payments made by the debtor. The common-law rule assumes that it is not necessary that the creditor should make such appropriation at the time that the payment is made.¹ For what length of time after payment the right of the creditor to make such appropriation persists, is a question upon which there is a conflict of authority in the jurisdictions which have adopted the common-law rule. According to one view, the creditor may make such appropriation at any time before the controversy between the debtor and the creditor has arisen;² and if such controversy has arisen, it is said that the creditor can no longer make such appropriation, but that the law will make it.³ In other jurisdictions it is said that the creditor may make the appropriation at any time before the action against the debtor to enforce payment of the debt has been begun.⁴ Other authorities apply this rule even

¹ *Slaughter v. Milling*, 15 La. Ann. 526; *Sleet v. Sleet*, 109 La. 302, 33 So. 322; *Dorsey v. Cassaway*, 2 H. & J. (Md.) 402, 3 Am. Dec. 557; *Neal v. Allison*, 50 Miss. 175.

¹ *England. Cory v. The Mecca* [1897], A. C. 286; *Seymour v. Pickett* [1905], 1 K. B. 715.

Connecticut. American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583 (obiter).

Maine. The Lehigh Coal and Navigation Co. v. McLeod, 114 Me. 427, 96 Atl. 736 (obiter).

Michigan. People v. Grant, 139 Mich. 26, 102 N. W. 226.

New Jersey. Benson v. Reinshagen, 75 N. J. Eq. 358, 72 Atl. 955.

Vermont. Pierce v. Knight, 31 Vt. 701 (obiter).

² *United States. United States v. Kirkpatrick*, 22 U. S. (9 Wheat.) 720, 6 L. ed. 199.

Connecticut. American Woolen Co.

v. Maaget, 86 Conn. 234, 85 Atl. 583 (obiter).

Indiana. Applegate v. Koons, 74 Ind. 247.

Maine. The Lehigh Coal and Navigation Co. v. McLeod, 114 Me. 427, 96 Atl. 736.

New Jersey. Benson v. Reinshagen, 75 N. J. Eq. 358, 72 Atl. 955.

Rhode Island. Burt v. Butterworth, 19 R. I. 127, 32 Atl. 167.

West Virginia. Norris v. Beaty, 6 W. Va. 477.

³ *In re American Paper Co.*, 255 Fed. 121.

⁴ *England. Cory v. The Mecca* [1897], A. C. 286.

California. Haynes v. Waite, 14 Cal. 446.

Michigan. People v. Grant, 139 Mich. 26, 102 N. W. 226.

Missouri. State v. Blakemore, 275 Mo. 695, 205 S. W. 626.

New Hampshire. Richards v. Columbia, 55 N. H. 96.

more liberally in favor of the creditor and allow him to make such application at any time before the court makes the application.⁵

The civil-law rule, on the other hand, requires the creditor to make the application when payment is made, or, at least, as some authorities hold, within a reasonable time after payment has been made; and this rule is followed in some American states.⁶ This appears to have been the original English rule,⁷ but it has been repudiated in later cases.⁸

§ 2838. Appropriation by law—Presumed mutual intention of parties followed. It is only when the parties have failed to apply a payment that the law will make such application.¹ If neither party is shown to have made an appropriation of a payment, the law will make such appropriation.² The general principle which governs appropriation of payments by the law is said to be that the law will apply such payments as justice dictates and as the parties would probably have intended.³ Rules so vague and general are

North Carolina. *Moss v. Adams*, 39 N. Car. (4 Ired. Eq.) 42.

Vermont. *Pierce v. Knight*, 31 Vt. 701 (obiter).

⁵ England. *Cory v. The Mecca* [1897], A. C. 286; *Seymour v. Pickett* [1905], 1 K. B. 715.

Alabama. *Pearce v. Walker*, 103 Ala. 250, 15 So. 568.

New York. *California Bank v. Webb*, 94 N. Y. 467.

South Carolina. *Baum v. Trantham*, 42 S. Car. 104, 46 Am. St. Rep. 697, 19 S. E. 973; *Heilbron v. Bissell*, *Bailey Eq.* (S. Car.) 430.

⁶ *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Harker v. Conrad*, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691.

⁷ *Dawe v. Holdsworth*, *Peake N. P.* 64; *Devaynes v. Noble* (Clayton's Case), 1 Meriv. 572.

See also, *Megatt v. Mills*, 1 Ld. Raym. 287, where a payment was applied to an earlier debt incurred in trade so as to avoid the consequence of involuntary bankruptcy.

⁸ See discussion in *Cory v. The Mecca* [1897], A. C. 286.

¹ *Kann v. Kann*, 259 Pa. St. 583, 103 Atl. 369.

² *United States v. United States v. Kirkpatrick*, 22 U. S. (9 Wheat.) 720, 6 L. ed. 199; *In re American Paper Co.*, 255 Fed. 121.

North Dakota. *Langton v. Kops*, — N. D. —, 171 N. W. 334.

Pennsylvania. *Kann v. Kann*, 259 Pa. St. 583, 103 Atl. 369.

Washington. *Bishop v. T. Ryan Construction Co.*, — Wash. —, 180 Pac. 126.

West Virginia. *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203.

Wyoming. *King v. Beaumier*, — Wyom. —, 174 Pac. 612.

³ Arkansas. *Price v. Dowdy*, 34 Ark. 285.

California. *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

of little practical aid.⁴ Certain concrete rules have been worked out, however, as guides in ascertaining the intention of the parties; and these rules are applied by the courts with substantial unanimity.

The law will apply a payment to an undisputed claim in preference to a disputed one,⁵ and to an overdue claim in preference to one incurred after such payment,⁶ and to the valid part of a debt in preference to the void part.⁷ Payment to a building and loan association by a borrowing member is to be applied to his liability for the stock and not upon his loan.⁸

§ 2839. Appropriation in order of maturity of debt. Payment will, in the absence of reasons to the contrary, be applied to the

Connecticut. *Chester v. Wheelwright*, 15 Conn. 562.

Georgia. *Andrews v. Exchange Bank*, 108 Ga. 802, 34 S. E. 183.

Illinois. *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317.

Indiana. *Jacobs v. Ballenger*, 130 Ind. 231, 15 L. R. A. 169, 29 N. E. 782.

Iowa. *First National Bank v. Hollinsworth*, 78 Ia. 575, 6 L. R. A. 92, 43 N. W. 536.

Kentucky. *Hillyer v. Vaughan*, 24 Ky. (1 J. J. Mar.) 583.

Massachusetts. *Commercial Bank v. Cunningham*, 41 Mass. (24 Pick.) 270, 35 Am. Dec. 322; *Richardson v. Woodbury*, 66 Mass. (12 Cush.) 279.

Michigan. *Grasser & Brand Brewing Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445; *Van Seeiver v. King*, 176 Mich. 605, 142 N. W. 1069.

Minnesota. *Thorne v. Allen*, 72 Minn. 401, 75 N. W. 706.

New Hampshire. *Doherty v. Cotter*, 68 N. H. 37, 38 Atl. 399.

New Jersey. *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687.

New York. *Orleans County National Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775, 3 L. R. A. 302, 20 N.

E 357; *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912.

North Carolina. *Raymond v. Newman*, 122 N. Car. 52, 29 S. E. 353.

Oregon. *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708.

Pennsylvania. *Risher v. Risher*, 194 Pa. St. 164, 45 Atl. 71.

Tennessee. *White v. Blakemore*, 76 Tenn. (8 Lea) 49.

Texas. *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857.

Vermont. *Pawlet v. Kelley*, 69 Vt. 393, 38 Atl. 92.

Washington. *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427.

⁴ See criticism in *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271, 9 N. W. 590.

⁵ *The Peerless*, 80 Fed. 942.

⁶ *United States v. Morgan*, 111 Fed. 474; *McWhorter v. Blumenthal*, 136 Ala. 568, 96 Am. St. Rep. 43, 33 So. 552; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

⁷ *Kuker v. McIntyre*, 43 S. Car. 117, 20 S. E. 976.

⁸ *Sheldon v. Birmingham Building & Loan Association*, 121 Ala. 278, 25 So. 820.

oldest debt,¹ as to the note of a series which matures earliest,² and to the earliest items of a running account.³ If the security for an earlier obligation is the same as the security for a later obligation,

¹ **United States.** Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co., 75 Fed. 554, 23 C. C. A. 302.

Alabama. Golden v. Conner, 89 Ala. 598, 8 So. 184.

Arkansas. Dunnington v. Kirk, 57 Ark. 595, 22 S. W. 430; Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308.

California. Moss v. Odell, 141 Cal. 335, 74 Pac. 999.

Colorado. Ady & Crowe Mercantile Co. v. Howard, — Colo. —, 176 Pac. 323.

Delaware. Lodge v. Ainscow, 1 Penn. (Del.) 327, 41 Atl. 187.

Georgia. Green v. Ford, 79 Ga. 130, 3 S. E. 624.

Indiana. Clark v. Huey, 12 Ind. App. 224, 40 N. E. 152.

Iowa. Briggs v. Iowa Savings & Loan Association, 114 Ia. 232, 86 N. W. 320.

Louisiana. Sleet v. Sleet, 109 La. 302, 33 So. 322; Bloom v. Kern, 30 La. Ann. 1263.

Michigan. Grassar & Brand Brewing Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445.

Minnesota. Jefferson v. Church, 41 Minn. 392, 34 N. W. 74.

Mississippi. Shelby v. Brown (Miss.) 24 So. 531.

Missouri. Beck v. Haas, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19.

New Hampshire. Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Doherty v. Cotter, 68 N. H. 37, 38 Atl. 499.

New Mexico. Armijo v. Henry, 14 N. M. 181, 25 L. R. A. (N.S.) 275, 89 Pac. 305.

North Carolina. Miller v. Womble, 122 N. Car. 135, 29 S. E. 102.

Pennsylvania. Risher v. Risher, 194 Pa. St. 164, 45 Atl. 71.

Washington. Frazer v. Miller, 7 Wash. 521, 35 Pac. 427.

West Virginia. Rowan v. Chenoweth, 55 W. Va. 325, 47 S. E. 80.

Wisconsin. Zinns Mfg. Co. v. Mendelson, 89 Wis. 133, 61 N. W. 302.

Wyoming. King v. Beaumier, — Wyom. —, 174 Pac. 612.

² *In re Stevens*, 107 Fed. 243; *Genin v. Ingersoll*, 11 W. Va. 549.

³ **England.** Clayton's Case, 1 Meriv. 572.

United States. *United States v. Kirkpatrick*, 22 U. S. (9 Wheat.) 720, 6 L. ed. 199; *Jones v. United States*, 48 U. S. (7 How.) 681, 12 L. ed. 870.

Alabama. Golden v. Conner, 89 Ala. 598, 8 So. 148.

Colorado. Ady & Crowe Mercantile Co. v. Howard, — Colo. —, 176 Pac. 323.

Illinois. Sprague v. Hazenwinkle, 53 Ill. 419.

Iowa. Allen v. Brown, 39 Ia. 330.

Kentucky. Helm v. Commonwealth, 79 Ky. 67; *Sternberger v. Gowdy*, 93 Ky. 146, 19 S. W. 186.

Louisiana. Sleet v. Sleet, 109 La. 302, 33 So. 322.

Michigan. People v. Sheehan, 118 Mich. 539, 77 N. W. 88.

Minnesota. Winnebago Paper Mills v. Travis, 50 Minn. 480, 58 N. W. 36.

New York. National Park Bank v. Seaboard Bank, 114 N. Y. 23, 11 Am. St. Rep. 612, 20 N. E. 632.

North Carolina. Jenkins v. Smith, 72 N. Car. 296.

Oregon. Patterson v. Bank, 26 Or. 509, 38 Pac. 817.

Pennsylvania. Pardee v. Markle, 111 Pa. St. 548, 56 Am. Rep. 299, 5 Atl. 36.

Tennessee. Lippman v. Boals, 84 Tenn. (16 Lea) 283.

a payment which has not been applied by the parties will be applied by the law to the obligation which has matured first.⁴ If the plaintiff maintains an action to recover a number of items, and if he admits general payments which exceed the amount of certain earlier items which are set forth in a cause of action, a verdict in favor of the plaintiff on such cause of action must be set aside, since by the operation of the law such payments must be applied upon the earlier items.⁵ A change in methods of bookkeeping from the "old system" to the "coupon book" system while an account is running, does not interrupt the account so as to prevent a payment made after the change from applying to items entered before the change.⁶ A change in the membership of the creditor firm does not change the account for purposes of appropriation; and if no appropriation is made by either party the law will apply a general payment to the earliest unpaid item of the original account.⁷

The rule that payment should be applied to the oldest debt has been applied in cases where some of the items of an account are secured, or could be secured as by lien, and others could not.⁸ In a few cases, priority has been given to the rule than a payment should be appropriated to an unsecured item as against one which is secured in some way.⁹

This rule will not be applied where it will work injustice. The law will not apply a general payment to the interest on a mortgage debt so as to prevent the mortgagee from exercising an option to declare the entire amount due.¹⁰ It has been held that the law will not apply a payment to a debt barred by the Statute of Limitations,¹¹ though there is authority to the effect that the law may appropriate a general payment to a debt barred by the Statute of Limitations.¹²

Texas. *Willis v. McIntyre*, 70 Tex. 34, 8 Am. St. Rep. 574, 7 S. W. 594.

Virginia. *Smith v. Loyd*, 38 Va. (11 Leigh) 535, 37 Am. Dec. 621.

Wisconsin. *Hannan v. Engelmann*, 49 Wis. 278, 5 N. W. 791.

⁴In *re American Paper Co.*, 255 Fed. 121.

⁵*King v. Beaumier*, — Wyom. —, 174 Pac. 612.

⁶*Goldsmith v. Lewine*, 70 Ark. 516, 69 S. W. 308.

⁷*Devaynes v. Noble*, 1 Meriv. 529; *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Forst v. Kirkpatrick*, 64

N. J. Eq. 578, 54 Atl. 554; *Morgan v. Tarbell*, 28 Vt. 408.

⁸*Moses v. Noble*, 86 Ala. 407, 5 So. 181; *Worthley v. Emerson*, 116 Mass. 374; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 268, 73 N. W. 159 [modification denied, 73 N. W. 248].

⁹*Pierce v. Sweet*, 33 Pa. St. 151.

¹⁰*Peterson v. Johnson*, 20 Wash. 497, 55 Pac. 932.

¹¹*Estes v. Fry*, 166 Mo. 70, 65 S. W. 741; *Livermore v. Rand*, 26 N. H. 85.

¹²*Fletcher v. Gillan*, 62 Miss. 8; *Phipps v. Willis*, 11 Tex. Civ. App. 186, 32 S. W. 801.

§ 2840. Appropriation as between principal and interest. A payment upon an interest bearing debt will be applied to the interest in preference to the principal,¹ and if the debtor is indebted to the creditor in several debts, each bearing interest, payment should be applied to interest on all the debts before it is applied to the principal of any one debt.² Even if the payment is equal in amount to the principal, it must be applied first to discharge overdue interest.³ Where the law allows interest on interest, a payment should be applied first to discharge overdue interest on interest; second, to discharge overdue interest; and third, to discharge the principal.⁴ If the law does not allow interest on interest, a payment less than the amount of the interest due is to be credited upon the interest, but the balance of the interest is not to be added to the principal.⁵

§ 2841. Conflict between interests of debtor and creditor—Common-law rule. When the interests of the debtor require one application and those of the creditor require another, we have again a conflict between the common-law rule and the civil-law rule.¹ The common law rule requires the law to apply payments for the bene-

¹ **United States.** *Story v. Livingston*, 38 U. S. (13 Pet.) 359, 10 L. ed. 200.

California. *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 53 Pac. 164.

Indiana. *Jacobs v. Ballenger*, 130 Ind. 231, 15 L. R. A. 169, 29 N. E. 782.

Kentucky. *Carter v. Sanderson* (Ky.), 41 S. W. 306.

Massachusetts. *Fay v. Bradley*, 18 Mass. (1 Pick.) 194.

Michigan. *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556, 46 N. W. 227.

Minnesota. *Bay View Land Co. v. Myers*, 62 Minn. 265, 64 N. W. 816.

Montana. *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92.

New Mexico. *Armijo v. Henry*, 14 N. M. 181, 25 L. R. A. (N.S.) 275, 89 Pac. 305.

North Carolina. *Johnson v. Johnson*, 58 N. Car. (5 Jones Eq.) 167.

North Dakota. *Langton v. Kops*, — N. D. —, 171 N. W. 334.

Ohio. *Miami Exporting Co. v. Bank*, 5 Ohio 260.

Pennsylvania. *Spires v. Hamot*, 8 W. & S. (Pa.) 17; *Kann v. Kann*, 259 Pa. St. 583, 103 Atl. 369 (obiter).

Virginia. *Boggeas v. Goff*, 47 W. Va. 139, 34 S. E. 741.

² *Steel v. Taylor*, 34 Ky. (4 Dana) 445; *Genin v. Ingersoll*, 11 W. Va. 549.

³ *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 668, 7 S. W. 142; *People v. New York County*, 5 Cow. (N. Y.) 331.

⁴ *Anketel v. Converse*, 17 O. S. 11, 91 Am. Dec. 115.

⁵ *Langton v. Kops*, — N. D. —, 171 N. W. 334.

¹ "The difference between the common law and the Roman law is to be found in the application which the law makes in the appropriation of a payment in the absence of any made

fit of the creditor in accordance with his presumed intention, where this can be done without injustice to the debtor.² Undue preference is not to be given to the interests of the creditor, however, and in most jurisdictions it is said that the application which the law will make must be just, reasonable and equitable; and that in making such application the law must give due regard to the interests of both parties.³ Where the rule that the law will apply payments for the benefit of the creditor, is followed, a payment will be applied to an unsecured debt in preference to one which is secured,⁴ and to the debt secured by the more precarious and less valuable of dif-

by either the debtor or the creditor. The common law appropriates the payment most beneficially for the creditor; the civil law appropriates the payment most beneficially for the debtor." *McLaughlin v. Green*, 48 Miss 175, 205.

² *In re American Paper Co.*, 255 Fed. 121; *Bell v. Bell*, 174 Ala 446, 37 L. R. A. (N.S.) 1203, 56 So 926; *Parker v. Dantzler Foundry & Machine Works*, 118 Miss. 126, L. R. A. 1918F, 795, 79 So 82; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

³ *United States. United States v. Kirkpatrick*, 22 U. S. (9 Wheat) 720, 6 L. ed. 199.

California. Murdock v. Clarke, 88 Cal 384, 26 Pac. 601.

Iowa. Cain v. Vogt, 138 Ia 631, 116 N. W. 786.

Kansas. Linscott State Bank v. Fidelity & Deposit Co., 94 Kan 30, 145 Pac. 868.

Kentucky. Woolfolk v. Thomas, 164 Ky. 43, 174 S. W. 730.

Massachusetts. Blackstone Bank v. Hill, 27 Mass. (10 Pick.) 129; *Commercial Bank v. Cunningham*, 41 Mass. (24 Pick.) 270, 35 Am. Dec. 322.

Michigan. Van Seeiver v. King, 176 Mich. 605, 142 N. W. 1069.

New York. Orleans County National Bank v. Moore, 112 N. Y. 543, 8 Am. St. Rep. 775, 3 L. R. A. 302, 20 N. E. 357; *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912.

Vermont. Robinson v. Doolittle, 12 Vt 246.

West Virginia. Wait v. Homestead Building Association, 81 W. Va. 702, 95 S. E. 203.

Wisconsin. Hannan v. Engelmann, 49 Wis. 278, 5 N. W. 791.

⁴ *United States. Sanborn v. Stark*, 31 Fed 18; *In re American Paper Co.*, 255 Fed 121.

Alabama. Stickney v. Moore, 108 Ala 590, 19 So 76.

Kentucky. Offut v. Devine's Exr. (Ky), 55 S. W. 428, 53 S. W. 816; *Bell & Coggeshall Co. v. Kentucky Glass Works Co.*, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180 [reversing on rehearing, 48 S. W. 440].

Michigan. Wood v. Callaghan, 61 Mich 402, 1 Am. St. Rep. 597, 28 N. W. 162.

North Carolina. Lester v. Houston, 101 N. Car 605, 8 S. E. 366.

Oklahoma. St. Louis & San Francisco Ry. Co. v. Ravia Granite Ballast Co., — Okla. —, 174 Pac. 252.

Vermont. Still v. Buzzell, 60 Vt. 478, 12 Atl. 209; *First National Bank v. Johnson*, 65 Vt. 382, 26 Atl. 634.

Washington. Post-Intelligencer Publishing Co. v. Harris, 11 Wash. 500, 39 Pac 965.

Wisconsin. North v. La Flesh, 73 Wis. 520, 41 N. W. 633.

ferent securities.⁵ Thus a general payment will be applied to an unsecured debt in preference to one secured by mortgage,⁶ or by a laborer's lien,⁷ or a vendor's lien,⁸ or by collateral personal security,⁹ and to a debt inferior to homestead rights in preference to one superior to them.¹⁰ The rule that a payment will be applied to an unsecured debt in preference to one which is secured, requires such application, although the secured debt was the older one.¹¹ Some states that hold that a general payment will be appropriated to an unsecured debt in preference to one which is secured, recognize an exception in case of debts secured by personal security only. It is held that a surety may insist on the appropriation of payments to debts in order of maturity, irrespective of the security afforded by his liability thereon.¹² If a receiver has been appointed for a corporation and a former debtor of such corporation continues to buy goods of the receiver, a payment made by such debtor to the receiver will be applied in payment of goods bought from the receiver and not in payment of goods bought before the receivership

⁵ *Alabama.* *McCurdy v. Middleton*, 82 Ala. 131, 2 So. 721; *Bell v. Bell*, 174 Ala. 446, 37 L. R. A. (N.S.) 1203, 56 So. 926.

California. *California National Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38.

Iowa. *Hanson v. Manley*, 72 Ia. 48, 33 N. W. 357.

Kentucky. *Blanton v. Rice*, 21 Ky. (5 T. B. Mon.) 253.

New Jersey. *Leeds v. Gifford*, 41 N. J. Eq. 464, 5 Atl. 795; *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137.

North Carolina. *Ramsour v. Thomas*, 32 N. Car. 165.

Pennsylvania. *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299, 5 Atl. 36; *Richard's Estate*, 185 Pa. St. 155, 39 Atl. 1117.

Virginia. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940.

Washington. *Smythe v. New England Loan & Trust Co.*, 12 Wash. 424, 41 Pac. 184.

West Virginia. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

⁶ *The Katie O'Neil*, 65 Fed. 111; *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422.

⁷ *Wagoner's Appeal*, 103 Pa. St. 185, 49 Am. Rep. 121.

⁸ *McCauley v. Holtz*, 62 Ind. 205.

⁹ *Sanborn v. Stark*, 31 Fed. 18; *White v. Beem*, 80 Ind. 239; *Burks v. Albert*, 27 Ky. (4 J. J. Mar.) 97, 20 Am. Dec. 209; *Burt v. Butterworth*, 19 R. I. 127, 32 Atl. 167.

¹⁰ *Andrews v. Kentucky Citizens' Building & Loan Association (Ky.)*, 70 S. W. 409. A different result was reached on similar facts in *First National Bank v. Hollingsworth*, 78 Ia. 575, 6 L. R. A. 92, 43 N. W. 536, on the theory that the superiority of a debt to homestead rights was not a lien, that the rights of the debtor's family should be protected, and that the law tended to favor homestead rights.

¹¹ *United States Fidelity & Guaranty Co. v. State*, 81 Kan. 660, 26 L. R. A. (N.S.) 865, 106 Pac. 1040.

¹² *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299, 5 Atl. 36; *Berghaus v. Alter*, 9 Watts (Pa.) 386; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229.

against which the debtor could have used a set-off existing in his favor and against the corporation.¹³

§ 2842. Civil-law rule. The civil-law rule requires the law to apply payments for the benefit of the debtor in accordance with his presumed intention.¹ This rule naturally prevails in jurisdictions whose law is based on the civil law;² but it has been adapted in some of the states whose law is common-law; and where this rule is followed, the law applies a payment to the debt which is most burdensome to the debtor.³ Under this rule, payment will be applied to a secured debt,⁴ as one secured by mortgage,⁵ or chattel mortgage.⁶ Payment will be applied to a debt which bears interest in preference to one which does not,⁷ and to one bearing a higher rate of interest in preference to one bearing a lower rate.⁸ If a trustee who is individually indebted to a beneficiary makes payments to him in excess of the income arising from the trust fund, it will be presumed that the excess is to be applied to the individual debts.⁹

¹³ *Parker v. Dantzler Foundry & Machine Works*, 118 Miss. 126, L. R. A. 1918F, 795, 79 So. 82.

¹ "The doctrine of the civil law upon this subject has been adopted in this state." *McLaughlin v. Green*, 48 Miss. 175, 205; *Poindexter v. La Roche*, 15 Miss. (7 S. & M.) 609; *Hamer v. Kirkwood*, 25 Miss. 95; *Parker v. Dantzler Foundry & Machine Works*, 118 Miss. 126, L. R. A. 1918F, 795, 79 So. 82.

² *Sanz v. Lavin*, 6 Philippine 299; *Slaughter v. Milling*, 15 La. Ann. 526.

³ *Kentucky. Scott v. Fisher*, 20 Ky. (4 T. B. Mon.) 387.

Maryland. Clark v. Boarman, 89 Md. 428, 43 Atl. 926.

Mississippi. Parker v. Dantzler Foundry & Machine Works, 118 Miss. 126, L. R. A. 1918F, 795, 79 So. 82.

Pennsylvania. Harker v. Conrad, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691.

Vermont. Roakes v. Bailey, 55 Vt. 542.

Texas. Stanley v. Westrop, 16 Tex. 200.

⁴ *Louisiana. Gillard v. Huval*, 22 La. Ann. 426.

Maryland. Clark v. Boarman, 89 Md. 428, 43 Atl. 926.

Mississippi. Windsor v. Kennedy, 52 Miss. 164.

Tennessee. Bussey v. Gant, 20 Tenn. (10 Humph.) 238; *Blackmore v. Granbery*, 98 Tenn. 277, 30 S. W. 229.

Vermont. Robinson v. Doolittle, 12 Vt. 246.

⁵ *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. Rep. 516; *Neal v. Allison*, 50 Miss. 175. In the language of the Louisiana courts, payment will be imputed to the debt-bearing mortgage. *New Orleans Ins. Co. v. Tio*, 15 La. Ann. 174 [citing, *Forstall v. Blanchard*, 12 La. 61]; *Dunlap v. Tarkington*, 5 La. Ann. 569.

⁶ *Windsor v. Kennedy*, 52 Miss. 164.

⁷ *Scott v. Fisher*, 20 Ky. (4 T. B. Mon.) 387; *Bussey v. Gant*, 20 Tenn. (10 Humph.) 238.

⁸ *Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40, 35 L. ed. 628; *Magarity v. Shipman*, 82 Va. 784.

⁹ *Calvert v. Carter*, 18 Md. 73.

If A orders goods from a corporation, intending to use a claim against the corporation as a set-off against the price of such goods, not knowing that a receiver has been appointed for the property of such corporation, and if A, after knowledge of the appointment of such receiver, orders other goods, a general payment made by A to the receiver will be applied upon the indebtedness due from A for goods purchased after knowledge of the receivership, and not upon the earlier debt, since A did not intend to pay such debt except by use of such set-off.¹⁰

Even where payments are to be applied in the manner most beneficial to the debtor, payments must be applied to interest first.¹¹

§ 2843. Interest of third persons in fund used for payment. Different questions arise where third persons are interested in one of two obligations, either as principal or surety. In such cases the rights of third persons must be considered and they may override even the right of the debtor and creditor to apply a payment by mutual agreement or to change an application once made.¹ If a landlord has a lien upon certain personalty belonging to his tenant which is also encumbered by a mortgage, and the mortgage is prior to the lien of the landlord for the second year of the tenancy, and if the landlord takes possession of certain personalty which is subject to both liens, the value of the property thus taken should be applied in the first instance to the rent for the first year of the tenancy, for which the lien of the landlord was superior to that of the mortgagee, even if the landlord has obtained a judgment for the rent due for both years. In an action by the landlord against the mortgagee for the value of property taken by the mortgagee in satisfaction of his lien, the landlord has no right to have the amount of property taken by the landlord prorated between the two years or applied to the second year.² If A has given bond as a public officer with one set of sureties for one period of time, and with a different set of sureties for a subsequent period of time, money received and paid in by A during the second period can not

¹⁰ *Parker v. Dantzler Foundry & Machine Works*, 118 Miss. 126, L. R. A. 1918F, 795, 79 So. 82.

¹¹ *Johnston v. Succession of Robbins*, 20 La. Ann. 569, 96 Am. Dec. 426.

¹ *Hudson v. Wilson*, — Ala. —, 79 So. 378; *McLennan v. Farmers' Sav-*

ings Bank, 131 Ia. 696, 117 Am. St. Rep. 439, 109 N. W. 291.

See also, *Farmers' Savings Bank v. Jameson*, 175 Ia. 676, L. R. A. 1916E, 362, 157 N. W. 460.

² *Hudson v. Wilson*, — Ala. —, 79 So. 378.

be applied to an indebtedness incurred by him during the first period, since the effect would be to transfer the burden from the sureties during the period in which he had become indebted to the sureties during the period in which he discharged his obligations punctually.³ Not even the specific agreement of the debtor and creditor can operate to apply money collected during the second period to the payment of a deficiency created during the first period.⁴ However, in the absence of a showing that the fund paid in was collected during the second period, it will be assumed that the payment is made from the private funds of the official.⁵ If a debtor has the specific fund for which another is surety and the creditor knows the source of such fund, the debtor can not, even with the consent of the creditor, apply it to a different debt.⁶ If a surety is bound under an agreement that the loan thus made shall be used in paying for stored wheat, he is not liable to those having notice, if the fund is diverted from this purpose.⁷ If payment is made by a third person who is liable as indorser for the debtor on one of several notes held by the creditor, the creditor can not apply such payment to such other notes.⁸ If A has been induced to lend money to B through C's fraud, and A subsequently lends an additional amount to B without being induced by C's fraud, and B makes a general payment to A, as between A and C, C may insist that such payment should be applied to the part of the debt which was induced by his fraud.⁹ If money is deposited in a bank in the name of one who is not the true owner thereof, the bank can not apply such deposit to the payment of the debt of the nominal depositor so as to deprive the real owner of his interest in such fund.¹⁰

The right of a third person to insist upon the application of payments so as to protect his interests is subordinate to the provisions of the original contract under which the obligation was

³ *United States v. January*, 11 U. S. (7 Cranch) 572, 3 L. ed. 443; *United States v. Eckford*, 42 U. S. (1 How.) 250, 11 L. ed. 120; *Jones v. United States*, 48 U. S. (7 How.) 681, 12 L. ed. 870 (obiter).

⁴ *United States v. January*, 11 U. S. (7 Cranch) 572, 3 L. ed. 443.

⁵ *Pratt's Appeal*, 41 Conn. 191; *Helm v. Commonwealth*, 70 Ky. 67.

⁶ *Colerain v. Bell*, 50 Mass. (9 Met.) 499; *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624 [criticising,

Pine County v. Willard, 39 Minn. 125, 12 Am. St. Rep. 622, 1 L. R. A. 118, 39 N. W. 71].

⁷ *Crossley v. Stanley*, 112 Ia. 24, 84 Am. St. Rep. 321, 83 N. W. 806.

⁸ *Memphis City Bank v. Smith*, 102 Tenn. 467, 52 S. W. 149.

⁹ *Farmers' Savings Bank v. Jameson*, 175 Ia. 676, L. R. A. 1016E, 362, 157 N. W. 460.

¹⁰ *McLennan v. Farmers' Savings Bank*, 131 Ia. 696, 117 Am. St. Rep. 439, 109 N. W. 291.

incurred.¹¹ If a number of notes have been given, secured by a chattel mortgage, and the mortgage contains a provision which authorizes the mortgagee to apply the proceeds of the mortgage to such notes as he may elect, a third person who is a surety upon two of such notes can not insist on a pro rata distribution of the proceeds among the different notes secured by the mortgage if the creditor elects to apply the proceeds of the mortgage to the notes upon which such third person is not a surety.¹² If a mortgagor borrows money under a contract by which such loan is to be applied to the discharge of certain debts which were not secured, and also to the discharge of one of the mortgages by which the realty was already encumbered, the fact that such mortgagor has agreed with one to whom he has sold the loan to apply the proceeds of such loan to the discharge of both of the mortgages upon such land, does not entitle the purchaser to treat such mortgages as paid by reason of such application as against the mortgagee.¹³

§ 2844. Source of payment as affecting appropriation. If a payment is made from a given fund or from a given source, such payment must be applied to a debt which is a lien upon such fund or which is a liability against such source as against other debts, unless the parties who would be prejudiced by a different application acquiesce therein.¹ If collateral security has been given to secure a debt upon which a surety is also liable, the proceeds of such collateral security must be applied to the discharge of the principal debt as between the creditor and the surety.² If material which

¹¹ *Advance Thresher Co. v. Hogan*, 74 O. S. 307, 78 N. E. 436; *Schirber v. Greene*, 89 Or. 1, 173 Pac. 256.

¹² *Advance Thresher Co. v. Hogan*, 74 O. S. 307, 78 N. E. 436.

¹³ *Schirber v. Greene*, 89 Or. 1, 173 Pac. 256.

¹ *England. Young v. English*, 7 Beav. 10.

Illinois. R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 23 L. R. A. (N.S.) 620, 86 N. E. 248.

Iowa. Sioux City Foundry & Mfg. Co. v. Morten, 174 Ia. 332, L. R. A. 1916D, 1247, 156 N. W. 367.

Minnesota. Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624.

Nebraska. Lee v. Storz Brewing Co., 75 Neb. 212, 106 N. W. 220.

South Carolina. Heyward-Williams Co. v. Zeigler, 106 S. Car. 425, 91 S. E. 298.

Vermont. Thorp v. Croto, 79 Vt. 390, 10 L. R. A. (N.S.) 1166, 65 Atl. 562.

Virginia. Ross v. McLauchlan, 48 Va. (7 Gratt.) 86.

West Virginia. Farr v. Weaver, — W. Va. —, 99 S. E. 395.

² *Elizabeth City First National Bank v. Scott*, 123 N. Car. 538, 31 S. E. 819.

has been delivered under a contract is returned in part, credit for such material must be a credit upon the contract under which it was delivered, and not a general credit upon all accounts of the party who returned such material, as far as the rights of a property owner whose property is subject to a lien for such material are concerned.³ If the loss under an insurance policy has been paid to a mortgagee for whose benefit such insurance was effected, such proceeds must be applied to the mortgage indebtedness as it falls due.⁴ The proceeds of the sale of a mortgaged property must be applied to the discharge of the mortgage debt.⁵ If a contractor makes a payment to a materialman out of funds paid to him by a given property owner, the materialman can not apply such payment to an indebtedness of the contractor growing out of another transaction.⁶

§ 2845. Creditor's ignorance or knowledge of interest of third person or source of fund. In some jurisdictions the general rule that payments from a fund must be applied so as to exonerate such fund, is affected by the knowledge or the ignorance of the creditor to whom such payment is made, of the fund or source from which such payment is made. If the creditor knows of the source of the payment or of the fund from which it is made, it is said in many jurisdictions that he can not apply such payment in any other way except to the exoneration of such fund or source even with the consent of the debtor who makes the payment, as long as other persons would be prejudiced by any other application of such payment.¹ If a materialman or a subcontractor knows that a payment which is made to him by the principal contractor is made from funds which were paid to the principal contractor by a property owner under a specific contract, such subcontractor or materialman

³R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 23 L. R. A. (N.S.) 620, 86 N. E. 248.

⁴Thorp v. Croto, 79 Vt. 390, 10 L. R. A. (N.S.) 1166, 65 Atl 562.

⁵St. Louis & San Francisco Ry. Co. v. Ravla Granite Ballast Co., — Okla. —, 174 Pac. 252.

⁶Sioux City Foundry & Mfg. Co. v. Merten, 174 Ia. 332, L. R. A. 1916D, 1247, 156 N. W. 367; Mills v. Olsen, 43 Mont, 129, 115 Pac. 33; Crane Bros

Mfg Co v. Keck, 35 Neb. 683, 53 N. W. 606; Lee v. Storz Brewing Co., 75 Neb. 212, 106 N. W. 220; Boyer-Van Kuran Lumber & Coal Co v Colonial Apartment House Co., 94 Neb. 180, 142 N. W. 519.

¹Mills v. Olsen, 43 Mont. 129, 115 Pac. 33; Lee v. Storz Brewing Co., 75 Neb. 212, 106 N. W. 220; Crane Co. v Pacific Heat & Power Co., 36 Wash. 95, 78 Pac. 460; Farr v. Weaver, — W. Va. —, 99 S. E. 395.

must apply such payment to the discharge of indebtedness growing out of such contract.² If a third party whose property is subject to a lien to secure a certain debt furnishes the debtor with money to discharge such debt, and the creditor knows of the source of such fund, such payment can be applied only to the debt which is secured by such lien.³

In some jurisdictions, however, it seems to be held that the knowledge of the creditor is immaterial, and that if the fund which is paid by the debtor is the property of the debtor and not merely a trust fund for the property of another, such payment is subject to the ordinary rules of appropriation of payments as between the debtor and the creditor without reference to the fund or the source from which the payment is made.⁴ Where this view prevails, a principal contractor to whom a payment under a contract has been made by the property owner, may apply such money to the payment of his debts as he chooses, without regard to the interests of the property owner.⁵ In some of the jurisdictions, however, in which this view has been expressed,⁶ it has subsequently been disapproved.⁷

If the creditor to whom the payment is made is ignorant of the fund or the source from which such payment is made, it is held in some jurisdictions that such payments are governed by the ordinary rules of appropriation of payments as between the debtor and the creditor; and that in such case it is not necessary that such payment should be so appropriated as to exonerate the fund or the source from which such payment comes.⁸ Where this view prevails, a subcontractor or materialman who does not know the source of the fund from which the principal contractor makes a payment, is not bound to make investigation; but he may treat such payment as the property of the principal contractor and he may appropriate

² *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33; *Lee v. Storz Brewing Co.*, 75 Neb. 212, 106 N. W. 220; *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460.

³ *Farr v. Weaver*, — W. Va. —, 99 S. E. 395.

⁴ *W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Society*, 144 Wis. 501, 129 N. W. 516.

⁵ *W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Society*, 144 Wis. 501, 129 N. W. 516.

⁶ *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698.

⁷ *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740.

⁸ *Chicago Lumber Co. v. Douglas*, 89 Kan. 303, 44 L. R. A. (N.S.) 843, 131 Pac. 563; *George H. Sampson Co. v. Commonwealth*, 208 Mass. 372, 94 N. E. 473; *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740.

it to the payment of some debt other than the debt growing out of the contract under which such contractor had received such fund from the property owner.⁹

In other jurisdictions the interests of the person who furnishes the fund from which the debt is paid eventually, or who has a financial interest in a fund or in property by which such debt is secured, are regarded as of paramount importance, even though the creditor to whom the payment is made is ignorant of the fund or of the source of payment.¹⁰ If a surety furnishes money to the principal debtor for the discharge of the debt, it is held that the creditor must apply it to such debt, even if he does not know of the source of such payment.¹¹ If a contractor has made a general payment to a subcontractor or materialman out of funds paid him under a given contract by the property owner, and if the subcontractor or materialman in ignorance of the source of such payment has applied it to a debt of the contractor arising out of a different building contract, and if he has released the lien for the debt to which he has appropriated such payment, it is held that the property owner by whom such payment was made to such contractor may insist upon its appropriation to debts due to subcontractors and materialmen incurred in the performance of such contract, so as to relieve such property from mechanics' liens.¹²

§ 2846. Appropriation, when immaterial. In the absence of facts differentiating debts, it has been held that the law will apply payments pro rata.¹ If no practical difference exists in legal effect between an appropriation made without legal authority and one made in accordance with law, the law will not interfere to change the appropriation as made. Thus if two notes are secured by a mortgage, application by the creditor of a payment to the last to fall due instead of to the first is not prejudicial to the debtor, where, even if such payment had been applied to the first note, a balance

⁹ *Crane Co. v. Wichita Union Terminal Ry.*, 98 Kan. 336, 158 Pac. 59; *B. F. Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, L. R. A. 1917C, 630, 158 Pac. 740; *Farr v. Weaver*, — W. Va. —, 99 S. E. 395.

¹⁰ *Sioux City Foundry & Mfg. Co. v. Merten*, 174 Ia. 332, L. R. A. 1916D, 1247, 156 N. W. 367.

¹¹ *Columbia Digger Co. v. Rector*, 215 Fed 618

¹² *Sioux City Foundry & Mfg. Co. v. Merten*, 174 Ia. 332, L. R. A. 1916D, 1247, 156 N. W. 367.

¹ *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137; *Swisher v. McWhinney*, 64 O. S. 343, 60 N. E. 565; *Wetmore & Morse Granite Co. v. Ryle*, — Vt. —, 107 Atl. 109.

would be due thereon, which, by the terms of the mortgage, would make the second note due and payable at the option of the mortgagee.² If the debtor owes two notes of equal amounts to the same payee, secured in the same way and indorsed to two different holders, and he directs a payment due to him from the indorser to be applied on one of such notes, the application of such payment to the other note is in no way prejudicial to the debtor and is binding.³

§ 2847. Involuntary payments. The general rules as to the application of payments have no effect in case of involuntary payments, coerced by the law. Neither debtor¹ nor creditor² can direct the application of involuntary payments compelled by legal process. Even if a mortgage is given voluntarily, payment as the result of a foreclosure suit is not voluntary, and the debtor can not direct the payment.³ A payment of a claim by a receiver is treated as an involuntary payment in this sense.⁴

Involuntary payments have, in some jurisdictions, been applied to unsecured rather than to secured indebtedness.⁵ Under some circumstances the opposite rule has been applied. A payment by an assignee in insolvency will be applied to a debt secured by a mortgage in preference to one not so secured, since the assignee represents the creditors as well as the debtor.⁶ Another rule sometimes followed in such cases is to prorate the payment among the several debts, irrespective of the collateral security held for each.⁷

² Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2 [modified in banc, 51 Pac. 542].

³ Forbes v. Morehead (Ky.), 58 S. W. 982.

¹ Van Buren County Savings Bank v. Rockwell, 154 Ia. 26, 134 N. W. 424; Kinkead v. Peet, 164 Ia. 65, 145 N. W. 313; Orleans County National Bank v. Moore, 112 N. Y. 543, 8 Am. St. Rep. 775, 3 L. R. A. 302, 20 N. E. 357; Wetmore & Morse Granite Co. v. Ryle, — Vt. —, 107 Atl. 109.

² Blackstone Bank v. Hill, 27 Mass. (10 Pick.) 129; Cage v. Her, 13 Miss. 410, 43 Am. Dec. 521; Bergdoll v. Sopp, 227 Pa. St. 363, 76 Atl. 64; Herr v. Lancaster Trust Co., 237 Pa. St. 344, 85 Atl. 443; Wetmore & Morse Granite Co. v. Ryle, — Vt. —, 107 Atl. 109.

³ Orleans County National Bank v. Moore, 112 N. Y. 543, 8 Am. St. Rep. 775, 3 L. R. A. 302, 20 N. E. 357.

⁴ Wetmore & Morse Granite Co. v. Ryle, — Vt. —, 107 Atl. 109.

⁵ California National Bank v. Ginty, 108 Cal. 148, 41 Pac. 38; Small v. Older, 57 Ia. 326, 10 N. W. 734; Hanson v. Manley, 72 Ia. 48, 33 N. W. 357; Citizens' Bank v. Whinery, 110 Ia. 390, 81 N. W. 694; Smith v. Moore, 112 Ia. 60, 83 N. W. 813; Wilson v. Allen, 11 Or. 154, 2 Pac. 91.

⁶ Bell & Coggeshall Co. v. Kentucky Glass Works Co., 106 Ky. 7, 50 S. W. 1092, 51 S. W. 180 [reversing on rehearing, 48 S. W. 440].

⁷ Florida. Cohen v. L'Engle, 29 Fla. 655 [sub nomine, Cohen v. Bank, 11 So. 44].

If a claim which is filed with a receiver consists of a note and an account, and a dividend is paid on the claim, such dividend should be prorated between the note and the account, although parties other than the creditor in question were interested in the note.⁸

Special questions may arise where a particular fund has been appropriated by the debtor in advance to the payment of a specific debt. Thus a debtor may give to his creditor a mortgage or lien on specific property. Since the law is often invoked to sell such property, the question of appropriation in advance is often complicated with questions of involuntary payments. The proceeds of property encumbered by a lien,⁹ or mortgage,¹⁰ should be applied to the payment of the debt secured thereby. Money paid to a mortgagee on account of loss of property secured by a chattel mortgage must be applied by him to the mortgage debt.¹¹ A partnership borrowed money of A, secured in part by a first mortgage, in part by a second mortgage on improved realty and in part not secured; and insurance policies covering such realty were indorsed to A as collateral security. The building was destroyed by fire; and the insurance money was paid to A, who credited it so as to discharge the debt secured by the first mortgage and the balance upon unsecured debts. It was held that as against the heirs of a deceased partner, A must credit the balance upon the debt secured by the second mortgage.¹² In some cases where the same security covers several debts, the creditor has a right to make application among such debts. Mortgagees in possession claiming under several mortgages may apply the rents and profits to the different mortgage debts as they please.¹³ So in case of foreclosure of a mortgage securing several debts, it was held that the mortgagee could apply

Massachusetts. *Commercial Bank v. Cunningham*, 41 Mass. (24 Pick.) 270, 35 Am. Dec. 322; *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

Michigan. *Shelden v. Bennett*, 44 Mich. 634, 7 N. W. 223.

New York. *Orleans County National Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775, 3 L. R. A. 302, 20 N. E. 357.

Vermont. *Wetmore & Morse Granite Co. v. Ryle*, — Vt. —, 107 Atl. 109.

⁸ *Wetmore & Morse Granite Co. v. Ryle*, — Vt. —, 107 Atl. 109.

⁹ *Strickland v. Hardie*, 82 Ala. 412,

3 So. 40; *Clements v. Draper*, 108 Ala. 211, 10 So. 25.

¹⁰ *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912; *Summer v. Kelly*, 38 S. Car. 507, 17 S. E. 364.

¹¹ *Sherman v. Foster*, 158 N. Y. 587, 53 N. E. 504. (A third person was surety for the mortgage debt.)

¹² *Burbank v. Buhler*, 108 La. 39, 32 So. 201. (Under the civil law rule in force in this state probably any general payment should have been so applied.)

¹³ *Leach v. Curtin*, 123 N. Car. 85, 31 S. E. 296.

the proceeds to such of said debts as were not otherwise secured.¹⁴ So if personal property is pledged to secure certain debts, some of which are not otherwise secured and others of which are secured also by personal security, the creditor may apply the proceeds of such pledge to the debts otherwise unsecured.¹⁵ According to some authorities, the law will apply the proceeds of mortgaged realty pro rata among the different debts secured thereby, irrespective of the order of their maturity¹⁶ or assignment.¹⁷ Other authorities apply the proceeds to the debts in order of their maturity.

§ 2848. What amounts to appropriation by debtor. Payment made in pursuance of a pre-existing contract as to its application is treated in law as being so applied,¹ especially if the rights of third persons are prejudiced thereby, as where, in reliance upon an agreement to apply a payment to a debt secured by a deed of trust, a third person has acquired a lien upon the property secured by such trust deed.² Under a contract to pay rent by doing certain work no further application of such payment is necessary. The mere doing of such work operates as such payment.³

Payment made pursuant to a contemporaneous agreement is treated in law as being so appropriated.⁴ If a debtor tenders a payment on condition that such payment, as well as former payments, shall be applied to a certain debt, the acceptance of the later payment amounts to an application of such payment and of such prior payments.⁵ A prior direction, which does not amount to a contract, may be changed by the debtor when payment is made.⁶

If there is no agreement as to the application of a payment, and the debtor intends a specific application of a payment made by him, he must notify the creditor of his intention.⁷ Such notice may be

¹⁴ *Smith v. Moore*, 112 Ia. 60, 83 N. W. 813.

¹⁵ *Wilcox v. Fairhaven Bank*, 80 Mass. (7 All.) 270.

¹⁶ *Maddox v. Teague*, 18 Mont. 593, 47 Pac. 209.

¹⁷ *Maddox v. Teague*, 18 Mont. 593, 47 Pac. 209.

¹ *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999; *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009.

² *Coney v. Laird*, 153 Mo. 406, 77 Am. St. Rep. 721, 53 S. W. 96.

³ *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321.

⁴ *Augusta Cooperage Co. v. Parham*, — Ark. —, 213 S. W. 737; *Hansen v. Rounsavell*, 74 Ill. 238 (obiter).

⁵ *Royal Colliery Co. v. Alwart Bros. Coal Co.*, 276 Ill. 193, 114 N. E. 499.

⁶ *Ray v. Borgfeldt*, 169 Cal. 253, 146 Pac. 679 (obiter).

⁷ *Long v. Miller*, 93 N. Car. 233; *Hill v. Southerland*, 3 Va. (1 Wash.) 128.

given in express terms,⁸ or it may be implied from the circumstances of the payment.⁹ If the interest of a debtor under a conditional sale contract will be forfeited if payments made by him are not applied to a note which he has given in pursuance of such contract of conditional sale, instead of being applied to a demand note, his conduct in making payments without indicating to which note they are to be applied will be regarded under the circumstances as equivalent to a direction to apply them to the note, default of which will terminate his rights under the contract.¹⁰

The secret intention of the debtor has no legal effect.¹¹ An entry or memorandum made by the debtor and not brought to the attention of the creditor is not a sufficient application.¹²

⁸ Terhune v. Colton, 12 N. J. Eq. 232.

⁹ England. Shaw v. Picton, 4 Barn. & C. 715.

Arkansas. Terry v. Klein, 133 Ark. 366, 201 S. W. 801.

California. Ray v. Borgfelt, 169 Cal. 253, 146 Pac. 679.

Connecticut. Cavanaugh v. Marble, 80 Conn. 389, 15 L. R. A. (N.S.) 127, 68 Atl. 853.

North Carolina. Stone Co. v. Rich, 160 N. Car. 161, 75 S. E. 1077 (obiter).

Vermont. Ballantine v. Fenn, 88 Vt. 166, 92 Atl. 3.

¹⁰ Cavanaugh v. Marble, 80 Conn. 389, 15 L. R. A. (N.S.) 127, 68 Atl. 853.

"It is unquestionable that the debtor in making a payment may ordinarily direct to which of two or more debts due from him to the creditor the payment shall be applied, and, if he fails to so direct the creditor ordinarily may apply it as he may elect. But it is not necessary that the debtor should direct the application in express words. If his intention as to the application appears from the facts and circumstances connected with the payment and his purpose can be fairly implied therefrom by the creditor, that is enough. Sawyer v. Tappan, 14 N. H. 352; Lauten v. Rowan, 59 N. H. 215; Roakes v. Bailey, 55 Vt. 542;

Pardee v. Markle, 111 Pa. 548, 50 Am. Rep. 299, 5 Atl. 36; Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; Newmarch v. Clay, 14 East, 239. The court has found that it was always the intention of the payor that the payments should apply on the note for \$742.50. We think that the court was right in its conclusion that the facts and circumstances known to the plaintiffs at the time the payments were made were such that they were bound to presume that the payments were to apply on that note. It was payable in instalments. The conditions of the sale were broken if the instalments were not paid. The first two payments were made before the existence of the mortgage note. The latter note was not payable in instalments, but on demand, and no actual demand for its payment is shown. Under such circumstances, the plaintiffs were not warranted in assuming that the vendees sent these payments, intending that the plaintiffs might apply them to either note at their option." Cavanaugh v. Marble, 80 Conn. 389, 15 L. R. A. (N.S.) 127, 68 Atl. 853.

¹¹ Pearce v. Walker, 103 Ala. 250, 15 So. 568.

¹² Terhune v. Colton, 12 N. J. Eq. 232; Brice v. Hamilton, 12 S. Car. 32

§ 2849. What amounts to appropriation by creditor. The creditor may make an appropriation of a payment by his intention to make such appropriation, together with some outward and visible act which makes such intention manifest.¹ An act which is in its nature ambiguous does not amount to an appropriation.² The act of the creditor in indorsing a payment on a note, does not show an appropriation of such payment to the interest on such note.³ The act of the creditor in giving a receipt,⁴ or in rendering to the debtor an account which shows an appropriation,⁵ amounts to an appropriation. The legal effect of the act, as well as the express language which is used, may be considered in order to determine whether a payment has been appropriated or not.⁶ The act of the creditor in rendering an account on which a general credit is entered, is held to show an appropriation of such payment to the earliest items.⁷ The act by which the creditor manifests his intention to make an appropriation need not be performed with the sole, or even with the primary, intention of making an appropriation of such payment by the performance of such act.⁸ If the creditor has a right to make an appropriation of a payment, his act in filing a petition to recover a balance due on a specified debt amounts to an appropriation of a payment to another debt, so as to leave the balance which he seeks to recover.⁹ This principle has been applied to a case in which a public corporation was the creditor and in which the appropriation was not made by the officers which had charge of the finances of such public corporation, but at the trial of which no obligation as to the method of appropriating such payment was made.¹⁰

Whether the creditor must notify the debtor of an application made by himself is a question on which there is some conflict of

¹ *Cory v. The Mecca* [1897], A. C. 286; *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626; *Egolf Building & Loan Association v. Cleaver*, 228 Pa. St. 60, 77 Atl. 245 (obiter); *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203.

² *Fellows v. Christensen*, 28 S. D. 353, 133 N. W. 814; *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203.

³ *Fellows v. Christensen*, 28 S. D. 353, 133 N. W. 814.

⁴ *Smith v. Wood*, 1 N. J. Eq. 74.

⁵ *People v. Grant*, 139 Mich. 26, 102 N. W. 226.

⁶ *People v. Grant*, 139 Mich. 26, 102 N. W. 226.

⁷ *People v. Grant*, 139 Mich. 26, 102 N. W. 226.

⁸ *Haynes v. Waite*, 14 Cal. 446; *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626.

⁹ *Haynes v. Waite*, 14 Cal. 446; *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626.

¹⁰ *State v. Blakemore*, 275 Mo. 695, 205 S. W. 626.

authority, though the weight of authority is that some notice must be given to constitute an appropriation.¹¹ A credit on a specific note, without the knowledge of the debtor, has been held not to be an irrevocable application.¹² If the creditor enters the payments on a general account with the debtor so as, in law, to amount to an application to the earliest items, his secret and uncommunicated intention to apply each payment to a specific item is without effect.¹³

§ 2850. What amounts to appropriation by act of the law. The appropriation which the law makes of payments not made in the course of legal proceedings is automatic and self-executing. A judgment or judicial decree may be necessary to settle any doubt as to what appropriation the law has made; but the appropriation that the law makes is not delayed until the judgment or decree is rendered. At most, the judgment or decree is merely the evidence of the appropriation made by the law.¹ In like manner, an involuntary payment which is made in the course of legal proceedings is appropriated at once without the need of any formal entry of credit.² If a payment is made to the receiver of the creditor, and the debtor does not direct the application of such payment, the act of the receiver in making a general deposit of such payment in the bank does not amount to an application of such payment.³

§ 2851. Effect of appropriation. An application when once made is a finality,¹ and can be changed afterwards only by the consent of the parties.² If the debtor has once made a valid appropriation of a payment, neither he³ nor the creditor⁴ can change the

¹¹ *Schoonover v. Osborne*, 117 Ia. 427, 90 N. W. 844; *Capen v. Alden*, 46 Mass. (5 Met.) 268; *Sawyer v. Tappan*, 14 N. H. 352.

¹² *Law v. Blomberg* (Neb.), 91 N. W. 206.

¹³ *Schoonover v. Osborne*, 117 Ia. 427, 90 N. W. 844.

¹ See §§ 2838 et seq.

² *Patch v. First National Bank*, 90 Vt. 4, 96 Atl. 423; *Wetmore & Morse Granite Co. v. Ryle*, — Vt. —, 107 Atl. 109.

³ *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203.

¹ *Jackson v. Bailey*, 12 Ill. 159; *Brown v. Burns*, 67 Me. 535; *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218; *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203 (obiter).

² *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203 (obiter).

³ *Dickinson v. Marrow*, 14 M. & W. 713; *Brown v. Burns*, 67 Me. 535; *Hubbell v. Flint*, 81 Mass. (15 Gray) 550.

⁴ *Massachusetts. Spinney v. Freeman*, 230 Mass. 356, 119 N. E. 798. *North Carolina. Miller v. Womble*, 122 N. Car. 35, 29 S. E. 102.

appropriation thus made without the consent of the other. If it is understood that payments by one person are to be applied to an account due from another, payments made on such account can not be subsequently applied by the creditor to another account, though he might at the outset have refused to accept payment from any person except from the original debtor.⁵ If a payment has been made on an entire contract, it can not afterwards be applied to specific items.⁶ If the debtor has made an appropriation of a payment, such payment is in law regarded as being applied as the debtor directs, even if the creditor has in fact attempted to make a different application thereof.⁷

A valid appropriation of a payment by the creditor is final and can not be changed thereafter without the consent of debtor and creditor.⁸ If the creditor has seized property belonging to a surety under a power conferred in a mortgage and has sold it and applied the proceeds to the payment of the mortgage debt, he can not alter such application as against the debtor, although such surety has obtained a default judgment against the surety for the conversion of such property.⁹ If a mortgagor has consented to the application of a part of the proceeds of mortgaged realty to another debt which he owes to the mortgagee, he can not thereafter demand that such proceeds be applied to the mortgage debt.¹⁰ If a creditor has made a general application of a payment, on the theory that the account is a continuous one, he can not alter such application and apply

North Dakota. *Herold v. Hill*, — N. D. —, 169 N. W. 592.

Pennsylvania. *Kann v. Kann*, 259 Pa. St. 583, 103 Atl. 369.

South Carolina. *Reid v. Wells*, 56 S. Car. 435, 34 S. E. 401.

Washington. *Simpson v. Combes*, — Wash. —, 182 Pac. 566.

West Virginia. *Wait v. Homestead Building Association*, 81 W. Va. 702, 95 S. E. 203 (obiter); *Farr v. Weaver*, — W. Va. —, 99 S. E. 305 (obiter).

⁵ *National Cash Register Co. v. Bonnevillie*, 119 Wis. 222, 96 N. W. 558.

⁶ *Scannell v. Brewing Co.*, 178 Mass. 288, 50 N. E. 623.

⁷ *Augusta Cooperage Co. v. Parham*, — Ark. —, 213 S. W. 737; *Reid v.*

Wells, 56 S. Car. 435, 34 S. E. 401 [rehearing denied, 34 S. E. 939].

⁸ *England. Pollard v. Bank*, L. R. 6 Q. B. 623.

Alabama. *Nelson v. Holcomb*, 187 Ala. 119, 65 So. 773.

California. *White v. Costigan*, 138 Cal. 564, 72 Pac. 178.

Maryland. *Hawkins v. Bouie*, 121 Md. 147, 88 Atl. 126.

Ohio. *Brown v. Brabham*, 3 Ohio 275.

West Virginia. *Hanly v. Potts*, 52 W. Va. 203, 43 S. E. 218.

⁹ *Nelson v. Holcomb*, 187 Ala. 119, 65 So. 773.

¹⁰ *Hawkins v. Bouie*, 121 Md. 147, 88 Atl. 126.

the payment to the later items.¹¹ A was indebted to B on a note and subsequently they had open mutual accounts, A furnishing produce which B sold. B applied the price of such produce to the open account. After B's death his administrator was not allowed to change the application of such payments to the note, leaving the open account barred by the Statute of Limitations.¹²

If the interests of third parties are affected, the debtor and creditor can not, by mutual consent, change an appropriation of a payment which has once been made. The debtor and creditor can not change the application of a payment to a debt secured by a lien so as to prejudice other lienholders,¹³ or a subsequent purchaser of mortgaged premises who buys after the original application of such payment to the mortgage debt.¹⁴

If a member of a building and loan association borrows money and enters into a contract for the purchase of stock, payments which by mutual consent are to be applied in payment of the stock can not be appropriated subsequently by the debtor to the satisfaction of the mortgage debt.¹⁵ From its nature, this question usually arises on the insolvency of the association, when the borrowing members seek to have the amount paid on the stock applied to payment of the loan. In most of the cases the amount paid as premium and interest is applied to the amount of the loan, although the amount paid in on stock subscriptions is not thus credited. In some jurisdictions, however, the amount paid in as premiums is credited on the loan only as far as it is unearned at the time of insolvency.¹⁶

The injustice which frequently arises in a case of this sort, is not due solely to the law involving appropriation of payments, but

¹¹ *Pond v. O'Connor*, 70 Minn. 266, 73 N. W. 150, 248.

¹² *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218.

¹³ *Green Bay Lumber Co. v. Thomas*, 106 Ia. 420, 76 N. W. 749.

¹⁴ *McCown v. Westbury*, 52 S. Car. 421, 29 S. E. 663 [rehearing denied, 30 S. E. 142].

¹⁵ *Alabama*. *Bell v. Southern Home Building & Loan Association*, 140 Ala. 371, 103 Am. St. Rep. 41, 37 So. 237.

California. *Groover v. Pacific Coast Savings Society*, 164 Cal. 67, 43 L. R. A. (N.S.) 874, 127 Pac. 495.

Michigan. *Home Savings & Loan Association v. Mason*, 127 Mich. 676, 87 N. W. 74.

Mississippi. *People's Building & Loan Association v. McPhilamy*, 81 Miss. 61, 59 L. R. A. 743, 32 So. 1001.

North Dakota. *Hale v. Cairns*, 8 N. D. 145, 44 L. R. A. 261, 77 N. W. 1010.

Tennessee. *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430.

Wisconsin. *Leahy v. National Building & Loan Association*, 100 Wis. 555, 69 Am. St. Rep. 345, 76 N. W. 625.

¹⁶ *Preston v. Rockey*, 185 N. Y. 186, 77 N. E. 1156.

to the fact that parties who enter into transactions of this sort frequently do not understand the distinction between paying the mortgage indebtedness and paying for the stock which it is hoped will eventually cancel the mortgage indebtedness, and to the fact that a contract, the performance of which is rendered impossible by the insolvency of the building and loan association, is made to defeat the rights of the borrowing member by applying the contract to transactions before insolvency, and refusing to apply it to transactions thereafter. For these reasons, in some jurisdictions, it is held that the insolvency of the association discharges the entire contract, including the application of payments already made; and that the amounts paid into the association are to be credited on the loan.¹⁷

¹⁷ *Preston v. Woodland*, 104 Md. 642, 65 Atl. 336; *Strauss v. Carolina Interstate Building & Loan Association*, 117 N. Car. 308, 30 L. R. A. 693, 23 S. E. 450; *Buist v. Bryan*, 44 S. Car. 121, 29 L. R. A. 127, 21 S. E. 537.

CHAPTER LXXXIII

TENDER

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I

DEFINITION AND NATURE

§ 2852. Definition and nature of tender. Tender is a proffer of performance made in due form by a party who is entitled to perform.¹ The elements of tender which are necessary to make a tender in due form are discussed in the following sections.²

For some purposes, including the necessity of the actual production of the thing which is tendered,³ and the effect of a refusal of tender upon the obligation of the party by whom tender is made,⁴ and also with reference to the effect of a tender after breach on the part of the party who makes such tender,⁵ a distinction must be made between the tender which is a proffer of performance of a covenant to pay a liquidated sum of money, and the tender which is a proffer of performance of any other covenant such as a covenant to convey land, to deliver personal property, to render services, and the like.

From another standpoint, a distinction must be made between tender of the various forms of covenants with reference to their relation to one another. The relation of covenants is considered in detail in connection with the subject of the breach of such covenants and of the effect of such breach.⁶ In this connection it may be pointed out that the great distinction lies between tender of performance of a concurrent covenant where the party who tenders performance has a right to demand simultaneous performance in return on the part of the party to whom performance is tendered;⁷ and the tender of performance of a subsequent covenant,⁸ or of a precedent covenant,⁹ or of an independent covenant,¹⁰ in which cases the party who tenders performance can not make a tender in

¹ *Kelley v. Clark*, 23 Ida. 1, 129 Pac. 921; *United States National Bank v. Shupak*, 54 Mont. 542, 172 Pac. 324; *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747; *Hart v. Kana-wha Oil Co.*, 79 W. Va. 161, 90 S. E. 604.

"A tender imports not merely the readiness and the ability to pay or perform, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the tender is to be made."

Bane v. Atlantic Coast Line R. Co., 171 N. Car. 328, 88 S. E. 477.

² See §§ 2854 et seq.

See, *The Requisites of a Valid Tender*, by J. H. Lind, 17 *American Law Register (N.S.)*, 745.

³ See § 2863.

⁴ See § 2874.

⁵ See §§ 2855 et seq.

⁶ See ch. LXXXIV.

⁷ See §§ 2961 et seq.

⁸ See §§ 2951 et seq.

⁹ See §§ 2951 et seq.

¹⁰ See §§ 2971 et seq.

due form if he demands performance in return on the part of the party to whom such performance is tendered.¹¹

As a result of the fundamental differences between these various classes of covenants, tender is sometimes used in the restricted sense of a proffer of performance of a covenant for the payment of money only,¹² and sometimes in an even more restricted sense as a proffer of performance of a covenant to pay money only, other than a concurrent covenant.

Since tender is a proffer of performance, it must be a proffer of the performance which is called for by the terms of the contract and not the proffer of something else in lieu of such performance.¹³ Since tender is a proffer of performance, the thing which is tendered must be tendered as performance of a valid and subsisting obligation, and not as something which is offered gratuitously by the party who makes the tender without any recognition on his part of a valid and subsisting obligation to perform.¹⁴

If tender in due form is accepted, the obligation is performed, unless the party who has proffered tender refuses performance, in which case there is a breach on his part. Each of these cases is discussed, therefore, under the headings of performance¹⁵ and of breach,¹⁶ respectively. For this reason the term "tender" is frequently used only where the tender which is proffered is refused by the party to whom such proffer is made;¹⁷ and in other cases the transaction is referred to as performance or breach, as the case may be.

¹¹ See §§ 2868 and 2971 et seq.

¹² "The debtor may be able and ready to pay, and the creditor may know this, but there is no tender unless the money is produced and offered to the creditor, or unless there is a waiver of the tender; and the debtor must seek the creditor and not the creditor the debtor." *Bane v. Atlantic Coast Line R. Co.*, 171 N. Car. 328, 88 S. E. 477.

"Tender is the unconditional offer of a debtor to the creditor of the amount of his debt. This means the real amount of the debt as fixed by the law, and the purpose of the law of tender is to enable the debtor to relieve himself of interests and costs and to relieve his property of encumbrance by offering his creditor all that

he has any right to claim. This does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due—actually due." *Kelley v. Clark*, 23 Ida 1, 129 Pac. 921.

¹³ "The law makes a clear distinction between a tender, the actual proffer of money or other property into court, and a mere proposal, or proposition to do the thing." *Hart v. Kanawha Oil Co.*, 79 W. Va. 161, 90 S. E. 604.

¹⁴ *Sansone v. Crocker*, — Ia. —, 170 N. W. 796.

¹⁵ See ch. LXXX.

¹⁶ See ch. LXXXIV.

¹⁷ *Barker v. Brink*, 5 Ia. 481; *Cape Fear Lumber Co. v. Small*, 84 S. Car. 434, 66 S. E. 880.

§ 2853. Nature of obligation, performance of which may be tendered. Whether an obligation is one the performance of which may be tendered, so as to have the legal effect of a valid tender, depends in part on the question whether tender is made when performance is due, or whether it is not made until after breach, and in part upon the nature of the thing which the party has promised. If tender is made at the time at which performance is due, the party who makes such tender has avoided the consequences of default. This principle applies alike to covenants for the payment of money, and to covenants for the performance of something other than the payment of money, such as covenants to convey property, to perform services, and the like. If the party who tenders performance does not make such tender until after the time fixed by the contract for performance and until after he is thus in default, his right to make a tender depends upon the nature of the thing which he has promised. While the weight of authority is in favor of the view that, at original common law, tender could not be made after default, no matter what the covenant,¹ there was, even at common law, some authority in favor of the view that if default is made in performance of a covenant to pay a fixed and liquidated sum of money only, and if the amount of damage due by reason of such default is susceptible of mathematical calculation, the party in default may make a valid tender of such performance;² and this is now the prevalent view at modern law.³

If default is made in a covenant for the payment of something other than a fixed and liquidated sum of money, the damages which arise by reason of such breach are ordinarily unliquidated and not susceptible of mathematical computation. At common law, tender of such unliquidated damages could not be made;⁴ that is, if such

¹ See § 2855.

² "I should be sorry that it should be doubted for a moment, that where there is a mere dry covenant for payment of money, it may not be tendered." *Johnson v. Clay*, 7 Taunt. 486.

³ This principle is assumed in a great many cases in which it is not thought necessary to decide it; and in which the question which is presented to the court is not the right to make a tender, but whether a valid and sufficient tender has in fact been made.

See §§ 2862 et seq.

⁴ *England. Dearle v. Barrett*, 2 Ad. & El. 82; *Davy v. Richardson*, 21 Q. B. D. 202.

Alabama. Southern Ry. Co. v. Harris, — Ala. —, 80 So. 101.

Arkansas. Day v. Lafferty, 4 Ark. 450.

Illinois. Gregory v. Wells, 62 Ill. 232.

Vermont. Green v. Shurtliff, 19 Vt. 592.

"Under the common law, tender is not avoidable where the action is for unliquidated damages, the amount of which is subject to the jury's discre-

tender were refused by the party to whom performance was due, no legal consequences followed such attempted tender.⁵ If there are several breaches of the same contract, and the damages on some of these breaches are liquidated, while on others they are unliquidated, a tender of all the damages on all of such breaches can not be made.⁶ It has been held, however, that a plea of tender may be made to a count in quantum meruit.⁷

The practical result of the rule denying tender of unliquidated damages was so unsatisfactory in certain classes of obligations that in some jurisdictions it has been changed by legislation, and provision has been made that tender of a specified amount, if kept good,⁸ shall prevent recovery of interest and costs if the party who refuses such tender does not recover more than the amount thereof.⁹

If the contract is one for the delivery of something other than money, tender of such articles can not be made after breach.¹⁰ This principle applies to contracts to pay current funds other than legal tender,¹¹ such as bank notes¹² or Confederate currency.¹³ The

tion." *Southern Ry. Co. v. Harris*, — Ala. —, 80 So. 101.

"The only remaining question for our consideration is presented by the demurrer to the plea of tender. We consider the law well settled, that, if a party covenants to pay in specific articles, he must meet his contract at the time and in the manner specified. Tender can not be made after the day, unless the damages are capable of being reduced to certainty, by computation; nor can it be pretended that it is possible to do so, in this instance, without the intervention of a jury. Even if a party failed to make a defense, a writ of inquiry must issue to ascertain the damages. It is, therefore, not one of these cases in which the doctrine of tender is applicable." *Day v. Lafferty*, 4 Ark. 450.

The same principle applies to a tender of unliquidated damages arising out of a tort. *Ganus v. Tew*, 163 Ala. 358, 50 So. 1000; *Cilley v. Hawkins*, 48 Ill. 308; *Wunrath v. People's Furniture & Carpet Co.*, 98 Neb. 342, 152 N. W. 736.

⁵ *Dearle v. Barrett*, 2 Ad. & El. 82; *Davys v. Richardson*, 21 Q. B. D. 202; *Gregory v. Wells*, 62 Ill. 232; *Green v. Shurtliff*, 19 Vt. 592.

The same principle applies to a tender of unliquidated damages arising out of a tort. *Ganus v. Tew*, 163 Ala. 358, 50 So. 1000; *Cilley v. Hawkins*, 48 Ill. 308; *Wunrath v. People's Furniture & Carpet Co.*, 98 Neb. 342, 152 N. W. 736.

⁶ *Green v. Shurtliff*, 19 Vt. 219.

⁷ *Johnson v. Lancaster*, 1 Strange 576.

⁸ See § 2871.

⁹ *Solomon v. Bewicke*, 2 Taunt. 317; *Frantz v. Rose*, 89 Ill. 590.

¹⁰ *Powe v. Powe*, 42 Ala. 113; *Day v. Lafferty*, 4 Ark. 450; *Stucker v. Miller*, 15 Ky. (5 Litt.) 235.

¹¹ *Powe v. Powe*, 42 Ala. 113; *Day v. Lafferty*, 4 Ark. 450; *Stucker v. Miller*, 15 Ky. (5 Litt.) 235.

¹² *Day v. Lafferty*, 4 Ark. 450; *Stucker v. Miller*, 15 Ky. (5 Litt.) 235.

¹³ *Powe v. Powe*, 42 Ala. 113.

reason given for the result which is reached in contracts to pay in something which is not legal tender, on the one hand, but is actually current as money, on the other, is that it is money of fluctuating value; and that in case of default one party or the other may have to perform more or to receive less than the terms of the original contract contemplated.¹⁴

If a tender of unliquidated damages is made and accepted, the transaction amounts to an accord and satisfaction,¹⁵ and the original liability is thus discharged.¹⁶

II

TIME AND PLACE AT WHICH TENDER CAN BE MADE

§ 2854. Tender before maturity. A party to a contract can be compelled to assent to the modification of the terms thereof, without his consent; and accordingly the creditor can not be compelled to accept payment or performance before the time fixed by the contract. Accordingly, a tender before the time fixed for performance is inoperative.¹ If the tender is of the principal and interest down to the date of the tender, it is clearly insufficient, since it is not only premature but since it does not include the amount to which the creditor is entitled.² Even if the debtor tenders the principal with amount due down to maturity, the tender is insufficient since it is premature,³ although from the nature of the case the creditor, except under extraordinary circumstances, accepts such payment; and accordingly this question is rarely presented for judicial decision.⁴

¹⁴ Powe v. Powe, 42 Ala. 113.

¹⁵ See §§ 2501 et seq.

¹⁶ McDaniel v. Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406.

¹ Alabama. Caldwell v. Caldwell, 157 Ala. 119, 47 So. 208.

Connecticut. Abbe v. Goodwin, 7 Conn. 377.

Indiana. Bowen v. Julius, 141 Ind. 310, 40 N. E. 700.

Massachusetts. Saunders v. Frost, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

Nebraska. Moore v. Kime, 43 Neb. 517, 61 N. W. 736.

New York. Ellis v. Craig, 7 Johns. Ch. (N. Y.) 7.

Oklahoma. Bell v. Riggs, 34 Okla.

834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

This question was raised, but not decided, in Moore v. Cord, 14 Wis. 213.

² Bell v. Riggs, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

See also, Graeme v. Adams, 64 Va. (23 Gratt.) 225, 14 Am. Rep. 130.

³ Brown v. Cole, 14 Sim. 427; Abbe v. Goodwin, 7 Conn. 377; Quynn v. Whetcroft, 3 Harris & McH. (Md.) 136. (Reversed, but ground of reversal not given.) Pyross v. Fraser, 82 S. Car. 498, 64 S. E. 407.

See also, Smiddy v. Grafton, 163 Cal. 16, 124 Pac. 433.

⁴ Pyross v. Fraser, 82 S. Car. 498, 64 S. E. 407.

§ 2855. Time at which tender may be made—Tender after default at common law. At common law a plea of tender was said to be insufficient unless the defendant alleged that he had always been ready to perform entirely the contract on which the action was founded;¹ and accordingly a tender after performance was due,

¹“In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded, and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prêt* and *profert in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defense against the plaintiff—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

“With respect to the averment of *toujours prêt*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can shew that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made and refused, a subsequent tender

of part of it, is bad, notwithstanding that, by part payment, or by other means, the debt may have been reduced, in the interim, to the sum tendered. And this is the principle of the decision of *Cotton v. Godwin* (7 M. & W. 147). If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prêt*, even though the amount demanded were made up of the sum due under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon v. Newington* (3 Q. B. 915), and *Hesketh v. Fawcett* (11 M. & W. 356), which appear to overrule *Tyler v. Bland* (9 M. & W. 338).

“This principle, however, we think, is only applicable where the larger sum is demanded generally, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up, for, in such case, the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *toujours prêt* as to each. But, besides the averment of readiness to perform, the plea must aver an actual performance of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender on the very day. And this is the principle of the decisions of *Hume v. Peplow* (8 East 116), and *Poole v. Tunbridge* (2 M. & W. 223). It is

was said to be insufficient even if the covenant was one for the payment of money only.² A reason which has been assigned for holding that a tender of the principal after maturity, together with interest, is insufficient, is that the damages have varied as the rate of interest has changed; and that the court has the power to send

also obvious that the defect in the plea in this respect can not be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable. On the same reasoning, it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow.

"If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is, that the same argument might be applied to the instance of the tender *post diem* of the amount of a bill or note, with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender." *Dixon v. Clark*, 5 C. B. 365.

² *May v. Cooper*, Fort. 376; *Giles v. Hartis*, 1 Lord Raymond 254; *Suffolk Bank v. Worcester Bank*, 22 Mass. (5 Pick.) 105; *Dewey v. Humphrey*, 22 Mass. (5 Pick.) 187; *Maynard v. Hunt*, 22 Mass. (5 Pick.) 240.

"Per Holt, chief justice, where debt is brought upon a bond conditioned to pay money at a day certain, if the defendant pleads a tender at the day, and that he had been always ready, etc., it is good. But in *assumpsit*, or debt upon a single bill, he must plead that he has been always ready; for though the defendant tendered the money, and has been always ready since the tender to pay it, yet the plaintiff may have demanded it before, it being a duty from the time of the promise; and if the defendant did not pay it upon demand, his promise was broken, though he tendered it afterwards. But if he pleads that he was always ready, this refers to the time of the promise made, and not to the time of the tender." *Giles v. Hartis*, 1 Lord Raymond 254.

A plea of tender after *imparlance* was held to be insufficient; although it did not appear clearly whether the tender was made at maturity or thereafter. *Wood v. Ridge*, Fort. 376.

The objection to permitting a plea of tender after *imparlance* seems to have been that the plea must allege that he was always ready to perform, and that a plea after *imparlance* can not relate to matters occurring prior to *imparlance*. *Giles v. Hartis*, 1 Lord Raymond 254, 2 Salk. 622.

See, however, as recognizing tender of money only after default, *Johnson v. Clay*, 7 Taunt. 486.

the case to a jury to make the computation, although it is the usual practice in the discretion of the court to refer it to an officer of the court to make such computation.³ It is said, furthermore, that a plea of tender is a plea in bar which must show that the plaintiff never had any cause of action; and that a plea of tender after maturity admits that he once had a cause of action and attempts to show that such cause of action has been discharged by such subsequent tender.⁴

If the tender was but a day too late, it was insufficient.⁵ In some of the cases in which this rule is insisted upon, the tender seems to have been for the amount of the principal only without interest;⁶ but at the same time the rule has been applied where principal and interest down to the date of the tender were offered.⁷ If a note was not paid on demand in accordance with its terms, and subsequently the maker acquired a set-off against the holder, a tender of the difference between the amount of the note and the amount of the set-off was insufficient.⁸ In an action by a mortgagee to recover possession after breach of condition, a tender by the mortgagor after default is insufficient,⁹ since in such cases his relief is in equity. Even in jurisdictions in which this principle has been applied, it is said that a tender after maturity not only stops a statutory penalty which is imposed as long as default shall continue,¹⁰ but it also stops interest as damages.¹¹

§ 2856. Tender after default—Modern rule. The practical injustice of permitting a plaintiff to prosecute an action and to recover interest and costs after the defendant has tendered the principal of a liquidated money debt, together with interest down to the date of the tender, has caused a change in the law, in part due to direct legislation intended to accomplish this result, in part due to change of judicial decision, and in part due to the abandonment of the technical formality of common-law pleading; and

³ Hume v. Peplow, 8 East. 168.

⁴ Hume v. Peplow, 8 East. 168.

⁵ May v. Cooper, Fort. 376.

⁶ City Bank v. Cutter, 20 Mass. (3 Pick.) 414.

⁷ Poole v. Crompton, 5 Dowl. 468.

See also, Dewey v. Humphrey, 22 Mass. (5 Pick.) 187, where it was found that the defendant tendered the full amount of the debt and damage.

⁸ Cotton v. Godwin, 7 M. & W. 147,

⁹ Dowl. 763.

¹⁰ Maynard v. Hunt, 22 Mass. (5 Pick.) 240.

¹¹ Suffolk Bank v. Worcester Bank, 22 Mass. (5 Pick.) 105

¹² Suffolk Bank v. Worcester Bank, 22 Mass. (5 Pick.) 105.

it is now held in many jurisdictions that a tender of the principal of a liquidated debt payable in money, together with interest down to the date of the tender, is sufficient, although such tender is not made until after maturity and until after the debtor is in default.¹ If the mortgagee has the option to declare the entire mortgage debt due for default in payment of interest, a tender of interest after default in payment thereof, but before the mortgagee has elected to exercise such option, prevents the mortgagee from exercising such option thereafter.² A tender after default divests the lien of a chattel mortgage.³ If a series of notes contains a provision to the effect that the holder may declare the entire series due in case of default in the payment of any one of them and such notes are payable to any bank in a given place which the holder may elect, and the holder does not elect any bank and leaves the state after the maturity of such note, the maker may after such maturity elect to deposit the amount of such note with interest in the bank in such place in which the holder of such note keeps his account; and such tender is sufficient to prevent the holder from exercising his option to declare the remaining notes due.⁴ Even if a public service corporation has a right to make a rule to the effect that service shall be discontinued to a consumer after a certain period of default in payment, tender after default but before the service is discontinued deprives the public service corporation of the right to discontinue service thereafter.⁵

The statutes which permit tender after default, although they are remedial in their terms, are not extended so as to include cases which are not within their general scope.⁶

¹ Little Rock Railway & Electric Co. v. Leader Co., 125 Ark. 418, L. R. A. 1917C, 374, 188 S. W. 1182; Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; Tracy v. Strong, 2 Conn. 659; Clark v. Paddock, 24 Ida. 142, 46 L. R. A. (N.S.) 475, 132 Pac. 795; Salinas v. Ellis, 26 S. Car. 337, 2 S. E. 121.

² Clark v. Paddock, 24 Ida. 142, 46 L. R. A. (N.S.) 475, 132 Pac. 795.

³ Gould v. Armagost, 46 Neb. 897, 65 N. W. 1064; Thomas v. Seattle Brewing & Malting Co., 48 Wash. 560, 15 L.

R. A. (N.S.) 1161, 91 Pac. 116; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

See also, *Young v. Daniels*, 2 Ia. 126, 63 Am. Dec. 477.

⁴ *Stansbury v. Embrey*, 128 Tenn. 103, 48 L. R. A. (N.S.) 980, 158 S. W. 991.

⁵ *Little Rock Railway & Electric Co. v. Leader Co.*, 125 Ark. 418, L. R. A. 1917C, 374, 188 S. W. 1182.

⁶ *Whiteman v. Perkins*, 56 Neb. 181, 70 N. W. 547; *Houston v. Sledge*, 101 N. Car. 640, 2 L. R. A. 487, 8 S. E. 145; *Berry v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978.

If the covenant is not one for the payment of money only, tender after default presents not only the question of the time of making tender, but also the question of the right to tender unliquidated damages. This question is discussed elsewhere.¹

§ 2857. Tender after action brought—Common-law and statutory rules. Even if tender may be made after default, it can not be made after action has been commenced in the absence of some statutory provision or rule of court which authorizes such tender.¹ Such tender has no effect on costs which have accrued before such tender is made.² Under many statutes, however, tender may be made after action has been brought if the principal and interest and costs down to the time of tender are offered in accordance with the requirements of the statute;³ and this usually includes the production of the money in court or payment into court.

Even if tender may be made at any time before trial, tender after trial has begun and verdict has been rendered is inoperative.⁴

§ 2858. Tender after action brought—Under rule of court. Under the practice in force in some jurisdictions, payment into court could be made, under a rule or order of court, after action was brought.¹ If such payment was made by the defendant under leave of court, and the plaintiff proceeded further, he did so at his

¹ See § 2853.

¹ *Levan v. Sternfield*, 55 N. J. L. 41, 25 Atl. 854; *Murray v. Windley*, 29 N. Car. 201, 47 Am. Dec. 324; *Whiteman v. Perkins*, 56 Neb. 181, 76 N. W. 547; *Porter v. Dixie Fire Ins. Co.*, 107 S. Car. 393, 93 S. E. 141.

"Under these circumstances it was the duty of the plaintiff or its assignors to tender performance on their part and to demand performance on the part of the defendants before subjecting them to the expense and annoyance of an action to recover the amount of the purchase price. Otherwise the sellers would have both money and property and the buyers nothing. The contract was for the purchase of property, not a lawsuit by which the property might be obtained. This is an action at law and unless the right

to maintain it existed when it was brought, it did not exist at all. Courts of equity have plastic hands and can adjust matters as of the date of the trial, but courts of law are bound by rigid rules and unless the cause of action is ripe when the suit is commenced it is not one that can be enforced without the commencement of another action." *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

² *Berry v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978.

³ *Snyder v. Quarton*, 47 Mich. 211, 10 N. W. 204; *Powers v. Powers*, 11 Vt. 262.

⁴ *Houston v. Sledge*, 101 N. Car. 640, 2 L. R. A. 487, 8 S. E. 145.

¹ *Watkins v. Towers*, 2 T. R. 275; *State Bank v. Holcomb*, 7 N. J. L. 193;

peril.² If the same cause of action was stated under a number of different counts and the defendant paid money in under one of such counts, and the plaintiff took it out, he could not recover costs upon remaining counts in which he had stated the same cause of action in a different form.³ If the defendant is permitted on application to pay into court the amount due up to that time with costs which have accrued up to that time, and the plaintiff proceeds with the action and recovers no more than the amount paid in, plaintiff must pay the remaining costs and the costs of the application.⁴ If the court has power to make such a rule, but has not made one, the act of the defendant in paying money into court is without legal effect.⁵

§ 2859. Place of making tender. If the contract provides for the place of payment, tender may be made there even if the creditor is absent.¹ If no place of payment is fixed by the contract, tender

Wright v. Behrens, 30 N. J. L. 413; Levan v. Sternfield, 55 N. J. L. 41, 25 Atl. 854.

See also, Browning v. Chamberlain, 210 N. Y. 270, 104 N. E. 627.

² "Lord Ellenborough, C. J., stopped Holroyd, who was to have argued in support of the demurrer, and asked the defendant's counsel if he could show any case where an averment of *touts temps prius* was holden not to be necessary in a plea of tender: it was expressly decided to be necessary in *Giles v. Hartis* (1 Lord Raym. 254, and vide *Wood v. Ridge*, Fort. 376), and was one of those landmarks in pleading that ought not to be departed from. The defendant has been guilty of a neglect, in non-payment of money at a certain day, upon which a cause of action arises to the plaintiff. It is no answer to shew that at a day subsequent he was ready to have paid it, unless he were always ready to have paid it from the time when it first became due. And no injustice is done; because the defendant may get relief by application to the court for leave to pay the principal and interest into court, after

which the plaintiff proceeds at his peril." *Hume v. Peplow*, 8 East. 168.

³ *Baillie v. Cazelet*, 4 T. R. 579.

⁴ *Zeevin v. Cowell*, 2 Taunt. 202.

⁵ *Dewey v. Humphrey*, 22 Mass. (5 Pick.) 187; *Levan v. Sternfield*, 55 N. J. L. 41, 25 Atl. 854.

See also, *Baker v. Hunt*, 1 Wend. (N. Y.) 103, where a motion for an order to compel the clerk to pay such money over to the plaintiff instead of returning it to the defendant was denied.

¹ *Maine. Aldrich v. Albee*, 1 Me. 120, 10 Am. Dec. 45.

New Hampshire. Wiggin v. Wiggin, 43 N. H. 567, 80 Am. Dec. 192.

Pennsylvania. Roberts v. Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

Tennessee. Stansbury v. Embrey, 128 Tenn. 103, 47 L. R. A. (N.S.) 980, 158 S. W. 991.

Texas. Deel v. Berry, 21 Tex. 463, 73 Am. Dec. 236.

Vermont. Contract to deliver goods. Barney v. Bliss, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696.

Failure to make tender at that place renders the tender insufficient in

must be made to the creditor in order to stop interest.² Tender of a personal debt may be made at the residence of the creditor if the debtor can find such residence by the use of reasonable diligence.³ It is the duty of the debtor to find the creditor and make tender to him, and not the duty of the creditor to find the debtor and make demand for payment.

The mere fact that a note is dated at a certain place does not make it payable there.⁴ If the contract provides for the delivery of personal property at a specified place, the debtor must tender such property at such place.⁵ Under a contract which provides for the delivery of chattels without specifying the place, tender should be made to the creditor at his residence or place of business, if the chattels are portable.⁶ If the creditor is absent from the state, the debtor is not obliged to make personal tender to him.⁷ If the articles are not portable, the general rule seems to be that the debtor must call upon the creditor to indicate at what place he elects to receive such articles, and if he indicates a reasonable place tender must be made there.⁸ If the creditor can not be found, or if he refuses to indicate a reasonable place for delivery, the debtor may select a reasonable place, and make tender there, after giving notice thereof to the creditor if it is possible to give such notice by the exercise of reasonable diligence.⁹ A vendee who has an option to avoid liability by redelivery does not make a valid tender by notifying the vendor that he holds subject to the vendor's orders.¹⁰ A statement in a pleading filed by a minor seeking to avoid liability for a sale induced by an alleged concealment by him

the absence of waiver. *Bonewell v. Jacobson*, 130 Ia. 170, 5 L. R. A. (N.S.) 436, 106 N. W. 614.

² *Galloway v. Smith*, Litt. Sel. Cas. (Ky.) 132; *McNair v. Moore*, 55 S. Car. 435, 73 Am. St. Rep. 760, 33 S. E. 491.

³ *Wagers v. Dickey*, 17 Ohio 439, 49 Am. Dec. 467; *La Farge v. Rickert*, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209.

⁴ *McNair v. Moore*, 55 S. Car. 435, 73 Am. St. Rep. 760, 33 S. E. 491.

⁵ *Smith v. Loomis*, 7 Conn. 110; *Mitchell v. Gregory*, 4 Ky. (1 Bibb.) 449, 4 Am. Dec. 655; *Wheelock v. Tanner*, 39 N. Y. 481.

⁶ *Miles v. Roberts*, 34 N. H. 245; *Santee v. Santee*, 64 Pa. St. 473.

Contra, the place is the residence of the debtor. *Grant v. Groshon*, 3 Ky. (Hard.) 85, 3 Am. Dec. 725; *Chambers v. Winn*, 2 Ky. (Sneed) 166, 2 Am. Dec. 713.

⁷ *Trimble v. Williamson*, 49 Ala. 525; *Angell v. Loomis*, 97 Mich. 5, 55 N. W. 1008; *Gill v. Bradley*, 21 Minn. 15.

⁸ *Mason v. Briggs*, 16 Mass. 453; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161.

⁹ *Miles v. Roberts*, 34 N. H. 245.

¹⁰ *Langston v. Bitting*, 96 Ga. 410, 23 S. E. 308.

of the fact of infancy, that the goods are in his possession and that the vendors could "come and get them if they chose," is not a sufficient tender.¹¹

III

PARTIES TO TENDER

§ 2860. By whom tender can be made. If the creditor stands upon his rights and waives none of them, he may insist upon the debtor's strict compliance with the elements of tender. Only the debtor, or his legal representative,¹ can make a valid tender. The creditor may refuse a tender by a stranger, without incurring any legal liability,² though if he accepts such payment or performance he is concluded thereby. An exception to this rule exists in cases where a person financially interested in the discharge of a debt,³ such as a surety,⁴ or the owner of realty upon which such debt is a lien,⁵ as the owner of mortgaged premises,⁶ or an assignee in bankruptcy,⁷ tenders payment of such debt. Such tender is valid.

§ 2861. To whom tender can be made. Tender can be made only to the creditor,¹ or to one of two or more joint creditors,² or to the duly authorized agent of the creditor,³ or his personal representatives.⁴ Tender of a debt due to a building and loan association made to the local secretary is sufficient.⁵ A tender may be made to the attorney-at-law in whose hands the claim has been

¹¹ *Adam Roth Grocery Co. v. Hopkins* (Ky.), 29 S. W. 293 [rehearing denied, 30 S. W. 405].

¹ *McDougald v. Dougherty*, 11 Ga. 570; *Sharp v. Garesche*, 90 Mo. App. 233.

² *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672.

³ *Kincaid v. School District*, 11 Me. 188.

⁴ *Hampshire Manufacturers' Bank v. Billings*, 34 Mass. (17 Pick.) 87.

⁵ *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158.

⁶ *Neldon v. Roof*, 55 N. J. Eq. 608, 38 Atl. 429.

⁷ *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50.

¹ *King v. Finch*, 60 Ind. 420; *Grand Lodge of Brotherhood of Railroad Trainmen v. Clark*, — Ind. —, 127 N. E. 280; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 206.

² *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115; *Carman v. Pultz*, 21 N. Y. 547; *Dawson v. Ewing*, 16 S. & R. (Pa.) 371; *Prescott v. Everts*, 4 Wis. 314.

³ *Western & Atlantic Ry. Co. v. Atkins*, 141 Ga. 743, 82 S. E. 139; *Hoyt v. Byrnes*, 11 Me. 475; *McNiffe v. Wheelock*, 67 Mass. (1 Gray) 600.

⁴ *Ratcliff v. Davies*, Cro. Jac. 244.

⁵ *Smith v. Old Dominion Building & Loan Association*, 119 N. Car. 257, 26 S. E. 40.

placed for collection.⁶ A tender made, after a bona fide attempt to find the creditor, to the creditor's son who is authorized to reject the tender unless a receipt in full of all demands is also given by the debtor, is sufficient.⁷

A tender made to one who is not the debtor or his authorized agent or representative is without legal effect.⁸ A tender to an agent not authorized to receive payment is without legal effect;⁹ and so is a tender made to executors named in a will not yet probated.¹⁰ Payment into court is inoperative in the absence of statutory authority therefor.¹¹

If the debtor is misled as to the identity of the creditor,¹² as where the original creditor has assigned the debt without notice to the debtor,¹³ a tender to the party who the debtor is led to believe is his creditor is sufficient.

IV

ELEMENTS OF TENDER

§ 2862. What can be tendered. If the contract is one for the payment of money generally, tender must be made in such money as is legal tender.¹ Coin which is legal tender is not deprived of that quality by being worn as long as it retains the appearance of a coin issued from the mint.² A tender of base money has been said to be sufficient if such money is actually current.³ Tender in

⁶ *Salter v. Shove*, 60 Minn. 483, 62 N. W. 1126; *Hopkins Mfg. Co. v. Ketterer*, 237 Pa. St. 285, 85 Atl. 421; *Hirsh v. Ogden Furniture & Carpet Co.*, 48 Utah 434, 160 Pac. 283.

⁷ *Crawford v. Osmun*, 94 Mich. 533, 54 N. W. 284.

⁸ *Grand Lodge of Brotherhood of Railroad Trainmen v. Clark*, — Ind. —, 127 N. E. 280; *Holmberg v. Will*, 52 Okla. 745, 153 Pac. 832; *Chipman v. Bates*, 5 Vt. 143; *Vergonis v. Vaseleou*, 105 Wash. 441, 178 Pac. 463.

⁹ *Chipman v. Bates*, 5 Vt. 143.

¹⁰ *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.

¹¹ *Briede v. Babst*, 131 La. 159, 59 So. 106.

¹² *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A. (N.S.) 232, 106 Pac. 495.

¹³ *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A. (N.S.) 232, 106 Pac. 495.

¹ *Servel v. Jamieson*, 255 Fed. 892.

See, *Legal Tender*, by James B. Thayer, 1 *Harvard Law Review*, 73.

² *Mobile St. Ry. v. Watters*, 135 Ala. 227, 33 So. 42; *Jersey City & Bergen Ry. v. Morgan*, 52 N. J. L. 60 [sub nomine, *Morgan v. Jersey City & Bergen Ry.*, 18 Atl. 904]; *Cincinnati Northern Traction Co. v. Roanagle*, 84 O. S. 310, 35 L. R. A. (N.S.) 1030, 95 N. E. 887.

And see for a more extreme case holding worn coin legal tender, *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055.

³ *Pong v. de Lindsay*, 1 *Dyer* 82a.

bank notes,⁴ or by check,⁵ even if such check would have been paid if it had been presented and accepted,⁶ or by a certified check,⁷ or a certificate of deposit,⁸ or by a "time check" tendered to an employe,⁹ or chattels,¹⁰ is insufficient tender of a debt payable in money if objection is made upon that ground. So if a debt is due to the state, tender can not be made in state warrants which have no connection with the debt.¹¹ It has been held that a bank must accept its own notes as payment, and hence that such a tender is good.¹² A tender of the same kind of money as that borrowed, and the only kind in general circulation in that community, has been held sufficient.¹³

If by the terms of the original contract provision is made for payment by check or draft, tender may be made in such prescribed manner;¹⁴ and the fact that such check or draft is made payable only through a certain specified clearing-house does not render such tender inoperative,¹⁵ at least for the purpose of preventing the forfeiture of a lease for non-payment of rent thus tendered.¹⁶

⁴ *Grigby v. Oakes*, 2 B. & P. 526; *Hallowell & Augusta Bank v. Howard*, 13 Mass. 235; *Donaldson v. Benton*, 20 N. Car. (4 Dev. & B.) 435.

⁵ *United States. Servel v. Jamieson*, 255 Fed. 892.

Colorado. Larsen v. Breene, 12 Colo. 480; 21 Pac. 498.

Illinois. Harding v. Commercial Loan Co., 84 Ill. 251.

Michigan. Zimmerman v. Miller, — Mich. —, 173 N. W. 364.

Mississippi. Collier v. White, 67 Miss. 133, 6 So. 618.

Nebraska. Te Poel v. Shutt, 57 Neb. 592, 78 N. W. 288.

Washington. Cady v. Case, 11 Wash. 124, 39 Pac. 375.

Wisconsin. Lewis v. Larson, 45 Wis. 353.

⁶ *Zimmerman v. Miller*, — Mich. —, 173 N. W. 364.

⁷ *Thorne v. San Francisco*, 4 Cal. 127; *Larsen v. Breene*, 12 Colo. 480; *Barbour v. Hickey*, 2 D. C. App. 207, 24 L. R. A. 763.

⁸ *Dougherty v. Hughes*, 3 Greene (1a) 92.

⁹ *Burlington Voluntary Relief Department v. White*, 41 Neb. 547, 561, 43 Am. St. Rep. 701, 59 N. W. 747, 751.

¹⁰ *Wilson v. McVey*, 83 Ind. 108.

¹¹ *People v. Miles*, 56 Cal. 401; *Kentucky Chair Co. v. Commonwealth*, 105 Ky. 455, 49 S. W. 197; *Raymond v. State*, 54 Miss. 563, 28 Am. Rep. 382; *Battle v. Thompson*, 65 N. Car. 406.

¹² *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311, 42 Am. Dec. 297.

Contra, as to payment. *Hallowell & Augusta Bank v. Howard*, 13 Mass. 235; *Coxe v. Bank*, 8 N. J. L. 172, 14 Am. Dec. 417.

¹³ *King v. King*, 90 Va. 177, 17 S. E. 894.

See also, *Pong v. de Lindsay*, 1 Dyer 82a.

¹⁴ *Philadelphia Co. v. Renner*, 222 Pa. St. 512, 20 L. R. A. (N.S.) 932, 71 Atl. 1056.

¹⁵ *Philadelphia Co. v. Renner*, 222 Pa. St. 512, 20 L. R. A. (N.S.) 932, 71 Atl. 1056.

¹⁶ *Philadelphia Co. v. Renner*, 222 Pa. St. 512, 20 L. R. A. (N.S.) 932, 71 Atl. 1056.

§ 2863. Actual production of thing tendered—Ability to perform. The thing which is tendered, especially if money, must be actually produced and offered to the creditor as far as is in its nature possible, unless this requirement is waived.¹ What amounts to waiver is discussed elsewhere.² Some statutes make a written offer to pay money equivalent to tender if not accepted. Such statutes have no application to cases where the party making the tender has neither the intent nor the ability to perform.³

Production of money is not always conclusive tender. Thus the debtor produced money and laid it on the table before the creditor without counting it before him or letting him count it, and asked an extension for another year, which was granted. This was not a sufficient tender.⁴ Under some statutory provisions sufficient tender is made of an obligation which is payable at a specified place if the maker is at such place and is able and willing to pay it at maturity.⁵ Such a statute does not apply to a demand note.⁶ The fact that the maker of a note deposited the amount thereof at a specified place is not sufficient under such statute, unless it is shown that the maker resided at such place or had his place of business there.⁷

If a vendor of realty is bound to tender a conveyance to the purchaser, the deed must actually be produced unless such production is waived.⁸ A statement by the vendor that he has the deed in his pocket,⁹ or a statement by him that he will place a deed in the hands of a designated court,¹⁰ is insufficient as a tender of such conveyance.

¹ Angier v. Equitable Building & Loan Association, 109 Ga. 625, 35 S. E. 64; Pinney v. Jorgenson, 27 Minn. 26, 6 N. W. 376; Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 N. W. 44; Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345; North v. Mallett, 3 N. Car. (2 Hayw.) 151, 2 Am. Dec. 622; Lefferts v. Dolton, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

The possession of a sufficient amount of money to pay the debt does not amount to a tender. Brown v. Louisville & Nashville Ry., 103 Ky. 211, 44 S. W. 648.

² See §§ 2872 et seq.

³ McCourt v. Johns, 33 Or. 561, 53 Pac. 601.

⁴ McInerney v. Lindsay, 97 Mich. 238, 56 N. W. 603.

⁵ Nichols v. Asbeck, — Cal. —, 178 Pac. 705; United States National Bank v. Shupak, 54 Mont. 542, 172 Pac. 324.

⁶ United States National Bank v. Shupak, 54 Mont. 542, 172 Pac. 324.

⁷ Nichols v. Asbeck, — Cal. —, 178 Pac. 705.

⁸ Howard v. Higgins, 137 Cal. 227, 69 Pac. 1060; Lefferts v. Dolton, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

⁹ Lefferts v. Dolton, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

¹⁰ Howard v. Higgins, 137 Cal. 227, 69 Pac. 1060.

Tender by words is insufficient in the absence of an ability to perform.¹¹ An attempted tender of a certain amount by one who does not possess such amount is insufficient.¹²

§ 2864. Tender of less amount than due. The amount tendered must be equal to the amount of the indebtedness. Tender of less than the amount due is ineffective.¹ A tender of a part of the amount due does not stop the running of interest upon the entire debt.² If tender is made after interest has begun to run, it must include interest;³ and tender made after an action has been instituted must include costs,⁴ and the creditor's attorney's fee, where

¹¹ *Eastern Oregon Land Co. v. Moody*, 198 Fed. 7; *Bradford v. Fidelity Savings & Loan Society*, 177 Cal. 247, 170 Pac. 404; *Selby v. Hurd*, 51 Mich. 1, 16 N. W. 180; *Short v. Rogue River Irrigation Co.*, 82 Or. 662, 162 Pac. 845.

¹² *Bradford v. Fidelity Savings & Loan Society*, 177 Cal. 247, 170 Pac. 404.

¹ *United States. Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475; *Pacific Mail Steamship Co. v. Western Pac. R. Co.*, 251 Fed. 218.

Alabama. McCalley v. Otey, 103 Ala. 469, 15 So. 945.

California. Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225; *Bradford v. Fidelity Savings & Loan Society*, 177 Cal. 247, 170 Pac. 404.

Iowa. Sansone v. Crocker, — Ia. —, 170 N. W. 796.

Massachusetts. Welch v. Adams, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. 34.

Michigan. Montague v. Lougan, 68 Mich. 98, 35 N. W. 840.

Minnesota. Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247, 9 L. R. A. 55, 45 N. W. 857; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 106.

North Carolina. Rand v. Harris, 83 N. Car. 486.

North Dakota. State v. Barnes, 22 N. D. 18, 37 L. R. A. (N.S.) 114, 132 N. W. 215.

Pennsylvania. McKibbin v. Peters, 185 Pa. St. 518, 40 Atl. 288.

Wisconsin. Warden v. Sweeney, 86 Wis. 161, 56 N. W. 647.

A tender of the amount of a fine imposed upon one of two criminals is insufficient if tendered in payment of the fine imposed upon both of them. *State v. Barnes*, 22 N. D. 18, 37 L. R. A. (N. S.) 114, 132 N. W. 215.

² *Pacific Mail Steamship Co. v. Western Pac. R. Co.*, 251 Fed. 218.

Indiana. Chicago & South Eastern Ry. v. Woodard, 159 Ind. 541, 65 N. E. 577.

Louisiana. Louisiana Molasses Co. v. Le Sauxier, 52 La. Ann. 2070, 28 So. 217 [judgment affirmed, 52 La. Ann. 1768, 28 So. 223]; *Briede v. Babst*, 131 La. 159, 59 So. 106.

Massachusetts. Weld v. Eliot Five Cents Savings Bank, 158 Mass. 339, 33 N. E. 519.

Oklahoma. Bell v. Riggs, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

Washington. Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760.

The fact that the amount of interest which is not tendered is comparatively small does not make the tender sufficient. *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

⁴ *Iowa. Martin v. Whisler*, 62 Ia. 416, 17 N. W. 593; *Sansone v. Crocker*, — Ia. —, 170 N. W. 796.

Kentucky. Samuela v. Simmons (Ky.), 60 S. W. 937.

Minnesota. Seeger v. Smith, 74 Minn. 279, 77 N. W. 3.

the right thereto given by statute has accrued.⁵ Tender of the additional sum suggested as a reasonable attorney's fee by the plaintiff's attorney is sufficient.⁶ If the action has been instituted without making the statutory demand, and hence the defendant is not liable for costs, tender need not include costs.⁷ So if expenses authorized by law have been incurred on account of the debtor's default, such as advertising a sale under a deed of trust,⁸ or expenses incurred by taking property under a chattel mortgage,⁹ the tender must include such expenses. Tender of the amount found to be due by a court of original jurisdiction is insufficient to stop interest if the amount is increased on appeal.¹⁰ Tender of an insufficient sum is not made valid by the fact that the debtor in good faith believes that he is tendering all that is due.¹¹ If the debtor owes several distinct claims to his creditor, he may tender payment of one of them, leaving the other unpaid.¹² The debtor must, in such case, notify the creditor that the tender is made for the specific debt. If without such notice the debtor tenders to the creditor upon his entire indebtedness a sum less than the entire amount due, but greater than one of the debts, it is insufficient.¹³ If a contract for the sale of realty contains no specific provision with reference to an encumbrance upon such realty, and such realty is in fact encumbered, a tender of the purchase price fixed by the contract, less the amount of such encumbrance, is sufficient.¹⁴ Under some statutes, one upon whose property a tax has been imposed for a number of items, some of which are valid and some of which are not, can not make a sufficient tender by tendering the amount of the valid items, omitting the invalid items.¹⁵

Nebraska. *McEldon v. Patton* (Neb.), 93 N. W. 938.

Ohio. *Burt v. Dodge*, 13 Ohio 131.

Texas. *Berry v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978.

⁵ *Chicago & South Eastern Ry. v. Woodard*, 159 Ind. 541, 65 N. E. 577.

So where the mortgage provides for an attorney's fee and such provisions are upheld. *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202 [affirming, 68 Ill. App. 239].

⁶ *Smith v. Jackson*, 153 Ill. 399, 39 N. E. 130.

⁷ *People's Furniture & Carpet Co. v. Crosby*, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 658.

⁸ *McNiece v. Eliason*, 78 Md. 168, 27

Atl. 940; *McClung v. Trust Co.*, 137 Mo. 106, 38 S. W. 578.

⁹ *Gould v. Armagost*, 46 Neb. 897, 65 N. W. 1064.

¹⁰ *Wolfert v. Reilly*, 133 Mo. 463, 34 S. W. 847; *Neilson v. Chicago & Northwestern Ry.*, 91 Wis. 557, 64 N. W. 849.

¹¹ *Helphrey v. Chicago & Rock Island Ry.*, 29 Ia. 480; *Patnote v. Sanders*, 41 Vt. 60, 98 Am. Dec. 564.

¹² *Carleton v. Whitecher*, 5 N. H. 289.

¹³ *Shuck v. Chicago, Rock Island & Pacific Ry.*, 73 Ia. 333, 35 N. W. 429.

¹⁴ *Horgan v. Russell*, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

¹⁵ *Schiffer v. Douglass*, 74 Kan. 231, 86 Pac. 132.

If the exact amount which is due is not ascertainable,¹⁶ as where an accounting is necessary,¹⁷ or where there are outstanding rights the amount of which can be determined only by a judicial decree,¹⁸ tender,¹⁹ or at least an exact tender,²⁰ is excused.

§ 2865. Tender of greater amount than due. If the debtor tenders an amount which is greater than the true amount of the indebtedness, such tender is said to be sufficient if the circumstances under which it is made indicate that the surplus over and above the true amount of the debt is to belong to the creditor.¹ While a tender of an excessive amount is said to be sufficient, it is said that if such tender of an excessive amount is withdrawn and the exact amount is tendered at a later time, the tender dates from the time at which it is made.²

The result which is reached in cases of this sort is undoubtedly just, especially in cases in which there is some doubt as to the actual amount due, and in which the debtor has tendered an excessive amount by way of precaution. The only difficulty which would prevent this rule from being adopted in all cases is that the creditor can not be compelled to accept a larger amount than is due, any more than any other person can be compelled to accept a benefit which he is unwilling to accept. The true solution of these cases may possibly be that the creditor, by a refusal to accept the amount, waives the objection that the amount is excessive;³ and it is possible that if the creditor indicated the exact amount due and refused to accept the tender on the ground that the amount was excessive, the tender might be regarded as insufficient.

If the amount which is tendered is divisible, so that the true amount which is due may be taken from the total amount tendered without making change, it is said that the debtor may tender a larger amount than is due and he may demand that the creditor

¹⁶ *Spinks v. Jordan*, 108 Miss. 133, L. R. A. 1915C, 634, 66 So. 405; *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, L. R. A. 1916F, 352, 97 N. E. 43.

¹⁷ *Spinks v. Jordan*, 108 Miss. 133, L. R. A. 1915C, 634, 66 So. 405.

¹⁸ *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, L. R. A. 1916F, 352, 97 N. E. 43.

¹⁹ *Spinks v. Jordan*, 108 Miss. 133, L. R. A. 1915C, 634, 66 So. 405.

²⁰ *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, L. R. A. 1916F, 352, 97 N. E. 43.

Notes to Section 2865

¹ *Patterson v. Cox*, 25 Ind. 261; *Hanscom v. Hinman*, 30 Mich. 419; *Wilson v. Duplin Telephone Co.*, 139 N. Car. 395, 52 S. E. 62; *Odom v. Carter*, 36 Tex. 281.

² *Odom v. Carter*, 36 Tex. 281.

³ See § 2873.

take therefrom the true amount.⁴ This result has been explained by saying that a tender of the greater includes the less,⁵ although this maxim has also been used to justify a tender of an amount in excess of the true debt if the surplus is to belong to the creditor.⁶

It has been said, however, that if the amount which is tendered is not divisible and if the debtor demands that the creditor make change, so that the creditor will not receive the surplus, the tender is insufficient.⁷ This principle has been applied where the change which was demanded was between five and ten dollars,⁸ on the theory that if the right to make change were recognized, there would be no limit to it, and that a tender of a single bank-note of enormous amount might be made for a very small debt.⁹ On the other hand, the sufficiency of a tender in excess of the amount with the demand that the creditor take out the amount due, has been recognized,¹⁰ although no emphasis was placed on the fact that the amount which was tendered was divisible, so that it was unnecessary to make change.¹¹

It has been held, however, that a common carrier of passengers must furnish change to a reasonable amount,¹² so that it is not unreasonable for a passenger to tender five dollars in one piece and ask for change in paying a five-cent fare.¹³ On the other hand, it is held that even if it is the duty of the common carrier to make change in a reasonable amount, the party who makes the tender can not demand that the change be paid over to him before he pays to the carrier the amount which he is tendering.¹⁴

The carrier may refuse to make change in excess of a reasonable amount, and he may exact a valid and enforceable rule to this effect.¹⁵ It is said, however, that if the passenger expresses a

⁴ Wade's Case, 5 Coke 114a; Dean v. James, 4 Barn. & Ad. 546.

⁵ Wade's Case, 5 Coke 114a.

⁶ Patterson v. Cox, 25 Ind. 261.

⁷ Betterbee v. Davis, 3 Camp. 70; Perkins v. Beck, 4 Cranch C. C. 68.

⁸ Tender in English money. Betterbee v. Davis, 3 Camp. 70; Robinson v. Cook, 6 Taunt. 336.

⁹ Betterbee v. Davis, 3 Camp. 70.

¹⁰ Walsh v. Colvin, 53 Wash. 309, 101 Pac. 1085.

¹¹ Walsh v. Colvin, 53 Wash. 309, 101 Pac. 1085.

¹² Barrett v. Market Street Ry., 81 Cal. 296, 15 Am. St. Rep. 61, 6 L. R.

A. 336, 22 Pac. 859; Burge v. Georgia Ry. & Electric Co., 133 Ga. 423, 65 S. E. 879; Jones v. Louisville & Nashville Ry., 109 Miss. 655, 68 So. 924.

¹³ Barrett v. Market Street Ry., 81 Cal. 296, 15 Am. St. Rep. 61, 6 L. R. A. 336, 22 Pac. 859.

¹⁴ Louisville & Nashville Ry. v. Cottengim (Ky.), 13 L. R. A. (N.S.) 624, 104 S. W. 280, 31 Ky. L. R. 871.

¹⁵ Barker v. Central Park, North & East River Ry., 151 N. Y. 237, 56 Am. St. Rep. 626, 35 L. R. A. 489, 45 N. E. 550; Funderburg v. Augusta & Aikin Ry., 81 S. Car. 141, 21 L. R. A. (N.S.) 863, 61 S. E. 1075; Knox-

willingness to wait for his change until his destination at a large town is reached, he may tender a much larger amount than if he demands change at once, since a demand for change which may be unreasonable if for immediate payment would be reasonable if the passenger offered to wait until some large town were reached.¹⁶

If the tender is not made in proper form, it does not, of course, gain any validity from the fact that the amount is in excess of the true amount.¹⁷

§ 2866. Tender of property other than money. If tender of property, other than money, is necessary, the production of the articles at the proper time and place is necessary,¹ and an offer to produce them in the future is insufficient.² If the property tendered is not homogeneous, the exact property to be tendered must be selected by the debtor, and if he tenders a greater amount, leaving the creditor to make the selection required by the terms of the contract, the tender is insufficient.³

If the property is homogeneous,⁴ such as nuts,⁵ or grain,⁶ tender of a larger amount than that provided for by contract, leaving the

ville Traction Co. v. Wilkerson, 117 Tenn. 482, 9 L. R. A. (N. S.) 579, 99 S. W. 992.

¹⁶ Jones v. Louisville & Nashville Ry., 109 Miss. 655, 68 So. 924.

¹⁷ Tollefson v. Tollefson, — Wis. —, 176 N. W. 879.

¹ Bonewell v. Jacobson, 130 Ia 170, 5 L. R. A. (N. S.) 436, 106 N. W. 614; Lefferts v. Dolton, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

² "The word 'offer' is frequently used by courts and text writers as synonymous with 'tender,' and it may be properly so used with reference to articles capable of manual delivery and actually produced. But, with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase 'offer to return' is more commonly and aptly applied to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to

express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered." Milliken v. Skillings, 80 Me. 180, 36 Atl. 77 [quoted in Mundt v. Simpkins, 81 Neb. 1, 115 N. W. 325].

³ Clark v. Baker, 52 Mass. (11 Met.) 186, 45 Am. Dec. 199; Croninger v. Crocker, 62 N. Y. 151.

⁴ Nash v. Brewster, 39 Minn. 530, 2 L. R. A. 409, 41 N. W. 105; Brownfield v. Johnson, 128 Pa. St. 254, 6 L. R. A. 48, 18 Atl. 543.

⁵ Brownfield v. Johnson, 128 Pa. St. 254, 6 L. R. A. 48, 18 Atl. 543.

⁶ Armstrong v. Tait, 8 Ala. 635, 42 Am. Dec. 656; Nash v. Brewster, 39 Minn. 530, 2 L. R. A. 409, 41 N. W. 105; Hughes v. Prewitt, 5 Tex. 264.

creditor to select the quantity specified, is sufficient. But cattle have been held not to be homogeneous within the meaning of this rule.⁷

In many cases, even of homogeneous property,⁸ such as scrap iron,⁹ or brick,¹⁰ it has been held to be the duty of the debtor to separate the property to be tendered from the general mass.

§ 2867. Conditions imposed by party making tender—Conditions already imposed by law. The debtor may attach a condition to the tender requiring the creditor to perform some act which he would be in any event legally bound to do without affecting the sufficiency of the tender.¹ Thus he may require the surrender of property which the creditor was holding under a lien to secure the debt of which tender was made,² or the surrender of property pledged to secure such debt,³ or the release of a mortgage given to secure such debt,⁴ or the reconveyance of property conveyed by a deed, absolute on its face, but intended as a mortgage.⁵ A tender to one who claims as assignee of a mortgage debt, but whose title is denied by the original mortgagee, may be coupled with demand for the production of a written assignment of such debt or a release of the mortgage by the original mortgagee, without destroying its validity.⁶

⁷ *Bates v. Bates*, Walk. (Miss.) 401, 12 Am. Dec. 572.

⁸ *Dixon v. Fletcher*, 3 M. & W. 146; *Naylor Lumber Co. v. American Tie & Timber Co.*, 197 Ala. 403, 73 So. 12; *Rommel v. Wingate*, 103 Mass. 327; *Croninger v. Crocker*, 62 N. Y. 151.

Such a tender is, at any rate, not such a delivery as to pass title to the purchaser, and as to enable the seller to sue for the purchase price. *McCormick Harvesting Machine Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10.

⁹ *Perry v. Mount Hope Iron Co.*, 16 R. I. 318, 15 Atl. 87.

¹⁰ *Smith v. Loomis*, 7 Conn. 110.

¹ *Berry v. Bank*, 177 Cal. 206, 170 Pac. 415; *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204.

Contra, *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

² *Johnson v. Cranage*, 45 Mich. 14, 7 N. W. 188.

³ *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 17 Pac. 69; *Berry v. Bank*, 177 Cal. 206, 170 Pac. 415; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468.

⁴ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482.

Contra, *Fields v. Danenhower*, 65 Ark. 392, 43 L. R. A. 519, 46 S. W. 938.

Contra, in *Indiana* on the theory that the payment of the note discharges the mortgage *ipso facto*. *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

⁵ *Mankel v. Belscamper*, 84 Wis. 218, 54 N. W. 500.

⁶ *Kennedy v. Moore*, 91 Ia. 39, 58 N. W. 1066.

Since a party who is bound to perform a concurrent covenant may demand that the adversary party shall, at the same time, perform the covenant on his part to be performed,¹ a party who tenders performance of a concurrent covenant is not imposing conditions which the adversary party is not already bound to perform, by demanding that the adversary party should perform the covenant on his part to be performed as a condition to his accepting such tender.²

§ 2868. Conditions not imposed by law. If, however, the debtor attempts to impose any conditions not required by law,¹ such as demanding that the tender be accepted as full performance,² or that a discharge³ or a release in full⁴ be given, or that

¹ See §§ 2961 et seq.

² *Cave v. Osborne*, 193 Mass. 482, 79 N. E. 794; *Douglas v. Hustead*, 216 Pa. St. 292, 65 Atl. 670.

³ *Arkansas. Fields v. Danenhower*, 65 Ark. 392, 43 L. R. A. 519, 46 S. W. 938.

California. Jones v. Shuey (Cal.), 40 Pac. 17.

Colorado. Butler v. Hinckley, 17 Colo. 523; *Rude v. Levy*, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

Connecticut. Sanford v. Bulkley, 30 Conn. 344.

Illinois. Pulsifer v. Shepard, 36 Ill. 513.

Indiana. Rose v. Duncan, 49 Ind. 269.

Iowa. Sansone v. Crocker, — Ia. —, 170 N. W. 796.

Kansas. Latham v. Hartford, 27 Kan. 249.

Massachusetts. Loring v. Cooke, 20 Mass. (3 Pick.) 48; *Chapin v. Chapin*, 161 Mass. 138, 36 N. E. 746.

Nebraska. Te Poel v. Shutt, 57 Neb. 592, 78 N. W. 288; *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085; *McEldon v. Patton (Neb.)*, 93 N. W. 938; *Baird v. Union Mutual Life Insurance Co.*, — Neb. —, 177 N. W. 156.

Ohio. Petersburg Fire Brick Co. v. American Clay Machinery Co., 89 O. S. 365, 106 N. E. 33.

South Dakota. Brace v. Doble, 3 S. D. 110, 52 N. W. 586; *Pittsburgh Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L. R. A. (N.S.) 746, 126 N. W. 271.

Washington. Vergonis v. Vaseleou, 105 Wash. 441, 178 Pac. 463.

Wisconsin. Elderkin v. Fellows, 60 Wis. 339.

² *Minnesota. Moore v. Norman*, 52 Minn. 83, 38 Am. St. Rep. 526, 18 L. R. A. 359, 53 N. W. 809.

Missouri. Ruppel v. Building Association, 158 Mo. 613, 59 S. W. 1000.

Nebraska. Tompkins v. Batie, 11 Neb. 147, 38 Am. Rep. 301, 7 N. W. 747.

New York. Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158.

North Carolina. Rand v. Harris, 83 N. Car. 486.

Pennsylvania. Pershing v. Feinberg, 203 Pa. St. 144, 52 Atl. 22.

South Carolina. Doty v. Crawford, 39 S. Car. 1, 17 S. E. 377.

³ *Richardson v. Chemical Laboratory*, 50 Mass. (9 Met.) 42.

⁴ *Rude v. Levy*, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560; *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223; *Loring v. Cooke*, 20 Mass. (3 Pick.) 48; *Baird v. Union Mutual Life Insurance Co.*, — Neb. —, 177 N. W. 156.

a right of appeal be waived,⁵ or that in connection with the debt in question other claims between the same parties be settled,⁶ or that payment be made at a place other than that specified in the contract,⁷ the tender is insufficient. If a debt is secured by a mechanic's lien, the debtor can not insist upon a release of such lien as a condition of accepting the tender, if the creditor claims a larger amount than the sum tendered, even if the amount which is tendered is all that is in fact due,⁸ nor does it stop interest.⁹ Under a contract for a bond of indemnity, a tender made on condition of furnishing a lease for the realty in question, instead of such bond, is insufficient.¹⁰ It has been held that tender of the amount due on a note given for a conveyance of realty is insufficient where coupled with a demand for such conveyance.¹¹ A tender of the amount due on a land contract has, however, been held sufficient, though accompanied by a request for a conveyance.¹² If a contract for the sale of personalty does not contemplate a formal conveyance, a tender of the amount due under such contract is inoperative if the purchaser demands the delivery of a form of conveyance as a condition to the acceptance of such payment.¹³

⁵ *Beardsley v. Beardsley*, 86 Fed. 16, 20 C. C. A. 538.

⁶ *Greenhill v. Hunton* (Tex. Civ. App.), 69 S. W. 440.

⁷ *Petersburg Fire Brick Co. v. American Clay Machinery Co.*, 89 O. S. 365, 106 N. E. 33.

⁸ *Pittsburgh Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L. R. A. (N.S.) 740, 126 N. W. 271.

⁹ *Pittsburgh Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L. R. A. (N.S.) 740, 126 N. W. 271.

¹⁰ *National Bank v. Levanseler*, 115 Mich. 372, 73 N. W. 399.

¹¹ Even under a statute allowing the debtor to demand a receipt. *De Graffenried v. Menard*, 103 Ga. 651, 30 S. E. 560; *Elder v. Johnson*, 115 Ga. 691, 42 S. E. 51; *Morris v. Continental Ins. Co.*, 116 Ga. 53, 42 S. E. 474.

¹² *Harding v. Giddings*, 73 Fed. 335, 19 C. C. A. 508.

¹³ *Vergonis v. Vaseleou*, 105 Wash. 441, 178 Pac. 463.

"The principal defense was that of tender. It is not necessary to recite the several acts of the appellant con-

stituting the supposed tenders, but they were clearly insufficient. He seems to have conceived the idea that he was entitled to some form of absolute conveyance of the property as a condition precedent to the final payment, and all of the tenders made prior to the commencement of the action, conceding them to be sufficient in other respects, were made subject to such a condition. But the contract did not warrant this conclusion. The appellant was obligated to pay as the instalments matured, and the contract by its terms provided that his title to the property should become absolute on full payment. The contract neither provided for nor contemplated any additional evidence of title, and, conceding that the appellant may have been entitled to some form of cancellation of the contract from the fact that it had been placed of record, this right would arise only after the purchase price was paid. The obligation to pay and the obligation to cancel were not mutual, concurrent or dependant." *Vergonis v. Vaseleou*, 105 Wash. 441, 178 Pac. 463.

Even under a statute allowing the debtor to demand a receipt, he can demand a receipt only for the money paid in, and not a receipt in full.¹⁴ A demand for the surrender of collateral to secure payment of the debt in question, as well as other debts, prevents a tender from being effective.¹⁵ A tender by A of personalty claimed by B, reserving to A the right to recover its value if it should be held to belong to A, is insufficient.¹⁶ A tender of deeds and abstracts under a contract for the sale of realty is insufficient if coupled with a demand for a cash payment not required by the contract.¹⁷ The rejection of a valid conveyance tendered by the grantor and a demand for a conveyance of different form prevents a tender of the purchase price from being sufficient.¹⁸ Tender of the amount due with request for an assignment of the debt instead of payment is not sufficient.¹⁹ The debtor has a right, however, to use language showing that he does not admit that more is due. As long as he does not require the creditor to assent thereto as a condition of payment, the use of such language does not vitiate a tender. Thus tender by debtor of a sum "as a payment of the balance due on that mortgage," is sufficient if the amount is correct.²⁰

If the condition which is attached to the tender calls for the performance of some specified act by the party to whom tender is made, and the rights of the party who made such conditional tender can not be protected by treating the adversary party as having accepted the offer, the party who received the amount thus tendered and refused to perform the conditions of the tender must restore it to the adversary party.²¹ If a tender is made on condition that a receipt be given in a prescribed form and that certain securities be returned, the party to whom such tender is made can not keep the amount thus tendered if he refuses to give such receipt and to surrender such securities.²²

¹⁴ *West v Farmers' Mutual Ins. Co.*, 117 Ia. 147, 90 N. W. 523.

¹⁵ *Schmittiel v. Moore*, 101 Mich. 590, 60 N. W. 279; *Fidelity Loan & Trust Co. v. Engleby*, 99 Va. 168, 37 S. E. 957.

See as apparently contra, *Fourth National Bank v Stahlman*, 132 Tenn. 367, 1 L. R. A. 1916A, 508, 178 S. W. 942.

¹⁶ *Perkins v. Maier & Zobelein Brewery*, 134 Cal. 372, 66 Pac. 482.

¹⁷ *Breja v. Pryne*, 94 Ia. 755, 64 N. W. 669.

¹⁸ *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.

¹⁹ *Cochran v. Jackman* (Ky.), 56 S. W. 507; *Whittaker v. Roller Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289.

²⁰ *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50.

²¹ *Bank v. Mortgage Co.*, 104 Wash. 196, 175 Pac. 950.

²² *Bank v. Mortgage Co.*, 104 Wash. 196, 175 Pac. 956.

While a tender to which are added conditions which are not already imposed by law, is inoperative as a tender, it is ordinarily operative as an offer of compromise, accord and satisfaction, and the like; and if the party to whom such conditional tender is made accepts it with knowledge of such condition, he accepts the offer made therein.²³ If the party to whom tender is made accepts it in full performance, he is ordinarily bound by such acceptance, and can not subsequently claim that full performance has not been made.²⁴ If a certain sum is paid into court at the beginning of a suit as full tender, the creditor can not accept it and continue the suit for the rest of his cause of action, even if he protests that more is due when he accepts the money.²⁵

§ 2869. Demand for surrender of note when paid. There is some conflict of authority as to whether a tender of the full amount of a negotiable instrument is insufficient when coupled with a demand for the surrender thereof. The better rule is that as the holder of the instrument ought to surrender it on payment, such tender is sufficient.¹

In some cases demand for the surrender of the negotiable instrument is regarded as imposing a condition which renders the tender insufficient. If there is a dispute as to the amount due upon the negotiable instrument, a demand for its surrender by the payee is said to render the tender insufficient.² Some authorities hold that a demand that a note should be surrendered where the note is mislaid³ or not in the possession of creditor's attorney on whom such demand is made, this fact being known to the debtor,⁴ makes the tender insufficient by adding a condition that the law does not require.

§ 2870. Tender in equity. A decree in equity is flexible as distinguished from the rigidity of the judgment at common law. It can be moulded to suit the rights of the parties, and it can be conditioned, as to one party, on the performance, by the other, of

²³ See §§ 168 and 2503 et seq.

²⁴ *Jonathan Turner's Sons v. Lee Gin & Machine Co.*, 98 Tenn. 604, 38 L. R. A. 549, 41 S. W. 57.

²⁵ *Jonathan Turner's Sons v. Lee Gin & Machine Co.*, 98 Tenn. 604, 38 L. R. A. 549, 41 S. W. 57.

¹ *Hansard v. Robinson*, 7 Barn. & C. 90; *Heywood v. Hartshorn*, 55 N. H.

476; *Bailey v. Buchanan*, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. 155.

² *Moore v. Norman*, 52 Minn. 83, 38 Am. St. Rep. 526, 18 L. R. A. 350, 53 N. W. 809.

³ *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148.

⁴ *Malone v. Wright*, 90 Tex. 49, 36 S. W. 420 [modifying, 34 S. W. 455].

the terms imposed upon him. In equity, therefore, an offer of payment made in the pleadings is held, in many jurisdictions, to be a sufficient tender as far as performance of a covenant to pay is concerned, or as far as such payment is a condition of equitable relief.¹ A party who is entitled to keep the property which he has received under the contract to enforce a lien thereon, is not bound to tender such property until the debt which is secured by such lien has been satisfied.² In a number of jurisdictions, however, the distinction between the nature of the judgment at law and the decree in equity has been ignored; and tender is regarded as necessary in equity, before relief is sought.³ It has been held that a tender must be kept good in equity by paying money into court.⁴

§ 2871. Keeping tender good. After tender is duly made it must, to preserve its legal effect, be kept good;¹ that is, the person making the tender must keep enough money on hand after the date of the tender to make the payment if called upon,² and he

¹ United States. *Caesar v. Capell*, 83 Fed. 403.

Alabama. *Hodges v. Verner*, 100 Ala. 612, 13 So. 679.

Illinois. *Wenegar v. Bollenbach*, 180 Ill. 222, 54 N. E. 192.

Indiana. *Bowen v. Gerhold*, 32 Ind. App. 614, 102 Am. St. Rep. 257, 70 N. E. 546.

Iowa. *Crawford v. Liddle*, 101 Ia. 148, 70 N. W. 97.

Massachusetts. *Lefevre v. Chamberlain*, 228 Mass. 204, 117 N. E. 327.

Missouri. *Jopling v. Walton*, 138 Mo. 485, 40 S. W. 99.

New York. *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. E. 1067; *Callanan v. Keeseville, Ausable Chasm & Lake Champlain Ry.*, 199 N. Y. 268, [sub nomine, *Callanan v. Powers*, 92 N. E. 747].

Oregon. *Owen v. Jones*, 68 Or. 311, 136 Pac. 332.

² *Hall v. Baldwin Bank*, 143 Wis. 303, 127 N. W. 969.

³ *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; *Fournier v. Clutton*, 146 Mich. 208, 117 Am. St. Rep. 638, 7 L. R. A. (N.S.) 179, 109

N. W. 425; *Sherbloom v. Faussett*, 99 Wash. 680, 170 Pac. 337.

See also, *Loff v. Gibbert*, — N. D. —, 166 N. W. 810.

⁴ *Commercial Bank v. Crenshaw*, 103 Ala. 497, 15 So. 741; *West v. Farmers' Mutual Ins. Co.*, 117 Ia. 147, 90 N. W. 523; *Barron v. Thompson*, — S. Car. —, 97 S. E. 840.

¹ *Dunn v. Hunt*, 63 Minn. 484, 65 N. W. 948; *Gauche v. Milbrath*, 94 Wis. 674, 60 N. W. 999; *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

² *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538; *Thayer v. Meeker*, 86 Ill. 470; *Slack v. Price*, 4 Ky. (1 Bibb.) 272.

"The note being due on demand was payable as soon as issued, but it was not until January 8, 1914, that defendants had to their credit, in the Bridger bank, funds sufficient to meet it. Thereafter from April 15th to June 20th, from July 30th to September 8th, and from September 28th to December 23d, in 1914, this balance was not sufficient. In other words, they did not keep money on deposit to meet this

must not make profit of it.³ It is not necessary, however, that the identical money tendered should be kept on hand continuously.⁴ Under the practice in force in most jurisdictions tender must be pleaded as a defense,⁵ and the money paid into court⁶ if it is desired to save interest and costs. A provision of the court of civil procedure requiring money to be paid into the clerk of court is held to apply to an action before a justice of the peace and to

note, but increased or diminished their deposit as the exigencies of their business permitted or required. They can not select a particular date upon which their balance was sufficient and insist that the note matured at that particular time." *United States National Bank v. Shupak*, 54 Mont. 542, 172 Pac. 324.

³*Middle States Loan, Building & Construction Co. v. Hagerstown Mattress Upholstery Co.*, 82 Md. 506, 33 Atl. 886; *Sanders v. Bryer*, 152 Mass. 141, 9 L. R. A. 255, 25 N. E. 86.

⁴*Cheney v. Bilby*, 74 Fed. 52, 20 C. A. 291; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

⁵*National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900.

⁶*Iowa. Deacon v. Central Iowa Investment Co.*, 95 Ia. 180, 63 N. W. 673.

Michigan. Grand Rapids v. Krakowski, — Mich. —, 174 N. W. 201.

Nebraska. Clark v. Neumann, 56 Neb. 374, 76 N. W. 892.

New Hampshire. Felker v. Hazelton, 68 N. H. 303, 38 Atl. 1051.

Ohio. Bahmann v. Stone, 59 O. S. 497, 52 N. E. 1022.

West Virginia. Shank v. Groff, 45 W. Va. 543, 32 S. E. 248.

Wisconsin. Weigell v. Gregg, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

"The tender after action was brought was insufficient because not made to the respondent nor any one representing the respondent. The money was left with a third person to be handed the respondent's attorney, and aside from the fact that the evidence fails

to show that it was never tendered him, even informally, the act itself was not a compliance with the formal rules of tender. But more than this, the money tendered was not brought into court. It is true that we have held in actions of equitable cognizance, where the plaintiff must rely upon equitable principles to sustain his cause of action, that it is sufficient to plead willingness to pay without an actual bringing of the money into court. But the present action is a legal action, to which the plea of tender is a legal defense, and the rule cited is without application." *Vergonis v. Vaseleou*, 105 Wash. 441, 178 Pac. 463.

"On December 10, 1913, the defendants tendered plaintiff the sum of \$1,546.16, the amount then due on the note. He refused to receive it, claiming \$3,000 more, with interest, was due. The defendants failed to pay the amount into court as required by circuit court rule 15 (108 N. W. xii), and the court properly found that their tender was not kept good. The cases of *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887, and *Inglis v. Fohey*, 136 Wis. 28, 116 N. W. 857, relied upon by defendants, to the effect that plaintiff waived the tender by refusing to accept the money, do not apply to a case like the one at bar, where the dispute is as to the amount due. The cases mentioned are where the party to whom the tender was made repudiated in toto the contract relied upon by the party making the tender." *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

require a tender to be kept good by a payment to him.⁷ Hence, a pleading of tender that does not allege a continuing offer and a payment into court is insufficient.⁸ If the amount which is tendered is placed in the hands of a master who makes a finding that the tender is good but returns the money to the mortgagor instead of paying it over to the court, and the mortgagor accepts such payment, the tender is not kept good.⁹ If the pleading which is filed by the plaintiff alleges tender and the defendant attacks such pleading by a general demurrer, it is not necessary that he shall keep the tender good or pay it into court as a condition precedent to his right to insist upon such demurrer.¹⁰

Under the specific provisions of some statutes, the money or thing which is tendered must be deposited in conformity to the terms of the statute in order to keep the tender good.¹¹ Since tender is not payment or performance, a purchaser must keep his tender good if he wishes to treat such tender as performance so as to acquire title to goods which he has purchased at the purchase price which he has thus tendered.¹²

If a tender of freight has been made to a carrier and it refuses to deliver the goods, the carrier can not defeat an action in replevin for failure to keep such tender good if it has come to trial without insisting that such tender should be kept good,¹³ at least if the costs are imposed upon the party who failed to keep such tender good.¹⁴

In an action to recover mortgaged property it is said that the mortgagor need not keep his tender good nor pay the money into court.¹⁵ In a suit to redeem it is said that it is not necessary that

⁷ *Bahmann v. Stoner*, 59 O. S. 497, 52 N. E. 1022.

Under such provisions the party who has made a tender may keep it good by paying the money into court without special leave of court, at least at any time before the plea is filed. *Grand Rapids v. Krakowski*, — Mich. —, 174 N. W. 201.

⁸ *Terrell Coal Co. v. Lacey* (Ala.), 31 So. 109.

⁹ *Barron v. Thompson*, — S. Car. —, 97 S. E. 840.

¹⁰ *Davis v. Isenstein*, 257 Ill. 260, 45 L. R. A. (N.S.) 52, 100 N. E. 940.

¹¹ *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171.

¹² *Silver v. Moore*, 109 Me. 505, 84 Atl. 1072.

¹³ *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Anderson Tool Co.*, 180 Ind. 453, 49 L. R. A. (N.S.) 749, 103 N. E. 102.

¹⁴ *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Anderson Tool Co.*, 180 Ind. 453, 49 L. R. A. (N.S.) 749, 103 N. E. 102.

¹⁵ *Flanders v. Chamberlain*, 24 Mich. 306; *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247, 9 L. R. A. 55, 45 N. W. 857; *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 15 L. R. A. (N.S.) 1164, 94 Pac. 116.

the mortgagor should pay the money into court.¹⁶ It is sufficient if in his pleading he offers to pay the amount found due.¹⁷ In some jurisdictions payment into court, while necessary to discharge a mortgage securing the debt, is not necessary to stop interest and costs.¹⁸

If a tender is a condition precedent to a right to bring an action of replevin, it is said to be sufficient if such a tender is kept good by payment into court after the complaint was filed but before summons was served.¹⁹

If an offer is to be accepted by making a promise, and not by the payment of money, irregularities in keeping a tender good do not defeat the effect of an acceptance in due form.²⁰

V

WAIVER OF TENDER

§ 2872. Waiver of elements of tender—Waiver of actual production. The creditor may waive certain requisites of a valid and operative tender.¹ The law does not require either of the parties

¹⁶ *Bowen v. Gerhold*, 32 Ind. App. 614, 102 Am. St. Rep. 257, 70 N. E. 546.

¹⁷ *Bowen v. Gerhold*, 32 Ind. App. 614, 102 Am. St. Rep. 257, 70 N. E. 546.

¹⁸ *Parker v. Beasley*, 116 N. Car. 1, 33 L. R. A. 231, 21 S. E. 955.

¹⁹ *Andrews v. Hoeslich*, 47 Wash. 220, 18 L. R. A. (N.S.) 1265, 91 Pac. 772.

²⁰ *Horgan v. Russell*, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

¹ *United States. Servel v. Jamieson*, 255 Fed. 802.

Alabama. Smith v. Thomas, — Ala. —, 78 So. 820.

California. Walker v. Harbor Business Blocks Co., — Cal. —, 186 Pac. 356.

Connecticut. Grippio v. Davis, 92 Conn. 693, 104 Atl. 165.

Iowa. Kuhlman v. Wieben, 129 Ia. 188, 2 L. R. A. (N.S.) 666, 105 N. W. 445.

Michigan. Fournier v. Clutton, 146

Mich. 298, 7 L. R. A. (N.S.) 179, 109 N. W. 425.

Montana. Old Kentucky Distillery v. Stromberg-Mullins Co., 54 Mont. 285, 169 Pac. 734; *Baum v. Northern Pac. Ry. Co.*, 55 Mont. 219, 175 Pac. 872.

Nebraska. Baird v. Union Mutual Life Ins. Co., — Neb. —, 173 N. W. 686.

New York. Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, L. R. A. 1916F, 352, 97 N. E. 43.

Oklahoma. Puls v. Casey, 18 Okla. 142, 92 Pac. 383.

Oregon. Puffer v. Badley, 92 Or. 360, 4 A. L. R. 1561, 181 Pac. 1.

South Carolina. Faysoux v. Seaboard Air Line Ry. Co., 109 S. Car. 352, 96 S. E. 150.

Washington. McLeod v. Morrison, 66 Wash. 683, 38 L. R. A. (N.S.) 783, 120 Pac. 528; *Huber v. Home Savings & Loan Association*, 99 Wash. 593, 169 Pac. 979.

West Virginia. Catlett v. Bloyd, — W. Va. —, 99 S. E. 81.

to the contract to do a vain thing;² and if the party to whom the tender is to be made, makes it clear that he will not accept tender, such refusal on his part waives formal tender on the part of the adversary party.³ If the debtor is ready and willing to pay the money, the actual production of it may be waived by the absolute refusal of the creditor to accept it.⁴ If the creditor refuses to

² *Marchant v. Hughlett*, 118 Md. 229, 84 Atl. 380; *Butler v. Gleason*, 214 Mass. 248, 101 N. E. 371; *Ibs v. Hartford Life Ins. Co.*, 121 Minn. 310, 141 N. W. 289.

"Parties can not be required to do vain things." *State v. Webster Parish*, 120 La. 163, 14 L. R. A. (N.S.) 794, 45 So. 47.

³ *California*. *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

Connecticut. *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165.

Illinois. *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219.

Michigan. *Fournier v. Clutton*, 146 Mich. 298, 7 L. R. A. (N.S.) 179, 109 N. W. 425.

Montana. *Old Kentucky Distillery v. Stromberg-Mullins Co.*, 54 Mont. 285, 169 Pac. 734.

Oklahoma. *Puls v. Casey*, 18 Okla. 142, 92 Pac. 388.

Oregon. *Puffer v. Badley*, 92 Or. 360, 4 A. L. R. 1561, 181 Pac. 1.

West Virginia. *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379.

⁴ *United States*. *Hills v. Bank*, 105 U. S. 319, 26 L. ed. 1052.

Alabama. *Smith v. Thomas*, — Ala. —, 78 So. 820.

California. *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928; *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. Rep. 155, 44 Pac. 305.

Connecticut. *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356.

Delaware. *Wood v. Bangs*, 2 Penn. (Del.) 435, 48 Atl. 189.

Indiana. *Blair v. Hamilton*, 48 Ind. 32.

Kansas. *Champion Machine Co. v. Mann*, 42 Kan. 372.

Louisiana. *Sonia Cotton Oil Co. v. The Red River*, 106 La. 42, 87 Am. St. Rep. 294, 30 So. 303; *State v. Webster Parish*, 120 La. 163, 14 L. R. A. (N.S.) 794, 45 So. 47.

Massachusetts. *Hazard v. Loring*, 64 Mass. (10 Cush.) 267.

Michigan. *Jones v. Preferred Bankers' Life Assurance Co.*, 120 Mich. 211, 79 N. W. 204.

Minnesota. *Pinney v. Jorgensen*, 27 Minn. 26, 6 N. W. 376.

Missouri. *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 45 Am. St. Rep. 556, 25 L. R. A. 514, 27 S. W. 648; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773.

Montana. *Baum v. Northern Pac. Ry. Co.*, — Mont. —, 175 Pac. 872.

Nebraska. *Jones v. Chicago, Burlington & Quincy Ry.*, 102 Neb. 853, 170 N. W. 170.

New Jersey. *McCormick v. Hickey*, 56 N. J. Eq. 848, 42 Atl. 1019.

New York. *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, L. R. A. 1916F, 352, 97 N. E. 43.

Ohio. *Brock v. Hidy*, 13 O. S. 306.

Pennsylvania. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. St. 235, 5 L. R. A. 731, 18 Atl. 724; *Hampton v. Speckenagle*, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704.

South Carolina. *Fayssoux v. Seaboard Air Line Ry. Co.*, 109 S. Car. 352, 96 S. E. 150.

South Dakota. *McPherson v. Fargo*, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057; *Stanley v. Pilker*, 40 S. D. 403, 167 N. W. 393.

accept legal tender notes and demands coin,⁵ or refuses to accept anything less than an excessive amount,⁶ or refuses to deal with the debtor,⁷ or refuses to remain long enough to give the debtor an opportunity to count out the money,⁸ actual tender is waived. If a party to whom money is due gives notice that he will not accept such payment, but that he will insist upon a right which he claims as an alternative, such statement on his part operates as a waiver of tender.⁹ By statute, refusal to accept an offer of performance excuses production of the thing to be delivered in performance. This includes payment of money.¹⁰ Thus the mortgagee's denial of the mortgagor's right to make such payment excuses formal tender.¹¹ So does a denial of the right of one seeking to redeem for non-payment of taxes.¹² So does the creditor's refusal to accept payment of a debt for which he holds a lien unless another debt not a lien is also paid,¹³ or demand of interest for an excessive period.¹⁴

If the debtor offers to pay the amount due and is able to produce it in a few minutes, actual tender is excused by the creditor's refusal to accept. So if the debtor states that he has money in a bank in the same building as that in which the conversation occurs, and offers to get it and pay the debt, the refusal of the creditor to receive it waives actual production of the money.¹⁵ The same principle applies where the money is in another bank in the same town and can be reached in a few minutes.¹⁶

Tennessee. *Rogers v. Tindall*, 99 Tenn. 356, 42 S. W. 86.

Washington. *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Weinberg v. Naher*, 51 Wash. 591, 22 L. R. A. (N.S.) 956, 99 Pac. 736; *McLeod v. Morrison*, 66 Wash. 683, 38 L. R. A. (N.S.) 783, 120 Pac. 528; *Huber v. Home Savings & Loan Association*, 99 Wash. 503, 169 Pac. 979.

West Virginia. *Koon v. Snodgrass*, 18 W. Va. 320.

Wisconsin. *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

⁵ *Hanna v. Ratekin*, 43 Ill. 462.

⁶ *Ashburn v. Poulter*, 35 Conn. 553; *Baird v. Union Mutual Life Ins. Co.*, — Neb. —, 173 N. W. 686.

⁷ *Sands v. Lyon*, 18 Conn. 18.

⁸ *Schayer v. Commonwealth Loan*

Co., 163 Mass. 322, 39 N. E. 1110; *Raines v. Jones*, 23 Tenn. (4 Humph.) 490.

⁹ *Weinberg v. Naher*, 51 Wash. 591, 22 L. R. A. (N.S.) 956, 99 Pac. 736.

¹⁰ *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82.

¹¹ *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

¹² *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379.

¹³ *Bowden v. Dugan*, 91 Me. 141, 39 Atl. 467.

¹⁴ *Stewart v. Henry County*, 66 Fed. 127.

¹⁵ *Smith v. Old Dominion Building & Loan Association*, 119 N. Car. 257, 26 S. E. 40.

¹⁶ *Steckel v. Standley*, 107 Ia. 694, 77 N. W. 489.

A refusal to accept, coupled with a demand for the production of the money, does not waive its production.¹⁷ A public officer is not such an agent of the party for whose benefit he may be required to act, that he has general authority to waive elements of tender. However, if the officer to whom by law tender should be made voluntarily accepts something which is not legal tender, such as a check,¹⁸ or a certificate of deposit,¹⁹ this is sufficient to keep the tender good. This is especially true where money has been tendered to the sheriff and he has requested that a check be given instead. Thus a mortgage debt was payable in gold coin. To redeem the property after sale tender of the proper amount of gold coin was made to the sheriff. He asked for a certified check instead. The coin was thereupon deposited in the bank, and a certified check obtained which was delivered to the sheriff. The check was not expressly made payable in gold coin, but when cashed by the sheriff it was in fact paid in gold. This was held to be a sufficient tender.²⁰

The debtor must have been willing and able to make tender, and the refusal must have prevented a tender which he was about to make, to excuse the actual production of the money,²¹ as where the vendor under an executory contract of sale insisted that the contract was forfeited and conveyed to another.²²

The custom of the creditor in permitting the debtor to make payments by check without objection operates as a waiver of objection to such form of tender, at least if the creditor has not notified the debtor in time, that he will not accept such medium of payment.²³ If a mortgagee has permitted the mortgagor to pay interest by check, and if he has not notified the mortgagor that such method of payment will not be accepted, he can not treat a tender of the amount by check as insufficient so as to accelerate the maturity of the principal under a provision in the contract to that effect.²⁴

¹⁷ *Niederhauser v. Detroit Citizens' Street Ry.*, 131 Mich. 550, 91 N. W. 1028.

¹⁸ Paid to sheriff. *Hooker v. Burr*, 137 Cal. 663, 70 Pac. 778. Paid to clerk of court. *Jessup v. Carey*, 61 Ind. 584. Paid to register of deeds. *Carter v. Lewis*, 27 Mich. 241.

¹⁹ Paid to the clerk. *Steckel v. Standley*, 107 Ia. 694, 77 N. W. 489.

Contra, a certificate of deposit payable to the order of the clerk was held not sufficient to keep a tender good. *Smith v. Bank*, 14 Ohio C. C. 199, 8 Ohio C. D. 176.

²⁰ *Hooker v. Burr*, 137 Cal. 663, 70 Pac. 778.

²¹ *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87, 12 So. 406; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

²² *McWhirter v. Crawford*, 104 Ia. 550, 72 N. W. 505 [modified on rehearing, 73 N. W. 1021].

²³ *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A. (N.S.) 232, 106 Pac. 495.

²⁴ *Gunby v. Ingram*, 57 Wash. 97, 36 L. R. A. (N.S.) 232, 106 Pac. 495. (Check returned after foreclosure.)

The principle that the absolute refusal of the creditor to accept performance operates as a waiver of tender is not limited to debts payable in money. It applies to a refusal to accept a tender of chattels, as a stock certificate.²⁵ An offer to convey a patent right is sufficient tender where such offer is refused.²⁶ If the purchaser refuses to accept a conveyance of realty, or to pay for the realty, such conduct waives tender of a deed.²⁷ If a deed is not actually tendered by the vendor to the purchaser,²⁸ as where the vendor notifies the purchaser that he has the deed in his pocket but does not actually produce it,²⁹ the failure of the purchaser to demand the production of such deed does not operate as a waiver thereof if he does not declare his unwillingness or inability to perform the contract on performance by the vendor.

The conduct of the party to whom it is sought to make a tender in evading such tender or in making it impossible, operates as a breach of the covenants on his part to be performed;³⁰ and it also operates as a waiver of the tender which he has prevented in this way.³¹ If the person to whom tender is to be made is to fix the time of delivery, his failure so to do operates as a waiver of tender.³² If the contract fixes the place at which delivery is to be made, the failure of the party to whom delivery is to be made to be present at such place at the time of delivery, either in person or by agent, operates as a waiver of tender.³³ If a creditor renders a statement showing the amount which he demands, and by mistake he omits interest, a tender by the debtor in good faith in compliance with such statement is sufficient as a tender.³⁴ The rendition of such statement does not, however, prevent the creditor from recovering the entire amount due, including the omitted items.³⁵

If the form of the objection to the tender is such as to prevent the creditor from objecting to its sufficiency in form, such objection

²⁵ *Williams v. Patrick*, 177 Mass. 160, 58 N. E. 583.

²⁶ *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247.

²⁷ *McWilliams v. Brookens*, 39 Wis. 334.

Refusal to rescind waives tender of all the property which has been received under the contract by the party who seeks rescission. *Puffer v. Badley*, 92 Or. 360, 4 A. L. R. 1561, 181 Pac. 1.

²⁸ *Lefferts v. Dolton*, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

²⁹ *Lefferts v. Dolton*, 217 Pa. St. 299, 118 Am. St. Rep. 913, 66 Atl. 527.

³⁰ *Loehr v. Dickson*, 141 Wis. 332.

³¹ 30 L. R. A. (N.S.) 495, 124 N. W. 293.

³² *Servel v. Jamieson*, 255 Fed. 892; *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 460, L. R. A. 1916F, 352, 97 N. E. 43.

³³ *Bell v. Hatfield*, 121 Ky. 560, 2 L. R. A. (N.S.) 529, 89 S. W. 544.

³⁴ *Bell v. Hatfield*, 121 Ky. 560, 2 L. R. A. (N.S.) 529, 89 S. W. 544.

³⁵ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

³⁶ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

does not waive the right of the creditor to treat it as insufficient if the amount is much less than the amount actually due.³⁰

§ 2873. Refusal on specific ground. Refusal of tender based on a specific ground of objection,¹ such as the insufficiency of the amount tendered,² or on the ground that the contract has already been discharged by an alleged breach,³ operates as a waiver of other grounds of objection, at least if such other objections could be remedied by the debtor if his attention had been called thereto. A denial of the existence of the contract is said not to waive tender.⁴

Specific objection on some other designated ground waives objection to the medium in which the tender is made,⁵ as that it is made in bank notes which are not legal tender,⁶ or partly in silver certificates which were not legal tender,⁷ or that it is made by check,⁸ or was made a day or so before maturity.⁹ A refusal to

³⁰ *Bradford v. Fidelity Savings & Loan Society*, 177 Cal. 247, 170 Pac. 404. (Ninety thousand dollars tender, even if sufficient, for sixty thousand dollars only.)

¹ *England. Black v. Smith*, Peake Nisi Prisi Cases 89; *Cadman v. Lubbock*, 5 Dow. & Ryl. 289.

Illinois. Thayer v. Meeker, 86 Ill. 470.

Missouri. Whelan v. Reilley, 61 Mo. 565.

Nebraska. Ricketts v. Buckstaff, 64 Neb. 851, 90 N. W. 915

Ohio. Jennings v. Mendenhall, 7 O. S. 257.

West Virginia. Koon v. Snodgrass, 18 W. Va. 320.

Wyoming. Wright v. Douglas, — Wyom. —, 183 Pac. 786.

² *Pearson's Estate*, 102 Cal. 509, 36 Pac. 934.

³ *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Stanley v. Pilker*, 40 S. D. 403, 167 N. W. 393.

⁴ *Mowry v. Kirk*, 19 O. S. 375.

⁵ *Wheeler v. Knaggs*, 8 Ohio 169; *Wright v. Douglas*, — Wyom. —, 183 Pac. 786.

⁶ *Fosdick v. Van Husan*, 21 Mich. 567; *Lacy v. Wilson*, 24 Mich. 479;

Beebe v. Knapp, 28 Mich. 53; *Koehler v. Buhl*, 94 Mich. 469, 54 N. W. 157; *Wheeler v. Knaggs*, 8 Ohio 169. (Express waiver.)

⁷ *Ritche v. Ege*, 58 Minn. 291, 59 N. W. 1020.

⁸ *Illinois. Sloan v. Petrie*, 16 Ill. 262.

Maryland. McGrath v. Gegner, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496.

Missouri. Henderson v. Bass County, 107 Mo. 50, 18 S. W. 992.

New York. Mitchell v. Mining Co., 67 N. Y. 280.

Ohio. Jennings v. Mendenhall, 7 O. S. 257.

Pennsylvania. Pershing v. Feinberg, 203 Pa. St. 144, 52 Atl. 22.

So with a certified check. *Beckham v. Puckett*, 88 Mo. App. 636. Or an order. *Hall v. Appell*, 67 Conn. 585, 35 Atl. 524; *Jennings v. Mendenhall*, 7 O. S. 257. (Express waiver of fact that payment was not in legal tender; doubt expressed as to whether silence would amount to a waiver.)

⁹ *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

accept a tender made at a place different from that fixed by the contract as the place of payment waives objection to the place if not on that ground.¹⁰ A refusal of tender on the ground that the amount is too small, waives the objection that the amount tendered was too large and that change was demanded.¹¹ Slight deficiencies in the amount tendered may be waived by a refusal based upon some other specified ground. So a refusal to accept a tender unless another claim should be paid, waives the objection that interest is not included.¹² So tender of water rental which does not include a lawful "carriage fee," but which is refused on the sole ground that an alleged royalty to which the creditor had no legal right is not included, is sufficient.¹³ But under a statute making failure to make an "objection to money" a waiver of such objection, objection to the amount is not waived, the statute being held to refer to the kind of money.¹⁴ By statute, failure to make objections at the time of tender waives all that the creditor then had an opportunity to make. This includes objection to the amount as insufficient,¹⁵ or that the debtor in making tender demanded that the creditor execute an instrument which he was not bound to execute,¹⁶ but not to such a deficiency as an offer of ten dollars on a claim of twenty thousand dollars.¹⁷ The uncommunicated intention of the creditor to refuse tender is not an excuse for omitting to make actual tender.¹⁸ Tender as a condition precedent to maintaining an action may be waived by an answer denying liability on a distinct ground.¹⁹

VI

EFFECT OF TENDER

§ 2874. Effect of sufficient tender. When tender is made the creditor has a reasonable time in which to decide whether he will

¹⁰ Union Mutual Life Ins. Co. v. Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90. (Tender was refused because the mortgagee insisted that the mortgagor improve the mortgaged property.) Slesinger v. Bresler, 110 Mich. 198, 68 N. W. 128. (Tender of notes agreed to be taken as payment refused because the creditor had changed his mind.)

¹¹ People's Furniture & Carpet Co. v. Crosby, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 658.

¹² Christenson v. Nelson, 38 Or. 473, 63 Pac. 648.

¹³ Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450, 45 Pac. 423.

¹⁴ McWhirter v. Crawford, 104 Ia. 550, 72 N. W. 505 [modified on rehearing, 73 N. W. 1021].

¹⁵ Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82 (as that interest is not included).

¹⁶ Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115.

¹⁷ Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

¹⁸ Bluntzer v. Dewees, 70 Tex. 272.

¹⁹ Martin v. Bank, 131 N. Car. 121, 42 S. E. 558.

accept it or not,¹ unless he rejects the tender without taking such reasonable time.

If tender is refused, the question whether the contract is discharged or not depends on whether the contract requires payment in money or other performance. If the contract provides for performance other than payment in money, a refusal of tender operates as a discharge,² on the theory that such tender transfers the title to the party to whom tender was made, if it was in due form and in accordance with the terms of the contract. If the contract provides for payment in money, refusal of tender does not discharge the contract as far as the liability of the principal debtor is concerned,³ though it stops interest⁴ and costs,⁵ provided the tender is kept good. A tender which is kept good by payment into court, relieves the debtor from liability for the plaintiff's attorney's fees as costs, even if such tender was defective as being con-

¹ *Root v. Bradley*, 49 Mich. 27, 12 N. W. 896; *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247, 9 L. R. A. 55, 45 N. W. 857.

² *Indiana*. *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128.

Iowa. *Long v. Wilson*, 80 Ia. 216, 45 N. W. 764.

Maine. *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542.

New York. *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

South Dakota. *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

Vermont. *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696.

³ *England*. *Dent v. Dunn*, 3 Camp. 296.

Iowa. *Mohn v. Stoner*, 11 Ia. 30.

Massachusetts. *Suffolk Bank v. The Worcester Bank*, 22 Mass. (5 Pick.) 106.

Michigan. *Snyder v. Quarton*, 47 Mich. 211, 10 N. W. 204.

Missouri. *Ruppel v. Missouri Guarantee, Savings & Building Association*, 158 Mo. 613, 59 S. W. 1000.

New Hampshire. *Stowell v. Read*, 16 N. H. 20, 41 Am. Dec. 714.

Oklahoma. *Loth-Hoffman Clothing Co. v. Schwartz*, — Okla. —, 176 Pac. 916.

Vermont. *Preston v. Grant*, 34 Vt. 201.

Washington. *Hays v. Bashor*, — Wash. —, 185 Pac. 814.

Accordingly, tender of the purchase price under an option does not vest title in the party who makes such tender, and he can not maintain replevin. *Hays v. Bashor*, — Wash. —, 185 Pac. 814.

⁴ *Dent v. Dunn*, 3 Camp. 296; *Peugh v. Davis*, 113 U. S. 542, 28 L. ed. 1127; *Cheney v. Libbey*, 134 U. S. 68, 33 L. ed. 818; *Tuthill v. Morris*, 81 N. Y. 94; *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L. R. A. 562, 22 N. E. 155; *Parker v. Beasley*, 116 N. Car. 1, 33 L. R. A. 231, 21 S. E. 955.

⁵ *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87, 12 So. 406; *Wing v. Blocker*, 115 Ga. 778, 42 S. E. 67; *Saunders v. King*, 119 Ia. 291, 93 N. W. 272; *Fuller v. Pelton*, 16 Ohio 457; *Cohon v. Kineon*, 46 O. S. 590, 22 N. E. 722.

ditional, if the real litigation was on another issue.⁶ If the debtor makes a valid tender of money through his agent, which is refused, and such agent thereafter becomes bankrupt, the loss of the principal and interest down to the date of tender is that of the debtor.⁷ Accordingly, a verdict and judgment for the defendant upon a plea of tender of money is wrong.⁸ It was queried in an early case whether if the creditor refused a valid tender and the coinage was subsequently debased, the debtor must bear such loss.⁹

To discharge interest, however, the tender must be kept good.¹⁰ If the tender is not kept good, and the debtor makes use of the money tendered by him, after tender is refused, he is liable for interest.¹¹ Since a tender of less than the full amount is insufficient in law, it does not prevent recovery of costs in a subsequent action.¹² A surety is discharged by refusal of tender made by him with the demand that the debt be assigned to him.¹³

If tender is made of performance of a precedent or concurrent covenant, and such tender is refused, it gives the right of action to the party who tenders performance.¹⁴

§ 2875. Effect of insufficient tender. If a tender is insufficient as lacking the requisite elements of a valid tender,¹ and if the creditor has not waived such defects,² such tender has no legal effect.³ If a tender is refused on the ground that it is insufficient, the debtor may make a sufficient tender if the time for performance on his part has not elapsed.⁴ If a tender has been made of articles which do not conform to the requirements of the contract, and such tender is refused, the party who is bound to furnish such articles may make a subsequent tender in compliance with the terms of the contract.⁵

⁶ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

⁷ *Dent v. Dunn*, 3 Camp. 296.

⁸ *Loth-Hoffman Clothing Co. v. Schwartz*, — Okla. —, 176 Pac. 916.

⁹ *Dyer* 82b (72).

¹⁰ *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87, 12 So. 406.

See § 2871.

¹¹ *Sanders v. Bryer*, 152 Mass. 141, 9 L. R. A. 255, 25 N. E. 86.

¹² *Elder v. Elder*, 43 Kan. 514, 23 Pac. 600; *Elsanger v. Grovjohn*, 29 Neb. 139, 45 N. W. 273.

¹³ *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. Rep. 155, 44 Pac. 305.

¹⁴ *Byington v. Little Rock Chamber of Commerce*, 132 Ark. 361, 201 S. W. 122; *Jackson v. Rogers*, 100 S. Car. 283, 96 S. E. 692.

See also, ch. LXXXIV.

¹ See §§ 2853 et seq.

² See §§ 2872 et seq.

³ *Commercial Bank v. Crenshaw*, 103 Ala. 407, 15 So. 711; *West v. Farmers' Mutual Ins. Co.*, 117 Ia. 147, 90 N. W. 523; *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 154 N. W. 645.

⁴ *Coleman v. Edwards*, 5 O. S. 51.

⁵ *Coleman v. Edwards*, 5 O. S. 51.

§ 2876. Tender conclusive as to debtor's liability. Tender followed by payment into court establishes the debtor's liability to that amount.¹ In the absence of statute, the payment into court by the defendant is not an admission of the existence of plaintiff's cause of action; and if plaintiff does not show a cause of action in his favor against the defendant, he can not recover a greater sum than that paid into court, although the defense which the defendant interposes would have prevented the plaintiff from recovering anything had it not been for such tender.² The money so paid in becomes the property of the creditor.³ If the issue on a plea of tender is found in favor of the defendant, the proper judgment is a judgment in favor of the plaintiff for the amount tendered and in favor of the defendant for the costs.⁴ It is error on overruling plaintiff's demurrer to defendant's answer, to allow the defendant to take the amount so paid in.⁵ So if tender is pleaded and kept good in an action in foreclosure it is error to find that there has been no breach of condition.⁶ Where the verdict should be for the difference, if any, between the amount so paid in and the amount found due, it is error to deduct the amount paid in from the amount of the verdict in rendering judgment.⁷ Tender does not, of course, prevent the debtor from setting up a counterclaim covering the difference between the amount tendered and the amount claimed.⁸ If the contract is severable a tender of part of the amount due and paid over does not prevent the defendant from setting up a counterclaim for damages which he has sustained by reason of defective performance of such contract.⁹ Under some statutes the plaintiff

¹ *Cox v. Parry*, 1 T. R. 464; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 16 L. R. A. (N.S.) 1055, 68 Atl. 484; *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357.

² *Cox v. Parry*, 1 T. R. 464.

³ *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543.

⁴ *Fuller v. Pelton*, 16 Ohio 457.

⁵ *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691.

⁶ *Uedelhofen v. Mason*, 201 Ill. 465, 66 N. E. 364 [affirming, 102 Ill. App. 116].

An offer to confess judgment has the

same effect under many of the codes of procedure. *Fisher v. Quillen*, 76 O. S. 189, 81 N. E. 182.

See also, *Armstrong v. Spears*, 18 O. S. 373.

⁷ *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055 [affirmed on rehearing, 156 Ind. 682, 60 N. E. 797].

⁸ *Young v. Borzone*, 26 Wash. 4, 23, 66 Pac. 135, 421.

⁹ *La Rault v. Palmer*, 51 Wash. 664 [sub nomine, *Palmer v. La Rault*, 21 L. R. A. (N.S.) 354, 99 Pac. 1036].

"The old rule was harsh and unjust. To relieve a party of the hazards attending a tender, courts gradually came to declare the more liberal rule

is given the choice between electing to take the money which has been paid in, and prosecuting the action to recover a greater amount; and under such a statute the plaintiff can recover only the amount actually found due, even though such amount is less than that which is paid into court.¹⁰

In admiralty the title to the money paid into court does not pass to the creditor, and he can take out only the amount to which he is found entitled.¹¹

adopted and announced in *Ycung v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421, but which is more aptly stated in *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325: 'The tenders and payment into court only admitted the cause of action as to the sum tendered. It did not conclude the respondent as to any defense she might have against a further recovery.' *Spalding v. Vandercook*, 2 Wend 431; *Eaton v. Wells*, 82 N. Y. 576; *Roosevelt v. New York and H. R. Co.*, 45 Barb. 554; *Davis v. Milaudon*, 17 La. Ann. 97, 87 Am. Dec. 517; *Hinds v. Cottle*, 143 Mass. 310, 9 N. E. 654 " *La Rault v. Palmer*, 51 Wash. 664 [sub nomine, *Palmer v. La Rault*, 21 L. R. A. (N.S.) 354, 99 Pac. 1036]

¹⁰ *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 16 L. R. A. (N.S.) 1055, 68 Atl. 484.

"This tender and payment, which constitute the fourth plea in each of these cases, were made under §§ 20 and 21 of Art. 75, Code Pub., Gen. Laws, 1904. The effect of these pleas was to admit the liability of the defendant upon the causes of action, and the issue raised upon the pleas was merely as to the extent of the defendant's liability. These sections were considered by this court in *Gamble v. Sentman*, 68 Md. 71, 11 Atl. 584, where it was said: 'These sections are substantially copied from Stat. 3d and 4th, William IV, ch. 42, § 21, and the rules as to costs thereby provided.

Their object is to encourage the settlement of suits without the cost and delay of trial. They allow the defendant, except in certain actions, "to pay into court a sum of money by way of compensation or amends," and such payment may be set up by plea. The plaintiff then, after the money has thus been paid in, may reply by accepting the same "in full satisfaction and discharge of the action," and if he does this, he may have his costs taxed, and if they be not immediately paid, he shall have judgment therefor; or he may reply that the sum paid in "is not enough to satisfy the claim of the plaintiff in respect to the matter to which the plea is pleaded, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to his costs of the suit, and the plaintiff to so much of the sum paid into court as shall be found for him * * *." The concluding paragraph of the law as above quoted plainly indicates that, where the plaintiff replies that the money paid in is not enough to satisfy his claim, it is the duty of the court to hold on to the money until the issue on that replication is decided, and then to pay over to the plaintiff only so much of it as the jury may find to be due him.'" *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 16 L. R. A. (N.S.) 1055, 68 Atl. 484.

¹¹ *The Mona* [1894], p. 265.

§ 2877. Effect of tender on collateral security. Since performance can not be tendered before maturity, tender of a debt before the day for payment does not discharge the lien of a mortgage which is given to secure such debt.¹ Tender of the amount of a debt secured by mortgage discharges the mortgage if made before condition broken on the day fixed by the contract for payment.² It has been held, however, that such tender will not avoid the lien of the mortgage unless the tender is kept good by paying the money into court;³ and the discharge of the mortgage is said to date only from the date of payment into court.⁴ If condition is broken and tender of the debt is made after that time, with interest down to the time of making tender, some courts hold that such tender discharges the mortgage.⁵ Such a tender has been held to discharge a lien in the nature of a mortgage created by a lease of water power.⁶ Other courts hold that such tender does not discharge the mortgage.⁷ A tender by attaching creditors of a mortgagor discharges the lien of a mortgage.⁸ A tender which is kept good has been held to divest the lien of a chattel mortgage.⁹

To discharge the lien of a mortgage the tender must be so far free from conditions that it would be sufficient to stop interest and

¹ Moore v. Kime, 43 Neb. 517, 61 N. W. 736.

See § 2854.

² United States. Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 25 L. ed. 1030.

Nebraska. Security State Bank v. Waterloo Lodge, 85 Neb. 255, 122 N. W. 992.

New Jersey. Shields v. Lozeur, 34 N. J. L. 496, 3 Am. Rep. 256.

New York. Breunich v. Weselman, 100 N. Y. 609, 2 N. E. 385 (obiter).

³ Parker v. Beasley, 116 N. Car. 1, 33 L. R. A. 231, 21 S. E. 955.

Contra, on the ground that payment into court is necessary as a defense to the debt, but not to the discharge of the lien. Kortright v. Oady, 21 N. Y. 343.

⁴ American Net & Twine Co. v. Githens, 57 N. J. Eq. 539, 41 Atl. 405.

⁵ Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Werner

v. Tuch, 127 N. Y. 217, 24 Am. St. Rep. 443, 27 N. E. 845.

⁶ Gordon v. Constantine Hydraulic Co., 117 Mich. 620, 76 N. W. 142.

⁷ Perre v. Castro, 14 Cal. 519, 76 Am. Dec. 444; Rowell v. Mitchell, 68 Me. 21; Holman v. Bailey, 44 Mass. (3 Met.) 55; Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co., 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450. (In this case the earlier and to some extent inconsistent Missouri cases are discussed. In McCullung v. Missouri Trust Co., 137 Mo. 100, 38 S. W. 578, there had been no tender in fact, but the court expressed the opinion that such a tender might stop interest but could not discharge the mortgage.) Shields v. Lozeur, 34 N. J. L. 496, 3 Am. Rep. 256.

⁸ Felker v. Hazelton, 68 N. H. 303, 38 Atl. 1051.

⁹ Gould v. Armagost, 46 Neb. 897, 65 N. W. 1064.

costs. If conditions are imposed by the party who makes the tender in excess of those imposed by law, the tender is ineffective.¹⁰ Refusal of a tender has been held not to discharge the lien of a mortgage if such refusal was due to a bona fide dispute as to the amount already paid in.¹¹

¹⁰ Moore v. Norman, 52 Minn. 83, 33
Am. St. Rep. 526, 18 L. R. A. 359, 53
N. W. 809.

¹¹ Easton v. Littooy, 91 Wash. 648,
158 Pac. 531.

CHAPTER LXXXIV

BREACH

I. NATURE AND METHOD OF TREATMENT OF TOPIC

- § 2878. Nature of breach.
- § 2879. Treatment of topic of breach.
- § 2880. Nature of default.

II. METHOD OF BREAKING CONTRACT

A. RENUNCIATION BEFORE PERFORMANCE

- § 2881. Classes of breach as to manner of breaking contract.
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I

NATURE AND METHOD OF TREATMENT OF TOPIC

§ 2878. Nature of breach. In discussing breach and its effects and consequences, and in attempting to define it, as is occasionally done, the courts ordinarily assume that the idea is one which is so thoroughly understood that a formal definition is unnecessary. The idea involved in the term is the idea of breaking; and as applied to a contract, it is of course used in a figurative sense. It implies a violation of a valid and subsisting obligation. While occasionally emphasis is given to failure to perform as the essential idea of breach, it is not every failure to perform the covenants of a contract which amounts to a breach, since the contract, although valid at the outset, may have been discharged, as by a new contract,¹ or by merger in some obligation of a higher character,² or by breach of an express condition,³ or by impossibility,⁴ or by war,⁵ or by alteration.⁶ In all of these cases non-performance may exist without breach.

On the other hand, breach may exist without non-performance, as in jurisdictions in which the repudiation of the obligation of a contract by one of the parties before the time for performance may give to the other party the right to treat such repudiation as a breach without waiting for the time fixed by the terms of the

¹ See ch. LXXV.

² See ch. LXXVI.

³ See ch. LXXVII.

⁴ See ch. LXXVIII.

⁵ See ch. LXXIX.

⁶ See ch. LXXXV.

original contract for performance.⁷ In the cases in which a contract has been discharged there is, however, no obligation remaining to be violated; and in jurisdictions in which renunciation in advance may be treated as breach, the party who renounces the contract is regarded as violating his duty to treat such contract as a valid and subsisting obligation until the time fixed by the terms of such contract for the performance thereof.⁸ The violation of a valid and subsisting obligation is, therefore, the essential idea of breach.

§ 2879. Treatment of topic of breach. In discussing the topic of breach a strict adherence to logical arrangement would require a consideration of the facts which amounted to breach, followed by a consideration of the effect of breach. As far as economy of space permits, these questions will be taken up in this order, although the constant necessity of distinguishing between breach as a cause of action to recover damages, and breach as a discharge of the party who is not in default, will require a consideration of the effect of each of the different types of breach in connection with the consideration of the nature of such type of breach. The different methods by which a contract may be broken will first be considered, including the effect of renunciation before performance is due;¹ renunciation when performance is due;² the voluntary creation of impossibility of performance by one of the parties to the contract;³ and breach by non-performance.⁴ The question of non-performance involves, however, the question of performance; and as this has been discussed already,⁵ it will not be repeated in connection with breach. In like manner the subject of tender, which has already been considered,⁶ will not be taken up in detail in connection with breach, although the effect of tender is frequently to put in default the party to whom tender is made and who refuses it; and in other cases its effect is to save the party who has made the tender from being in default. The relation of the various covenants of a contract to one another will then be considered;⁷ especially with reference to the breach of one of such covenants as a discharge of the others. The relation of the various covenants to the contract as a whole will then be taken up,⁸

⁷ See §§ 2881 et seq.

⁸ See § 2885

¹ See §§ 2881 et seq.

² See §§ 2908 et seq.

³ See §§ 2012 et seq.

⁴ See §§ 2926 et seq.

⁵ See ch. LXXX.

⁶ See ch. LXXXIII.

⁷ See §§ 2911 et seq.

⁸ See §§ 2977 et seq.

including the question of failure of consideration and the problems arising out of entire and severable contracts. The effect of breach,⁹ and waiver of breach, both as a cause of action to recover damages,¹⁰ and as a method of discharging the contract,¹¹ will then be discussed. Other topics which grow out of breach, such as damages,¹² the right to ignore the contract on its discharge and to recover on the theory of quasi contract,¹³ the right to enforce the contract in equity by the affirmative remedy of specific performance,¹⁴ and the right to enforce it negatively in equity by the remedies of injunction, rescission and cancelation,¹⁵ will be reserved for subsequent chapters.

§ 2880. Nature of default. In this connection, at the risk of repetition, it may be noted that the term "party who is not in default" is used as a convenient method of indicating the party who has not committed such a default as to justify the adversary party in treating the contract as discharged. In many cases, as in breach of independent covenants,¹ or in breach of subsidiary covenants,² a party may be in default so as to incur a liability for damages, but not in default so as to justify the adversary party in treating the contract as discharged. Courts have occasionally used language which would seem to imply that every breach of a contract by one party operated as a discharge of the adversary party;³ but such a statement, while usually correct with reference to the contracts involved in the particular cases, is not a safe general proposition. While it applies to dependent covenants, such as precedent covenants,⁴ or to concurrent covenants;⁵ and while it applies to cases of total failure of consideration,⁶ or to partial failure of consideration if the consideration which has failed is the vital element of the contract,⁷ it does not apply in the case of independent covenants,⁸ or in the case of partial failure of consideration where the consideration which has failed is not the vital element of the contract.⁹ Conversely, language is sometimes used which

⁹ See §§ 3023 et seq.

¹⁰ See §§ 3036 et seq.

¹¹ See §§ 3061 et seq.

¹² See ch. LXXXVII.

¹³ See ch. LXXXVIII.

¹⁴ See ch. LXXXIX.

¹⁵ See ch. XC.

¹ See §§ 2971 et seq.

² See § 2981.

³ "It is elementary that a breach of

a contract by one party excuses performance by the other." *Wasser v. Western Land Securities Co.*, 97 Minn. 460, 107 N. W. 160.

⁴ See §§ 2951 et seq.

⁵ See §§ 2961 et seq.

⁶ See §§ 2977 et seq.

⁷ See § 2986.

⁸ See §§ 2971 et seq.

⁹ See §§ 2981 et seq.

implies that the right to treat a contract as discharged is one which can be exercised only by a party who is not himself in default.¹⁰ This statement, also, is too broad and sweeping to be safe. It applies to a party who is in default in the performance of a precedent covenant,¹¹ and to a party who is in default in the performance of a concurrent covenant;¹² but it does not apply to a party who is in default in the performance of a subsequent covenant,¹³ or to a party who is in default in the performance of an independent covenant.¹⁴

II

METHOD OF BREAKING CONTRACT

A. RENUNCIATION BEFORE PERFORMANCE

§ 2881. Classes of breach as to manner of breaking contract. Breach of contract may be made in either of two ways: (1) One party to the contract may by word or act indicate that the contract is no longer binding upon him, and the adversary party may elect to treat this as breach. The chief classes of breach of this sort are as follows: (a) One party to the contract may renounce the obligation of the contract and treat it as no longer binding upon him. In some jurisdictions or in certain classes of cases this will give the adversary party the right to treat such conduct as breach where it occurs before performance is due.¹ In all classes of contracts such renunciation when performance is due gives the adversary party the right at his election to treat the contract as discharged;² and in certain classes of cases in which any other course would result in increasing damages he is required to accept it as a discharge, leaving him his right of action for damages. (b) One party to a contract may make performance impossible, either on his own part or on the part of the adversary party. This may be due.³

¹⁰ *North American Dredging Co. v. Outer Harbor Dock & Wharf Co.*, 178 Cal. 406, 173 Pac. 756; *Howard County v. Pesha*, — Neb. —, 172 N. W. 55; *Bradley v. Nevada-California-Oregon Ry.*, — Nev. —, 178 Pac. 906.

See also, *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

¹¹ See § 2060.

¹² See §§ 2069 et seq.

¹³ See § 2060.

¹⁴ See § 2076.

¹ See §§ 2881 et seq.

² See §§ 2908 et seq.

³ See §§ 2912 et seq.

(2) The other way in which breach may occur is where one party, without in any way repudiating his obligation under the contract, either does not perform or tenders defective performance which is not even substantial performance and which is not accepted by the adversary party as performance in place of that required by the terms of the contract.⁴

§ 2882. Renunciation before performance is due as excuse for not tendering performance—General principles. While a contract is still executory on both sides, the renunciation of it by one of the parties thereto before the time for performance has arrived has, or may have, important legal consequences. What these consequences are is a question upon some branches of which the courts are practically unanimous; while upon other branches they are by no means as unanimous as the outward form of some of the statements of the law would lead us to believe.

Renunciation by one party excuses the other from any further offer to perform,¹ so that the failure of such other party to per-

⁴ See §§ 2926 et seq.

¹ *United States. The Eliza Lines*, 199 U. S. 119, 50 L. ed. 115; *Dixon v. Anderson*, 252 Fed. 694.

Alabama. McAllister-Coman Co. v. Matthews, 167 Ala. 361, 140 Am. St. Rep. 43, 52 So. 416.

Connecticut. Lovell v. Hammond Co., 66 Conn. 500, 34 Atl. 511; *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

Illinois. Watson v. White, 152 Ill. 364, 38 N. E. 902.

Kansas. Bauman v. McManus, 75 Kan. 106, 10 L. R. A. (N.S.) 1138, 89 Pac. 15.

Kentucky. Hobbs v. Ray (Ky.), 96 S. W. 589, 29 Ky. L. Rep. 999.

Massachusetts. Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538.

Michigan. Stahelin v. Sowle, 87 Mich. 124, 49 N. W. 529; *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 409, 25 L. R. A. 627, 50 N. W. 615.

Minnesota. McGuire v. J. Neils Lumber Co., 97 Minn. 203, 107 N. W. 130.

Montana. McCaull-Dinsmore Co. v. Jackson, — Mont. —, 189 Pac. 771.

New Jersey. O'Neill v. Supreme Council, 70 N. J. L. 410, 57 Atl. 463; *Holt v. United Security Life Ins. & Trust Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118; *Holt v. United Security Life Ins. & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 381.

New York. Shaw v. Republic Life Ins. Co., 69 N. Y. 286.

North Dakota. Hart-Parr Co. v. Finley, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling, *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938].

Ohio. George Wiedemann Brewing Co. v. Maxwell, 78 O. S. 54, 84 N. E. 595.

Oregon. Longfellow v. Huffman, 49 Or. 486, 90 Pac. 907.

Pennsylvania. Hampton v. Speckenagle, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704; *Durham v. Wick*, 210 Pa. St. 128, 105 Am. St. Rep. 789, 59 Atl. 824.

Texas. Moore v. Jenkins, — Tex. —, 211 S. W. 975.

Vermont. Ellis' Administrator v. Durkee, 79 Vt. 341, 65 Atl. 94.

form or to tender performance does not give to the party who was originally in default the right to treat the contract as discharged because of such non-performance; and such failure does not show that the party who was originally not in default and who has omitted to perform further, or to tender performance, has consented to treat such contract as discharged so as to prevent him from enforcing it thereafter,² at least by an action for damages or some similar appropriate remedy.

§ 2883. Specific illustrations. Renunciation of a contract to sell land excuses tender of the purchase price and demand for the deed.¹ If A has entered into a contract to make a lease to B, and B has agreed to pay rent and furnish a bond, A's refusal to perform discharges B from B's duty to perform or to make formal tender of performance;² and B may have specific performance if he is ready and willing to perform and notifies A thereof.³

Virginia. *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93; *Mutual Reserve Fund Life Association v. Taylor*, 99 Va. 208, 37 S. E. 854.

West Virginia. *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81

Wisconsin. *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576, *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270.

To the same effect, see the obiter in *Stanford v. Magill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938

It has, however, been said to be error to charge the jury that if one of the parties to a contract "decides to rescind it" and notifies the other of that fact, that such other party is not then bound to continue performance is erroneous since rescission imports an agreement of both parties. *Adams v. Guiraud*, — Colo. —, 169 Pac. 580.

On renunciation by one party, the other party is no longer bound by the original contract if he elects to treat such renunciation as a discharge. *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84

N. E. 965; *Moore v. Jenkins*, — Tex. —, 211 S. W. 975.

Renunciation was apparently held not to excuse tender in *Mowry v. Kirk*, 19 O. S. 375.

² **Kansas.** *Bauman v. McManus*, 75 Kan. 106, 10 L. R. A. (N.S.) 1138, 89 Pac. 15

Kentucky. *Hobbs v. Ray* (Ky.), 96 S. W. 589, 29 Ky. L. Rep. 999.

New York. *Shaw v. Republic Ins. Co.*, 69 N. Y. 286.

Ohio. *George Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595.

Oregon. *Longfellow v. Huffman*, 49 Or. 480, 90 Pac. 907.

West Virginia. *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81.

Contra, *Mowry v. Kirk*, 19 O. S. 375.

¹ *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Durham v. Wick*, 210 Pa. St. 128, 105 Am. St. Rep. 789, 59 Atl. 824.

² *George Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595

³ *George Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595.

On renunciation of a building contract by one of the parties the adversary party may treat such contract as discharged.⁴ If a contract has been made to construct a dam and before performance the party for whom the dam is to be constructed demands that the dam be constructed according to plans substantially different from those upon which the parties had originally agreed, the contractor may treat such conduct as a breach which discharges him from further performance.⁵

A contract to sell certain goods is so far discharged by renunciation by the vendee that it is not necessary for the vendor to tender the thing sold, in order to enable him to recover damages for breach.⁶ If A has entered into a contract to accept certain property and to pay therefor, and if he subsequently denies having made such offer and declares that he will not take such property, such conduct excuses tender.⁷ If A and B have entered into a contract by which they are to buy stock from C and by which they adjust their liabilities for the payment of the purchase price thereof, A's refusal in advance to comply with the terms of the contract is such a breach that B may treat the contract as discharged and may enter into a bona fide compromise with C.⁸ Under an instalment contract by the terms of which each instalment is to be paid for within a certain time after delivery, the refusal of the purchaser to pay for any instalments until all are delivered operates as a discharge of such contract.⁹

If the seller refuses performance such renunciation discharges the buyer from further performance or tender thereof.¹⁰ If A has agreed to sell an automobile to B, and to give B a certain credit upon B's old automobile, A's refusal to deliver the new automobile

⁴ *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

⁵ *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

⁶ *United States. Roehm v. Horst*, 178 U. S. 1 [affirming, 91 Fed. 345, 33 C. C. A. 550].

⁷ *Kansas. Bauman v. McManus*, 75 Kan. 106, 10 L. R. A. (N.S.) 1138, 89 Pac. 15.

⁸ *Montana. McCaull-Dinsmore Co. v. Jackson*, — Mont. —, 189 Pac. 771.

⁹ *North Dakota. Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 163 N. W. 137.

Vermont. Ellis' Admr. v. Durkee, 79 Vt. 341, 65 Atl. 94.

¹⁰ *Wisconsin. Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576; *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270.

¹¹ *Ellis' Admr. v. Durkee*, 79 Vt. 341, 65 Atl. 94.

¹² *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.

¹³ *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270. (Decided under section 45 of the Uniform Sales Act.)

¹⁴ *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

unless B consents to a reduction in the agreed credit on the old automobile, discharges B from the duty of tendering the balance of the purchase price.¹¹

A contract to make and deliver certain goods is so far discharged by renunciation in advance by the adversary party that it is not necessary to make and tender the thing to be made in order to recover damages.¹² If A has agreed to make steel rails for B, to be drilled as B directs, B's refusal to give directions, and subsequent refusal to take any rails, excuses A from making, drilling and tendering them.¹³ Under a contract to make wagons,¹⁴ or to print books,¹⁵ refusal to accept excuses tender. Renunciation by a creditor of a contract to accept a three months' note if indorsed by a responsible indorser, excuses the debtor from his obligation of preparing and tendering such note.¹⁶ If A has agreed to make a loan to B on condition that B shows a good title to property which he offers as security for such loan, A's renunciation of such contract in advance discharges B from his duty to show such title as a condition precedent to his maintaining an action upon such contract.¹⁷

If an insurance company renounces liability on a valid policy before loss, the insured is excused from tendering premiums which fall due thereafter, even if he elects to treat the policy as in force; and when loss occurs, the insurance company can be compelled to pay the amount of the policy less the amount of the premiums which are due and unpaid;¹⁸ or the face of the policy discounted

¹¹ *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

¹² *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 204, 30 L. ed. 967; *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328; *Farwell v. Solomon*, 170 Mass. 457, 49 N. E. 738.

In such a case, it is the duty of the party not in default to cease performance if this will mitigate damages.

See § 2898 and ch. LXXXVII.

¹³ *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 204, 30 L. ed. 967.

¹⁴ *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328.

¹⁵ *Farwell v. Solomon*, 170 Mass. 457, 49 N. E. 738.

¹⁶ *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511. (The creditor had

agreed to prepare such note, but prepared a note payable on demand, and refused to prepare a three months' note.)

¹⁷ *Holt v. United Security Life Ins. & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

¹⁸ *Wayland v. Western Life Indemnity Co.*, 106 Mo. App. 221, 148 S. W. 626; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

The difficulties which attend the attempt to keep the policy alive after repudiation by the insurance company, even if premiums are tendered, are pointed out in *Day v. Connecticut General Life Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 603.

to the date of renunciation less the amount of premiums which in fact fall due thereafter, discounted to the same date.¹⁹ The same principles apply to a policy which was surrendered by a holder who was insane at the time, and which was accepted by the insurance company.²⁰

§ 2884. Effect of election not to tender performance on right to recover compensation at contract rate or to have specific performance. If, however, the party who is not in default wishes to recover the compensation named in the contract as if he had performed in full, and if the action is brought in a jurisdiction in which the party in default may recover the full contract price,¹ it is said to be necessary for him to tender performance.² If the purchaser has declared that he will not accept the goods which he has agreed to take under an executory contract of sale, the purchaser must tender such goods in order to recover the purchase price,³ even if the action is brought in a jurisdiction in which the full purchase price can be recovered upon making such tender.⁴ If the party who is not in default is ready and willing to perform and notifies the adversary party of such fact, such renunciation discharges the party who is not in default from his duty of performing or making formal tender of performance of concurrent covenants,⁵ if he notifies the party in default of his readiness and willingness to perform. Such renunciation does not, however, excuse the adversary party from a readiness and willingness to perform concurrent covenants on his part to be performed, if he wishes to treat the contract as still in effect.⁶ Readiness and willingness to perform concurrent covenants, and notice thereof to the party in default, is sufficient to enable the party not in default to maintain a suit for specific performance.⁷

The rule that renunciation by one party does not excuse performance or tender on the part of the party who is not in default, if the latter wishes to recover the compensation named in the contract, does not apply to cases in which the rights of both parties

¹⁹ *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355.

²⁰ *Nutter v. Des Moines Life Ins. Co.*, 156 Ia. 539, 136 N. W. 891.

¹ See § 2890 and ch. LXXXVII

² *Pate v. Ralston*, 158 Ia. 411, 51 L. R. A. (N.S.) 735, 139 N. W. 906.

³ *Pate v. Ralston*, 158 Ia. 411, 51

L. R. A. (N.S.) 735, 139 N. W. 906.

⁴ See § 2899 and ch. LXXXVII.

⁵ *George Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595.

⁶ *Longfellow v. Huffman*, 49 Or. 486, 90 Pac. 907.

⁷ *George Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595.

are so fixed that the value of performance on the part of the party who is not in default can be ascertained with certainty and deducted from the amount of the recovery.⁸ Accordingly, if an insurance company repudiates liability upon a valid contract of insurance, such renunciation discharges the adversary party from the duty of making further payment or tender under the policy.⁹ Even though the performance,¹⁰ which formed the consideration on his part, is not paid or tendered, an action may be brought upon such policy when the loss occurs; and the amount of such premiums or assessments may be deducted from the amount due upon the policy.¹¹

§ 2885. Renunciation—Theory of right of action at law before performance is due. Whether renunciation of a contract by one party before performance is due by the terms thereof can be treated by the adversary party as a breach so as to enable the adversary party to bring an action to recover damages for such breach before the time which was fixed by the contract for performance has arrived, is a question upon which there has been in the past a considerable conflict of authority and upon which some conflict still persists.

At one time the English courts seemed inclined to hold that the renunciation of the contract before performance was due did not give a right of action to the party who was not in default, for the purpose of enabling him to recover damages, until the time which was fixed by the contract for performance.¹ This result, which was not required for the actual decision in these cases, was reached in part on the theory that breach could not occur until the time fixed for performance,² and in part, apparently, on the theory that such renunciation would not even operate as a discharge of the party who was not in default from further performance, even though such further performance would aggravate the damages.³ The real

⁸ *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 109, 25 L. R. A. 627, 59 N. W. 615; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

⁹ *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 409, 25 L. R. A. 627, 59 N. W. 615; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

¹⁰ *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

¹¹ *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

¹ *Phillpotts v. Evans*, 5 Mees. & W. 475; *Ripley v. M'Clure*, 4 Exch. 345.

² *Ripley v. M'Clure*, 4 Exch. 345.

³ *Phillpotts v. Evans*, 5 Mees. & W. 475.

For the modern rule on this point, see ch. LXXXVII.

decision in one of these cases⁴ was that such renunciation of a contract of sale could not change the time as of which damages were to be estimated, from that which was fixed by the terms of the contract. In the other case the real decision was that if such renunciation were not withdrawn until the time fixed for performance, the contract could be regarded as broken.⁵

The question was finally submitted squarely for decision in a case in which A had employed B to render personal services for a certain time, performing at a certain time in the future, and before the time for the commencement of performance had arrived A notified B that he would not accept B's services or pay compensation therefor. B thereupon brought an action before the time for performance had arrived, and it was held that such action could be maintained.⁶ The decision was placed on the ground that it was for the benefit of both parties to permit B to bring an action at once to recover damages for breach of the contract, and to seek other employment as the means of mitigating damages, rather than to require B to remain idle until the termination of the period of employment fixed by the contract and then to maintain an action to recover the contract price.⁷ Without discussion it seems to have been assumed that the right to bring an action before the time fixed by the contract for performance followed necessarily from the duty of the employe to mitigate damages.⁸ The question was presented later in a case in which A had agreed to marry B on the death of A's father; and while A's father was still alive A had declared that he would not marry B when his father died. B thereupon brought an action to recover damages during the life of A's father. The doctrine of the earlier case⁹ was followed, although in that case the contract was to be performed at a certain time, while in the case at bar it was not to be performed until the happening of an event which was bound to happen, it is true, but the time at which it would happen could not be foreseen. This distinction, however, was held to be immaterial, and B was allowed to recover, although the action was brought before the event which was fixed by the contract as that on the happening of which performance would be due.¹⁰

⁴ *Phillpotts v. Evans*, 5 Mees. & W. 475.

⁵ *Ripley v. M'Clure*, 4 Exch. 345.

⁶ *Hochster v. De la Tour*, 2 El. & Bl. 678.

⁷ *Hochster v. De la Tour*, 2 El. & Bl. 678.

⁸ *Hochster v. De la Tour*, 2 El. & Bl. 678.

⁹ *Hochster v. De la Tour*, 2 El. & Bl. 678.

¹⁰ *Frost v. Knight*, L. R. 7 Exch. 111.

The principle which is involved in these cases has been recognized and followed in the courts of the United States; and it is now held by the great weight of authority that renunciation of a contract by one party before the time fixed for performance gives an immediate right of action to the adversary party."

11 England. *Frost v. Knight*, L. R. 7 Exch. 111; *Hochster v. De la Tour*, 2 El. & Bl. 678; *The Danube & Black Sea Railway & Kustendjie Harbor Co. v. Xenos*, 11 C. B. (N.S.) 152.

United States. *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953 [affirming, 91 Fed. 345, 33 C. C. A. 550]; *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 531, L. R. A. 1917B, 590, 60 L. ed. 811; *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83, 8 C. C. A. 11; *Edward Hines Lumber Co. v. Alley*, 73 Fed. 603, 19 C. C. A. 599; *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208; *Colorado Yale Marble Co. v. Collins*, 230 Fed. 78; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1919A, 545; *Dixon v. Anderson*, 252 Fed. 694.

Arkansas. *Wendt v. Ismert-Hincke Milling Co.*, 107 Ark. 106, 154 S. W. 194.

California. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 834; *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

Connecticut. *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

Florida. *Hall v. Northern & Southern Co.*, 55 Fla. 235, 46 So. 178 (obiter).

Illinois. *Roebing's Sons Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Lake Shore Ry. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773.

Indiana. *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275.

Iowa. *McCormick v. Basal*, 46 Ia.

235; *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340, 78 N. W. 33; *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637 [citing, *Quar-ton v. Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N.S.) 1, 121 N. W. 1009, and *Pardoe v. Jones*, 161 Ia. 426, 143 N. W. 405].

Kansas. *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 537, L. R. A. 1917A, 1000, 153 Pac. 1120.

Kentucky. *Globe Fertilizer Co. v. Tennessee Phosphate Co. (Ky)*, 83 S. W. 1177.

Maryland. *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509.

Michigan. *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173.

Minnesota. *Alger-Fowler Co. v. Tracy*, 93 Minn. 432, 107 N. W. 1124.

New Jersey. *O'Neil v. Supreme Council*, 70 N. J. L. 419, 57 Atl. 463; *Holt v. United Security Life Ins. & Trust Co.*, 76 N. J. L. 535, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

New York. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Tanenbaum v. Federal Match Co.*, 189 N. Y. 75, 81 N. E. 565.

North Dakota. *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling on this point, *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938].

Pennsylvania. *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836.

Tennessee. *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N.S.) 60, 147 S. W. 1135 (obiter).

The supreme court of the United States seemed at one time to be opposed to the recognition of this doctrine, although it avoided direct refusal to recognize it.¹² In subsequent cases, however, the question could not be avoided, and the supreme court of the United States has recognized the existence of the doctrine.¹³ In most jurisdictions it is now regarded as a rule which is so thoroughly settled that discussion is unnecessary.¹⁴

This result is generally explained on the theory that while this can not be a case of actual breach by reason of non-performance, since the time for performance has not arrived, repudiation is a breach of the right of the adversary party to have the contract kept open as a subsisting and effective contract.¹⁵ It has been explained, on the other hand, as a case in which there is not a breach, but an entire repudiation of the contract.¹⁶ The distinction in the last case between breach and entire repudiation is not clear. Probably the two ideas are substantially the same, although in some cases renunciation in advance is called a breach while in other cases that term seems to be reserved for breach by non-per-

Vermont. *Cobb v. Hall*, 33 Vt. 233.

Virginia. *James v. Kibler*, 94 Va. 165, 26 S. E. 417; *Lee v. Mutual Reserve Fund Life Association*, 97 Va. 160, 33 S. E. 556 (obiter).

Washington. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494.

West Virginia. *James v. Adams*, 16 W. Va. 245; *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630; *Pancake v. Campbell*, 44 W. Va. 82, 28 S. E. 719; *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248; *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81.

Wisconsin. *Merrick v. Northwestern National Life Ins. Co.*, 124 Wis. 221, 102 N. W. 593.

See, *Repudiation of Contracts*, I, II, by Samuel Williston, 14 *Harvard Law Review*, 317, 421.

¹²*Smoot's Case*, 82 U. S. (15 Wall.) 36, 21 L. ed. 107; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984.

¹³*Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953 [affirming, 91 Fed. 345, 33 C. C. A. 550]; *Central Trust Co. v. Chicago Auditorium Association*, 240

U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

¹⁴"The rule is well settled that, if before time of performance one party to a contract absolutely repudiates it and unequivocally refuses to perform the same, the other party may treat such repudiation as a breach thereof and sue for damages." *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637.

¹⁵*Frost v. Knight*, L. R. 7 Exch. 111; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561.

¹⁶"The present action is not brought for a mere breach of the agreement. In strictness there can be no breach until the time for performance arrives. The action for a repudiation in toto, in advance of the time for performance, and is sustained upon grounds outlined in *Hochster v. De la Tour*, 2 El. & Bl. 678, 22 L. J. Q. B. (N.S.) 455, 17 Jur. 972, 6 *English Ruling Cases*, 576, the doctrine of which case was approved by our supreme court in *O'Neill v. Supreme Council*, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 A. & E. Ann. Cas. 422, and adopted by this

formance.¹⁷ In any event the party not in default may bring an action to recover damages for breach, and he is not confined to an action in quasi-contract on the theory that the contract is a nullity from the beginning.¹⁸

In case of renunciation in advance by the principal, action may be brought at once not merely against the principal but also against his surety or one who is liable upon a bond to secure the performance of such contract.¹⁹

§ 2886. Renunciation—Theory of suit in equity before performance is due. Whether on renunciation by the party in default the party who is not in default may have a decree of specific performance before the time fixed by the contract for performance is a question upon which there is some divergence of authority. It has been held that he may sue at once for specific performance and for such decree,¹ although such decree should not order performance on the part of either party before the time fixed therefor by the terms of the contract.² On the other hand, it has been held that such suit can not be brought until the time fixed by the contract for performance.³

court in the former decision of this case. *Holt v. United Security L. Ins. & T. Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118, 12 A. & E. Ann. Cas. 1105. As pointed out in the *O'Neill* case, when such repudiation occurs, the injured party may, if he desires, rescind the contract in toto, that is, put it at an end as if it had never been made. But, instead of doing this, he may treat the contract as ended merely for purposes of further performance, and hold the wrongdoer liable for the damages sustained by reason of the repudiation. Such is the aspect of the present case." *Holt v. United Security Life Insurance & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

¹⁷ See §§ 2926 et seq.

¹⁸ *Holt v. United Security Life Insurance & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

¹⁹ *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

¹ *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248.

"Counsel for appellant contend that the suit was prematurely brought; that specific performance could not be had until the time arrived for the complete execution of the contract by the making of a deed by the vendor; that the time for appellee to demand his deed had not arrived. We do not so understand the law. A party to a contract enforceable in equity may sue to establish his rights thereunder as soon as the other contracting party has repudiated it, notwithstanding the time for full performance may not have arrived." *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248.

² *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248.

³ *Crosby v. Georgia Realty Co.*, 138 Ga. 746, 76 S. E. 38 [assuming to distinguish, *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248].

§ 2887. Specific illustrations of principle of breach by renunciation—Contracts for personal services. The principle that renunciation before performance is due is such a breach that the party who is not in default may maintain an action thereon at once is applied in cases of contracts for personal services, or contracts to act as agent.¹ It has been applied to a contract by which A employs B to act as his agent in selling real property,² including a contract by which the agent was given the right to buy the property himself at his election.³ It has been applied to a case in which the principal repudiates a contract of sale made on his behalf by his broker and declares that he will not perform the contract and that he will not indemnify the broker against the liability to which the broker is exposed upon such contract of sale because of the fact that he has made it in his own name.⁴

§ 2888. Contracts to intermarry. The principle is also applied to a promise of marriage which is repudiated by one of the parties before the time which has been agreed upon for performance arrives; and the adversary party may bring an action to recover damages at once without waiting for the time fixed by the contract for performance.¹ If A and B have agreed to intermarry on the death of A's father, A's renunciation of such contract during the life of his father is such a breach that B may maintain an action at once without waiting for the death of A's father.² Where A and B agree to intermarry upon the death of A's divorced wife, A's mar-

¹ California. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884.

Minnesota. *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

New York. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

Washington. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494.

West Virginia. *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81.

² *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494.

³ *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81.

⁴ *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

¹ England. *Frost v. Knight*, L. R. 7 Exch. 111.

Georgia. *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197.

Iowa. *Holloway v. Griffith*, 32 Ia. 409, 7 Am. Rep. 208.

Maryland. *Lewis v. Capman*, 90 Md. 294, 47 L. R. A. 385, 45 Atl. 459.

Missouri. *Trammel v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, 51 L. R. A. 854, 59 S. W. 79.

New York. *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516.

Washington. *Johnson v. Blomdahl*, 90 Wash. 625, 156 Pac. 561.

West Virginia. *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

² *Frost v. Knight*, L. R. 7 Exch. 111.

riage to another woman while his divorced wife is still living is such a breach that B could maintain action at once without waiting for the death of A's divorced wife.³

Cases of these two classes are analogous to the cases in which the English courts first recognized the doctrine of breach by renunciation in advance.⁴ In these cases there is a personal relation between the parties to the contract, stronger in the case of those who have agreed to intermarry and weaker in the case of those who have entered into a contract of employment or agency, which gives an interest in each case in having the existence of the contract recognized by both of the parties thereto from the time that the contract is made to the time at which it is to be performed.

§ 2889. Contracts for sale of personalty. The doctrine of breach by renunciation in advance is not, however, limited to cases of these sorts, but it is applied generally to all classes of contracts¹ without regard to their subject-matter, except that contracts involving the payment of money only and probably also involving full performance on the part of the party who is not in default have been put in a special class by some authorities.²

³Brown v. Odill, 104 Tenn. 250, 78 Am. St. Rep. 914, 56 S. W. 840.

⁴See § 2885.

¹United States. Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953; Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; Colorado Yule Marble Co. v. Collins, 230 Fed. 78; In re Mullings Clothing Co., 238 Fed. 58, L. R. A. 1918A, 545; Dixon v. Anderson, 252 Fed. 694.

Arkansas. Wendt v. Ismert-Hincke Milling Co., 107 Ark. 106, 154 S. W. 194.

Connecticut. Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566.

Florida. Hall v. Northern & Southern Co., 55 Fla. 235, 46 So. 178 (obiter).

Georgia. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112, 59 L. R. A. 122, 42 S. E. 378.

Illinois. Roebbling's Sons Co. v. Lock-

Stitch Fence Co., 130 Ill. 600, 22 N. E. 518.

Iowa. Sprague v. Iowa Mercantile Co., — Ia. —, 172 N. W. 637.

Kansas. Kansas Flour Mills Co. v. Brandt, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

Kentucky. Globe Fertilizer Co. v. Tennessee Phosphate Co. (Ky.), 85 S. W. 1177.

New Jersey. Holt v. United Security Life Ins. Co., 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118.

New York. Tanenbaum v. Federal Match Co., 189 N. Y. 75, 81 N. E. 565.

North Dakota. Hart-Parr Co. v. Finley, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling on this point, Stanford v. McGill, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 939].

Pennsylvania. Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536, 17 Am. St. Rep. 788, 18 Atl. 1058.

²See § 2891.

The principle that renunciation in advance of performance gives an immediate right of action to recover damages has been applied to contracts for the sale of personal property,³ such as a contract to sell wheat,⁴ flour,⁵ hops,⁶ rock,⁷ machinery,⁸ merchandise,⁹ and stock.¹⁰

§ 2890. Other contracts. While at one time this principle was rarely applied except in contracts for personal services, promises of marriage, and contracts for the sale of personalty, the courts have not confined the application of this principle to these classes of contracts; and indeed no reason appears, or principle, why cases of these classes should be distinguished, for this purpose, from other classes of contracts. No such distinction is made except as to contracts for the payment of money only;¹ and in other classes of contracts the doctrine of breach by renunciation in advance is generally recognized.² The principle has been applied to

³ **United States.** *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953.

Arkansas. *Wendt v. Ismert-Hincke Milling Co.*, 107 Ark. 106, 154 S. W. 194.

Georgia. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 94 Am. St. Rep. 112, 59 L. R. A. 122, 42 S. E. 378.

Illinois. *Roebeling's Sons Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518.

Iowa. *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637.

Kansas. *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

Kentucky. *Globe Fertilizer Co. v. Tennessee Phosphate Co. (Ky.)*, 85 S. W. 1177.

North Dakota. *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling, on this point, *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938].

Pennsylvania. *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, 18 Atl. 1058.

⁴ **Kansas Flour Mills Co. v. Brandt**, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

⁵ *Wendt v. Ismert-Hincke Milling Co.*, 107 Ark. 106, 154 S. W. 194.

⁶ *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953 [affirming, 91 Fed. 345, 33 C. C. A. 550].

⁷ *Globe Fertilizer Co. v. Tennessee Phosphate Co. (Ky.)*, 85 S. W. 1177.

⁸ *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling, on this point, *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938].

⁹ *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637.

¹⁰ *Northrop v. Deposit Co.*, 119 Fed. 969.

¹ See § 2981.

² **United States.** *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; *Colorado Yule Marble Co. v. Collins*, 230 Fed. 78; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 545; *Dixon v. Anderson*, 252 Fed. 694.

California. *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

Connecticut. *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

contracts which involve work and labor but which are not, properly speaking, contracts for personal services,³ such as a contract to furnish livery and baggage service at a hotel and to pay a certain compensation for such privilege in consideration of a monopoly of such business at such hotel,⁴ and to contracts for the reduction of garbage.⁵ The principle has been applied to contracts for the sale of realty,⁶ as where the vendor declares that he will be unable to construct the improvements on the realty, which, by the contract, are to be completed when the last instalment of the purchase price is due;⁷ and such renunciation may entitle the adversary party to a cancellation of the contract in equity.⁸ A contract whereby A agrees to hold certain property for life, with remainder in trust to B, is broken during A's lifetime by renunciation of B's contract so that B can maintain an action thereon at once.⁹ A repudiation of liability under a lease may give to the party who is not in default the right to bring an action at once and to recover damages on the theory of a total breach, although by the terms of the lease performance is to continue for a considerable period of time.¹⁰

The principle is also applied to a renunciation of a building contract,¹¹ or a contract to furnish insurance at a certain rate,¹² or to a contract to lend money.¹³

Florida. *Hall v. Northern & Southern Co.*, 55 Fla. 235, 46 So. 178 (obiter).

New Jersey. *Holt v. United Security Life Ins. Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118.

New York. *Tanenbaum v. Federal Match Co.*, 189 N. Y. 75, 81 N. E. 565.

On the other hand, the doctrine of renunciation in advance is said to be limited to contracts to intermarry, contracts of employment and contracts for the sale of goods. *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, — N. E. —.

³ *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

⁴ *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

⁵ *Bridgeport v. Aetna Indemnity Co.*, 91 Conn. 197, 99 Atl. 566.

⁶ *Dixon v. Anderson*, 252 Fed. 694; *Hall v. Northern & Southern Co.*, 55 Fla. 235, 46 So. 178 (obiter).

⁷ *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

⁸ *Contract for the sale of land. Hologreen v. Piets*, 50 Minn. 27, 52 N. W. 266.

See ch. XC.

⁹ *Schmitt v. Schnell*, 14 Ohio C. C. 153, 7 Ohio C. D. 657 [distinguishing, *Maud v. Maud*, 33 O. S. 147].

¹⁰ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539; *McGraw v. Union Trust Co.*, 135 Mich. 609, 98 N. W. 390; *Kalkoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *People v. St. Nicholas Bank*, 151 N. Y. 592, 45 N. E. 1129.

¹¹ *Colorado Yule Marble Co. v. Collins*, 230 Fed. 78.

¹² *Tanenbaum v. Federal Match Co.*, 189 N. Y. 75, 81 N. E. 565.

¹³ *Holt v. United Security Life Insurance Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118.

If an insurance company repudiates liability on an insurance policy before loss, the insured or the beneficiary may treat the policy as discharged and may recover the premiums, which have been paid thereon,¹⁴ or he may bring a suit in equity to have the right under the policy declared in advance,¹⁵ or he may treat the policy as still in effect and when the loss occurs the beneficiaries may recover the value of the policy less unpaid premiums;¹⁶ whether the beneficiary can bring an action upon the implied promise of the insurance company to accept the premiums and to treat the policy as in effect is a question on which there is a division of authority.¹⁷ If this remedy were granted, the insurance company would be obliged to repay the premiums or the value of the policy, and the policy would apparently be left in force, or at least the insurance company would be obliged to pay the value of the policy before the loss had occurred.¹⁸

§ 2891. Renunciation in advance of obligation for the payment of money only. A contract which has been performed in full on one side, and in which the executory covenant on the other is one for the payment of money only at a future time, is usually said not to be within the doctrine of renunciation. If the debtor repudiates his liability under the contract and declares that he will not pay the debt, the creditor is held to have no right of action before the time fixed by the contract for such payment. While there is little direct adjudication on this point, courts which have treated renun-

¹⁴ See ch. LXXXVIII.

¹⁵ *Day v. Connecticut General Life Ins. Co.*, 45 Conn. 480, 20 Am. Rep. 693 (obiter); *Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Hayner v. American Popular Life Ins. Co.*, 69 N. Y. 435.

See ch. LXXXVIII.

¹⁶ See § 2883.

¹⁷ On renunciation by the insurer, it is said that a right of action to recover damages accrues immediately. *O'Neill v. Supreme Council*, 70 N. J. L. 410, 57 Atl. 463; *Merrick v. Northwestern National Life Ins. Co.*, 124 Wis. 221, 102 N. W. 593.

See also, *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059 (obiter).

In other cases, it is said that no right of action to recover damages accrues till the death of the insured. *Day v. Connecticut General Life Ins. Co.*, 45 Conn. 480, 20 Am. Rep. 693;

Porter v. Supreme Council, 183 Mass. 326, 67 N. E. 238; *Langan v. Supreme Council*, 174 N. Y. 266, 66 N. E. 932; *Kelly v. Security Mutual Life Ins. Co.*, 186 N. Y. 16, — N. E. —.

This rule might be expected in Massachusetts where the doctrine of anticipatory breach is not recognized. See § 2892. It is also the rule in New York, where anticipatory breach is given some recognition (see § 2885), and where in case of the insolvency of the insurance company, *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, or of its withdrawal from business, *People v. Empire Mutual Life Ins. Co.*, 92 N. Y. 105, a right of action to recover the value of the policy was held to rise immediately.

See §§ 2937 et seq.

¹⁸ *Day v. Connecticut General Life Ins. Co.*, 45 Conn. 480, 20 Am. Rep. 693.

ciation before performance is due, as giving the party not in default a right to treat such renunciation as an immediate breach, and to sue for damages at once, have been careful to indicate that this rule does not apply to money contracts pure and simple, or at least to bonds and negotiable instruments.¹ Courts which have refused to recognize the doctrine of breach by anticipation have often placed their refusal on the ground that if such rule was to be recognized at all it must be applied to negotiable instruments, a result which it was assumed would be absurd.² This principle has been applied to bonds issued by a county. It has been held that the act of the county in renouncing liability on such bonds does not accelerate the maturity thereof, and that only the amount which is due by the terms of the bonds can be recovered.³

It is possible to justify the distinction between ordinary contracts and contracts for the payment of money only in case of

¹ "In the case of an ordinary money contract, such as a promissory note or bond, the consideration has passed; there are no mutual obligations, and cases of that sort do not fall within the reason of the rule. * * * We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods." *Roehm v. Horst*, 178 U. S. 1, 17, 18, 44 L. ed. 953.

To the same effect, see obiter in *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561.

² *Greenway v. Gaither*, Taney (U. S. C. C.), 227; *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384.

³ *Washington County v. Williams*, 111 Fed. 801.

"It has never been held, so far as we have been able to discover, that the holder of a promissory note, or other written agreement to pay a sum of money at a designated time, can maintain an action thereon, in advance of its maturity, because the maker thereof has announced his intention not to pay it. Now, the obligations in suit can be regarded in no other light than a contract on the part of the county

to pay a given sum of money annually until such time as the amount of its donation to the railroad company, and accrued interest thereon, was fully discharged. It was not stipulated in the agreement evidenced by the obligations that a failure to pay one of the annual instalments should render the entire amount of the obligation immediately payable, nor can it be successfully claimed that the notice given by the county that it would make no further payments had that effect. If the plaintiff's view is maintained, that the refusal of the county to pay rendered the entire debt immediately payable, and the obligations are enforced accordingly, the county would be compelled to do that which it never promised to do. Such conduct on the part of the county merely rendered it amenable to an action for such part of the indebtedness as was then due according to the terms of the donation. It results from this view that the trial court erred in the law case in rendering a judgment for the full amount of the five obligations, and the accrued interest, which were sued upon in that case. The recovery should have been limited to such annual instalments as were then due." *Washington County v. Williams*, 111 Fed. 801.

bonds, especially if the bonds are under seal. A sealed contract could not be discharged, at common law, by a subsequent oral agreement between the parties;⁴ and if the maturity of the obligation could not be accelerated by the express agreement of the parties, it would seem that it should not be accelerated by the repudiation of liability on the contract by the obligor. Bonds of a public corporation are furthermore issued, as a rule, under specific statutory authority which indicates the way in which such liability may be incurred,⁵ and often the time for which the obligation is to run, and which frequently provides for raising funds annually by taxation to retire the portion of such obligation which falls due in that year.⁶ For these reasons it might well be held that the informal act of the officials of such public corporation ought not to be allowed to accelerate the maturity of its obligations so as to impose a liability different from that which was authorized by the legislature.

To a less degree, justification may be found for the obiter which lays down the rule that the negotiable instrument is an exception to the general principle of renunciation in advance. The negotiable instrument is one which from its nature must be in writing.⁷ For many purposes the written negotiable instrument is the contract between the parties and not merely the evidence thereof.⁸

The rule that a covenant for the payment of money only, at least if the adversary party has performed the covenants on his part, is an exception to the principle of renunciation in advance, is not, however, limited to negotiable instruments; but it has been applied to similar covenants in non-negotiable contracts.⁹ In a contract by which A agreed to sell a certain realty to B, and B agreed to pay therefor in instalments, it has been held that on renunciation by B before performance on his part was due, A could not maintain an action on the contract.¹⁰ The fact that an insurance company goes out of business is held not to accelerate the maturity of its obligations to its agents to pay them commissions out of subsequent renewals.¹¹ It seems to be assumed that renunciation of a policy of life insurance does not give a right of action

⁴ See §§ 1172 and 2473.

⁵ See §§ 1903 et seq. and 1912 et seq.

⁶ See § 1909.

⁷ See §§ 2305 et seq.

⁸ See § 2312.

⁹ *Greenway v. Gaither, Taney* (U. S. C. C.) 227, Fed. Cas. No. 5788; *Moore v. Security Trust & Life Ins. Co.*, 168 Fed. 496.

¹⁰ *Greenway v. Gaither, Taney* (U. S. C. C.) 227, Fed. Cas. No. 5788.

¹¹ *Moore v. Security Trust & Life Ins. Co.*, 168 Fed. 496.

"But this rule is inapplicable to, and it does not govern, actions upon bonds, notes, and upon other contracts to pay money at times specified, where the party of one part has completely exe-

on the policy before loss occurs.¹² The holder may bring an action to recover the premiums which have been paid in;¹³ or he may sue in equity to have the policy declared to be a valid obligation;¹⁴ or he may wait till loss occurs and recover the amount of the policy, less the amount of the premiums which fell due after such renunciation, and which were not paid.¹⁵ The difficulties in determining the amount to be discounted from the face of the policy for immediate payment, and in determining in advance the amount of premiums to be paid during the time that the policy will remain in force, have made the courts regard this result as necessary from a practical point of view, whatever may be thought of its harmony with the general principles of renunciation in advance. The only alternative would be to resort to tables of mortality for the purpose of ascertaining the expectancy of life of the insured. Similar difficulties in determining the amount to be recovered on renunciation of contracts for personal services in advance do not seem to have suggested themselves.¹⁶

The reason for treating a contract to pay money as an exception to the general rule that renunciation gives right of action at once, has been said to be the fact that the value of money does not fluctuate.¹⁷

cuted the contract and it is executory only upon the part of the other party. No action for damages lies before the time of payment arrives against one who disables himself from paying, or gives notice that he will not pay, his obligations under contracts of this kind. *Roehm v. Horst*, 178 U. S. 1, 17, 18, 20 Sup. Ct. 780, 44 L. ed. 953; *Nichols v. Steel Company*, 137 N. Y. 471, 487, 33 N. E. 561; *Washington County v. Williams*, 111 Fed. 801, 810, 49 C. C. A. 621, 630. The claim to recover for the breach of the agreement to pay the commissions on the renewal premiums due after the termination of the agency contract is founded on an agreement of the latter class. The plaintiffs have performed their part of the contract of agency, they have completely earned the commissions, the contract is completely executed on their part, nothing remains executory but the agreement of the defendant to pay the commissions when the renewal premiums are collected, and those premiums had not become due or been

collected, and the time had not arrived when the commissions were due when this action was brought. The defendant's creation of its disability to collect the premiums and to pay the commission did not make the latter due earlier, and it created no cause of action for their present worth, and this action was prematurely brought." *Moore v. Security Trust & Life Ins. Co.*, 168 Fed. 496.

¹² See § 2890.

¹³ See ch. LXXXVIII.

¹⁴ See § 2890.

¹⁵ See § 2883.

¹⁶ See § 2887.

¹⁷ *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

"The reason why a contract to pay money at a definite time in the future is an exception to the rule is that money is not a commodity which is sold and bought in the market and the market value of which fluctuates, as is the case with grain, stocks, and other similar articles." *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124

The rule that a covenant to pay money is an exception to the ordinary principle of renunciation in advance does not seem to apply to a contract which is purely executory on each side.¹⁸ If A has agreed to lend money to B upon the happening of a certain event, and before the happening of such event A declares that he will not perform, B may maintain an action for damages without waiting for the happening of such event.¹⁹

If a contract contains a provision by which one of the parties agrees to give a negotiable instrument payable at the end of a specified period of time, as a means of securing the contract price, an action may be brought to recover the contract price upon the refusal of such party to execute and deliver such negotiable instrument.²⁰ A contract of sale provided for delivery in instalments, the vendee to give his notes, payable at a future day, as each instalment was delivered. Before the contract was completely performed the vendee refused to give his notes. The vendor was allowed to bring an action at once before the expiration of the time fixed for the credit, and the vendee can not then insist on such term of credit.²¹ If the action is not brought, however, until after the time at which the note is to be given, by the terms of the original contract, this is not a case of the application of the principle of renunciation in advance. It is rather a case of refusal to perform, or renunciation when performance is due.²²

§ 2892. Renunciation—Theory of no right of action before performance is due. In a few jurisdictions it is said that renunciation before performance is due does not amount to breach, but that if such renunciation is not withdrawn when performance is due breach exists.¹ The doctrine of breach by renunciation before per-

¹⁸ *Holt v. United Security Life Ins. Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118.

See, however, *Greenway v. Gaither, Taney* (U. S. C. C.) 227, Fed. Cas. No. 5783.

¹⁹ *Holt v. United Security Life Ins. Co.*, 74 N. J. L. 795, 11 L. R. A. (N.S.) 100, 67 Atl. 118.

²⁰ *American Mfg. Co. v. Klarquist*, 47 Minn. 344, 50 N. W. 243; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561.

²¹ *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561.

²² See §§ 2908 et seq.

¹ *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Porter v. Supreme Council*, 183 Mass. 326, 67 N. E. 238; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830 (obiter); *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.), 388, 98 N. W. 872.

This view was at one time entertained in North Dakota. *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938. This case has been overruled, however, and the majority view has been adopted. *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E. 851, 153 N. W. 137.

formance is due, as applying to contracts for the sale of personalty,² or for the sale of realty,³ is repudiated in some jurisdictions. In some cases in which the courts do not seem to deny the general principle that renunciation before performance is due gives a right of action at once, this principle is not applied to facts which in most jurisdictions would be regarded as involving the application of such principle.⁴ A contract by which one agrees to adopt another and make him his heir has been held not to be broken during the promisor's lifetime, by his declaration that he does not intend to carry the contract out, as he may yet conclude to do so.⁵ If A and B have entered into a contract by which B is to act as an architect for a certain compensation, A's refusal to permit B to perform has been held not to be, in itself, a breach of such con-

² *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757.

³ *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830.

⁴ *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731; *Pittman v. Pittman*, 110 Ky. 306, 61 S. W. 461.

See also, *Maud v. Maud*, 33 O. S. 147, in which repudiation by A in his lifetime contract by which certain realty, the consideration for which was furnished by A, B and C, was to belong to A for life and to be divided between B and C on A's death, was held not to give to B a right to sue in equity or to recover compensation before A's death.

⁵ *Pittman v. Pittman*, 110 Ky. 306, 61 S. W. 461.

"Does the fact that the appellee fraudulently represented that he would make the appellant his heir at law, and thus allow him to inherit with his other children his estate, and his declaration now that he does not intend to carry out that contract, precipitate a cause of action? We think not. The appellee might conclude to carry out the contract by making it possible, by will or otherwise, that the appellant should take a share of his estate. If

he should do that, then appellant certainly would have no cause of action against his estate for the alleged services or for specific performance. His estate might be large or small at his death, no one at this time being able to tell when he might die or what he might possess at his death. He did not agree that his estate would be of a certain value. The appellee has during his life the right to carry out his contract with the appellant. If he elects not to do so, then, of course, the appellant would have to proceed to recover from his estate the value of the services which he had performed, if he is not entitled to a specific performance of the contract; but we do not decide what will be his rights, if any he may have, at the death of the appellee. This right existing in appellee, to elect what course he will pursue with reference to the promise which he made to appellant, prevents a cause of action from arising in favor of appellant before the death of the appellee. Therefore, if the appellant can at any time maintain an action on the alleged contract, the time has not arrived for doing so." *Pittman v. Pittman*, 110 Ky. 306, 61 S. W. 461.

tract; and accordingly a complaint which alleges such contract and such renunciation, but which does not in terms allege non-payment, does not state a cause of action.⁶

§ 2893. Renunciation—Right of election of party not in default. In jurisdictions where renunciation before performance is due is held to be ground for treating the contract as discharged, and for bringing an action thereon at once, it amounts to breach and discharge only if the adversary party elects to treat it so.¹ The adversary party has the election between treating such renunciation as a breach or disregarding it as inoperative and waiting until the time fixed by the contract for performance, in order to give the party who has renounced the contract an opportunity to comply with its terms and perform according to his agreement.² A had agreed to sell to B from three hundred tons to five hundred tons at B's option, and A, on delivering three hundred tons ordered by B, notified B that he would deliver no more. It was held that B could ignore such notice, demand two hundred tons more and sue A for non-delivery.³

⁶ *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731.

See, also, *Maud v. Maud*, 33 O. S. 147, in which, however, the manner in which the contract was renounced and the form of the renunciation are not stated; and in which possibly the only refusal was a refusal to do more than was required by the terms of the contract."

¹ *Connecticut. Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

District of Columbia. Landvoigt v. Paul, 27 D. C. App. 423.

Georgia. Smith v. Georgia Loan, Savings & Banking Co., 113 Ga. 975, 39 S. E. 410.

Maryland. Dambmann v. Lorentz, 70 Md. 380, 17 Atl. 389 [sub nomine, *Dambmann v. Rittler*, 14 Am. St. Rep. 364].

Minnesota. Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

New York. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701; *Ga. Nun v. Palmer*, 202

N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99.

West Virginia. Swiger v. Hayman, 56 W. Va. 123, 107 Am. St. Rep. 899, 48 S. E. 839.

² *Connecticut. Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

District of Columbia. Landvoigt v. Paul, 27 D. C. App. 423.

Georgia. Smith v. Georgia Loan, Savings & Banking Co., 113 Ga. 975, 39 S. E. 410.

Maryland. Dambmann v. Lorentz, 70 Md. 380, 17 Atl. 389 [sub nomine, *Dambmann v. Rittler*, 14 Am. St. Rep. 364].

Minnesota. Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

New York. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

West Virginia. Swiger v. Hayman, 56 W. Va. 123, 107 Am. St. Rep. 899, 48 S. E. 839.

³ *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389 [sub nomine, *Dambmann v. Rittler*, 14 Am. St. Rep. 364].

§ 2894. When election to treat renunciation as breach must be made. Some courts hold that this election to treat such renunciation as a breach must be made promptly if at all,¹ or at least in a reasonable time.² On the other hand, the party not in default has been allowed to accept a renunciation as a breach after a delay of four months.³ At any rate, delay for a time agreed upon by the adversary party to decide whether he will accept a new contract is not a modification or waiver of rights under the old.⁴

§ 2895. What amounts to election to treat renunciation as breach. In order to elect to treat the contract as discharged by renunciation in advance, the party who is not in default must indicate his intention to accept such renunciation as a discharge by some outward act or by some statement which manifests such intention; but if the intention is thus manifested, no particular form of making such election is necessary.¹ Formal surrender of a written

¹ Kilgore v. Society, 90 Tex. 139, 37 S. W. 598.

² Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

³ Louisville Packing Co. v. Crain, 141 Ky. 379, 132 S. W. 575. (In this case, however, no objection was made to such delay; and the party who was in default insisted upon having the breach treated as of the date of the acceptance of the renunciation, rather than as of the date of the renunciation, since the damages would be less if they were regarded as of the later date.)

⁴ Goodsell v. Telegraph Co., 130 N. Y. 430, 29 N. E. 969.

¹ England. Frost v. Knight, L. R. 7 Exch. 111; Hochster v. De La Tour, 2 El. & Bl. 678; The Danube & Black Sea Railway & Kustendjie Harbour Co. v. Xenos, 11 C. B. (N.S.) 152.

United States. Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953 [affirming, 91 Fed. 345, 33 C. C. A. 550]; Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 83, 8 C. C. A. 14; Edward Hines Lumber Co. v. Alley, 73 Fed. 603, 19 C. C. A.

599; Marks v. Van Eeghen, 85 Fed. 853, 30 C. C. A. 208; Colorado Yule Marble Co. v. Collins, 230 Fed. 78; In re Mullings Clothing Co., 238 Fed. 58, L. R. A. 1918A, 545; Dixon v. Anderson, 252 Fed. 694.

Arkansas. Wendt v. Ismert-Hincke Milling Co., 107 Ark. 106, 154 S. W. 194.

California. Alderson v. Houston, 154 Cal. 1, 96 Pac. 884.

Connecticut. Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566.

Florida. Hall v. Northern & Southern Co., 55 Fla. 235, 46 So. 178.

Illinois. Roebling's Sons Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Lake Shore & Michigan Southern Ry. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773.

Indiana. Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275.

Iowa. McCormick v. Basal, 46 Ia. 235; Sprague v. Iowa Mercantile Co., — Ia. —, 172 N. W. 637 [citing, Querton v. Law Book Co., 143 Ia. 517, 32 L. R. A. (N.S.) 1, 121 N. W. 1009, and Pardoe v. Jones, 161 Ia. 426, 143 N. W. 405].

contract is unnecessary.² The fact that the party who is not in default and who gives notice of his election to treat a renunciation or refusal to perform as breach, continues performance so as to avoid interrupting the work and in order to injure the adversary party as little as possible, does not show that he has withdrawn his election to treat the contract as discharged.³

§ 2896. Effect of election to treat contract as in force—General principles. If the party who is not in default elects to treat the contract as still in force in spite of the renunciation by the adversary party, he may do so as long as such conduct on his part does not aggravate damages;¹ but if he does so, he keeps the contract in force for the benefit of both of the parties thereto, and not merely for his own benefit. Accordingly, the party who renounced such contract may take advantage of any subsequent facts which would have operated as a discharge if he had not renounced liability thereunder.² If by its terms a contract is to end upon the happening of a certain event, the party who has renounced the

Kansas. *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

Kentucky. *Globe Fertilizer Co. v. Tennessee Phosphate Co. (Ky.)*, 85 S. W. 1177.

Maryland. *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509.

Michigan. *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173.

Minnesota. *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

New Jersey. *O'Neil v. Supreme Council*, 70 N. J. L. 410, 57 Atl. 463; *Holt v. United Security Life Ins. & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

New York. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Tanenbaum v. Federal Match Co.*, 189 N. Y. 75, 81 N. E. 565.

North Dakota. *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137 [overruling, on this

point, *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938].

Pennsylvania. *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836.

Tennessee. *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N.S.) 60, 147 S. W. 1135.

Vermont. *Cobb v. Hall*, 33 Vt. 233.

Washington. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 491.

West Virginia. *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630; *Pancake v. Campbell*, 44 W. Va. 82, 28 S. E. 719; *Catlett v. Bloyd*, — W. Va. —, 99 S. E. 81.

The elements of an election to treat renunciation as a breach and the sufficiency of bringing an action after making such election, were discussed in *Landes v. Klopstock*, 252 Fed. 89.

² *South Boulder & Rock Creek Ditch Co. v. Marfell*, 15 Colo. 302, 25 Pac. 504.

³ *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

¹ See § 2898.

² *England. Avery v. Bowden*, 5 El. & Bl. 714.

contract before such event has happened may take advantage of the happening of such event if the adversary party elects to treat the contract as in effect.³ If the party who is not in default elects to treat the contract as in force, and such contract becomes impossible of performance after such renunciation but before the time fixed for performance,⁴ as by reason of the outbreak of war which makes performance impossible,⁵ such facts operate as a discharge; and the party who is not in default can not recur to the original breach and elect to treat the contract as discharged by such breach. If the vendor of realty refuses to treat the renunciation by the purchaser as a discharge, he must then be able to show his readiness and willingness to convey on performance by the purchaser, in order to enable him to retain earnest money which was paid by the purchaser to be applied on the purchase price.⁶ If the seller of goods refuses to treat renunciation by the purchaser as breach, it has been said that the seller must then tender the full amount of such goods, and if he tenders a less amount he is liable himself for such breach.⁷ A, the owner of an opera-house, had a contract with B, a manager of a theatrical company, by which A was to furnish his opera-house and B was to take a certain percentage of the receipts. B subsequently submitted to A a new "contract," giving B a larger percentage of the receipts, B stating that he could not think of playing for less. A returned the new "contract" unaccepted, claiming to have a contract with B. A was thereupon bound to furnish the opera-house in accordance with the original contract.⁸ If A, the lessor of an opera-house, agrees with B that B shall manage it for a certain sum per week and for a certain share of the profits, and if B is to pay a certain part of the rent, B's refusal to accept A's renunciation as a discharge makes it incumbent upon B to tender the part of the rent which he is bound to pay in order to keep the contract alive.⁹

Pennsylvania. *Maguire v. Johnston*, 207 Pa. St. 592, 57 Atl. 64.

Tennessee. *Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. W. 760.

Texas. *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L. R. A. 302, 79 S. W. 1069.

Wisconsin. *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

³ *Maguire v. Johnston*, 207 Pa. St. 592, 57 Atl. 64.

⁴ *Avery v. Bowden*, 5 El. & Bl. 714.

⁵ *Avery v. Bowden*, 5 El. & Bl. 714.

⁶ *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

⁷ *Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. E. 760.

⁸ *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255.

⁹ *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L. R. A. 302, 79 S. W. 1069.

While the time at which damages are to be fixed is to be determined by the contract and not by the renunciation thereof, as a general rule,¹⁰ it has been held that where renunciation is not accepted as a breach for a considerable time, the party in default may take advantage of any facts which have occurred after his renunciation, before the acceptance thereof, to lessen the amount of damages.¹¹

The party who is not in default is not bound to accept a renunciation as a discharge of the contract or as a breach for the purpose of accelerating the period of limitations.¹² If he does not elect to treat such renunciation as a breach, the period of limitations will not run until the time which is fixed for performance by the terms of the contract has arrived.¹³

§ 2897. Effect of election to treat contract as in force as to right to maintain action. By electing to treat the contract as in effect, the party not in default loses his right to maintain an action for such breach before the time fixed by the contract has arrived,¹ at

¹⁰ See ch LXXXVII.

¹¹ *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575.

¹² *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99.

¹³ *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99.

¹ *Landes v. Klopstock*, 252 Fed. 89.

"Upon receipt of the defendant's letter the plaintiffs need have done nothing; they could have waited until June 15th and sued the defendant under any of the remedies open to a seller, or they might themselves have declared the contract at an end, save for their right to sue at once under the doctrine of anticipatory breach. It is perfectly clear that they did not mean to declare the contract at an end. Three times in their letters they speak of the defendant's duty under the contract to give the notice, and they leave no ground for doubt that they intended to hold the defendant to his performance according to the contract as they understood it.

"We need not consider whether, hav-

ing taken that attitude towards the contract, the plaintiffs were excused from further performance if the defendant's obligation had been conditional. The English rule is that the promisee, if he means to ignore the repudiation, must still perform, quite as though the promisor had not repudiated. The language of Lord Cockburn in *Frost v. Knight*, L. R. 7 Ex. 111, 112, has been accepted generally, and in *Dalrymple v. Scott*, 19 Ontario Appeals, 477, it was the basis of the decision. True, it is difficult to see how these cases can be reconciled with the well-settled rule in this country that, when the promisor repudiates, the promisee not only need not perform, but, if he chooses to perform, does so on his own account. *Clark v. Margisligia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Dillon v. Anderson*, 43 N. Y. 231; *Danforth v. Walker*, 40 Vt. 257; *Moline Scale Co. v. Beed*, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Gibbons v. Bente*, 51 Minn. 490, 53 N.

least if the party who has renounced the contract does not persist in such renunciation. If the party who is not in default refuses to accept a renunciation as a breach, he can not subsequently alter his position and treat such renunciation as a breach, so as to recover damages therefor as a counterclaim in an action upon a different contract which was brought by the party in default on the contract in question after his renunciation and before the party who was not in default refused to accept it as breach.² The party who is not in default may, however, at any time before the party who has renounced the contract withdraws his renunciation, elect to treat it as a breach, even if he has at first refused to consider it as a breach, and has demanded performance.³

W. 756, 22 L. R. A. 80; *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783. In the case at bar we have not that question, because the plaintiffs had no conditions precedent to perform; they were required to do nothing until the day of payment arrived. We may therefore assume that the American rule obtains.

"They chose, on the other hand, to take positive action, and in that they erred, for only two courses were open to them, and they attempted an intermediate. They might have declared the contract at an end and sued at once. We pass the question whether any other declaration is necessary beyond the bringing of an action; we do not hold that there must be a prior acceptance of the rescission, so called. They did not accept the repudiation in any way; on the contrary, they refused to recognize it, quite as clearly as though they had said, 'We decline to recognize your right to repudiate.' Having so ignored it, as was their right, they added a condition, not authorized by the contract, upon which their own continued performance was to depend. This they had no right to do. *Rubber, etc., Co. v. Manhattan, etc., Co.*, 221 N. Y. 120, 116 N. E. 789. It is true that they supposed they

were acting under the contract, and the case is a hard one, but no harder than any other in which a party acts upon an interpretation of a contract, with which the courts do not agree. That is a hazard all must run.

"It is suggested that, as the plaintiffs had the right to declare an immediate breach, they might accord the defendant the right to retract, and that their letters should be taken as equivalent to a declaration that, if the defendant persisted in his repudiation until June 5th, they would accept the repudiation. They might have done this; but they did not. The question is whether we may regard their insistence upon the contract, which they misunderstood, as in effect a declaration that it was at an end. While we have avoided deciding whether such a declaration is necessary in order to sue upon a repudiation, either before or after the stipulated time of performance, we do hold that, if the promisee insists upon performance, he waives the right so to sue upon the repudiation, certainly if he does not himself retract in season." *Landes v. Klopstock*, 252 Fed. 89.

² *Zuck v. McClure*, 98 Pa. St. 541.

³ *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981.

§ 2898. Election to treat contract as in force as affecting damages—Theory that damages can not be increased. The right of election on the part of the party who is not in default to treat the contract as in force, exists, in many jurisdictions, only so far as it is consistent with the rule that the party not in default must do nothing after default to increase damages.¹ After notice of renunciation the party who is not in default can not proceed with performance on his part if such conduct will aggravate the damages; and if he does proceed with the performance of such contract under such circumstances, he can not recover the contract price, but he is restricted to the amount of damages which he sustained by reason of the breach without reference to his subsequent performance.² For the purpose of determining the amount of loss which he has sustained, the contract is regarded as broken at the time of the renunciation,³ although the rule for fixing the measure of such damages is not altered by such renunciation. Where A agreed with B to erect a creamery,⁴ or a cheese and butter factory,⁵ and before A has done any work B renounces the contract, A can not proceed to construct the factory and then recover the entire contract price from B.

¹ See ch. LXXXVIII.

² **Maine.** Listman Mill Co v. Dufresne, 111 Me. 104, 88 Atl. 354.

Massachusetts. Haynes v Nye, 185 Mass. 507, 70 N. E. 932.

Michigan. International Text Book Co. v. Jones, 166 Mich. 46, 131 N. W. 98.

Minnesota. Gibbons v Bente, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

Nebraska. Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Co., 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293 (obiter).

North Dakota. Davis v. Bronson, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

Utah. Thomas v. Clayton Piano Co., 47 Utah 91, 151 Pac. 543.

Wisconsin. Badger State Lumber Co. v. G. W. Jones Lumber Co., 140 Wis. 73, 121 N. W. 933; Richards v. Manitowoc Traction Co., 140 Wis. 85, 133 Am. St. Rep. 1063, 121 N. W. 937.

³ **Maine.** Listman Mill Co. v. Dufresne, 111 Me. 104, 88 Atl. 354.

Massachusetts. Haynes v. Nye, 185 Mass. 507, 70 N. E. 932

Michigan. International Text Book Co. v. Jones, 166 Mich. 86, 131 N. W. 98.

Minnesota. Gibbons v. Bente, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

Nebraska. Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Co., 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293 (obiter)

North Dakota. Davis v. Bronson, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

Utah. Thomas v. Clayton Piano Co., 47 Utah 91, 151 Pac. 543

Wisconsin. Badger State Lumber Co. v. G. W. Jones Lumber Co., 140 Wis. 73, 121 N. W. 933; Richards v. Manitowoc Traction Co., 140 Wis. 85, 133 Am. St. Rep. 1063, 121 N. W. 937.

⁴ Davis v. Bronson, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

⁵ Gibbons v. Bente, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

§ 2899. Theory that damages may be increased. In some cases, however, the party who is not in default has been permitted to continue performance and to recover the contract price.¹ One who has agreed to manufacture and to deliver goods,² or to construct a building,³ has been permitted to continue performance after renunciation by the adversary party, and to recover the contract price.⁴

As in the case of breach generally, some courts have permitted the party who is not in default to continue performance after renunciation by the adversary party if the case is one in which specific performance could have been had in equity.⁵ While the tendency toward specific relief probably does justice far more frequently than not, while this is in one sense a return to the earlier theory of relief,⁶ there are certain risks which attach to the granting of specific performance in an action at law which is tried to a jury,⁷ and the protection which equity gives against unfair dealing, and the requirement of a high degree of proof which equity imposes,⁸ are lacking when relief is given in this way.

§ 2900. Effect of election to treat renunciation as discharge. If the party not in default elects to treat renunciation as a discharge, he is excused from further performance,¹ and he may, in most jurisdictions, maintain an action at once, without waiting for the time fixed by the contract for performance.² If the party in default has renounced the contract and the party who is not in default has elected to treat such renunciation as a discharge, the party who renounced such contract can not withdraw his renunciation and treat the contract as still in effect,³ especially if the party who is

¹ Feick v. Stephens, 250 Fed. 185 (obiter); Roebing's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518.

See § 3034.

² Roebing's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518.

³ Feick v. Stephens, 250 Fed. 185 (apparently obiter, as the breach seems to have been failure to pay and not renunciation)

⁴ The possible justification for permitting the party who is not in default to aggravate damages by continuing performance after renunciation is considered in connection with the effect of breach in general. See §§ 3033 et seq.

⁵ Marsh v. Blackman, 50 Barb. (N. Y.) 320.

⁶ See ch. LXXXVII.

⁷ See ch. LXXXIX.

⁸ See ch. LXXXIX.

¹ See § 3030.

² See §§ 2891 et seq.

³ South Boulder & Rock Creek Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504; Morton v. Nelson, 145 Ill. 586, 32 N. E. 916; Waterman v. Bryson, 178 Ia. 35, 158 N. W. 466; Rayburn v. Comstock, 80 Mich. 448; Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981.

Contra, Perkins v. Frazer, 107 La. 390, 31 So. 773.

not in default has acted in reliance upon such renunciation in such a way that he will be prejudiced if the party who renounced such contract is allowed to retract such renunciation.⁴ If the renunciation of a contract consists of the declarations of one party, such renunciation may be withdrawn up to the time that the adversary party has elected to treat it as a discharge,⁵ at least if no injury to the adversary party will be caused by such retraction.⁶

If the party who is not in default accepts renunciation as a breach, his damages are fixed as of that time; and he can not recover subsequent damages although they are not increased by any further performance on the part of the party who is not in default, involving any economic waste; but they are merely increased by the occurrence of subsequent events which make performance more valuable to the party who is not in default than at the time of such renunciation.⁷ If a party who is to manage an opera-house for a certain share of the profits accepts renunciation as a breach, and fails to tender performance on his part, it is said that he can not recover a share of the profits of the sale of such lease which was made after such renunciation was refused by him.⁸

§ 2901. What constitutes renunciation — Formal renunciation not essential. It is not necessary that a party who attempts to repudiate a contract should do so in any set or definite form. Any expression of his intent to renounce a contract, either by word or act, is sufficient.¹ The refusal of one of the parties to the contract

⁴ Rayburn v. Comstock, 80 Mich. 448.

⁵ Swiger v. Hayman, 56 W. Va. 123, 107 Am. St. Rep. 809, 48 S. E. 839; Nelson v. Morse, 52 Wis. 240.

⁶ Swiger v. Hayman, 56 W. Va. 123, 107 Am. St. Rep. 809, 48 S. E. 839.

⁷ Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 65 L. R. A. 302, 79 S. W. 1069.

⁸ Greenwall Theatrical Circuit Co. v. Markowitz, 97 Tex. 479, 65 L. R. A. 302, 79 S. W. 1069. In view of the provisions of the contract, it may be that the manager was not entitled to any part of the proceeds of the lease; but if he had such right under the original contract, it should not be denied to him because the other party has renounced the contract. The result seems to be based on the theory that,

although the manager had insisted orally that the contract was in force and had demanded performance, he alleged such renunciation as a breach in his petition, although he also alleged the sale of the lease as a basis of recovery.

¹ Connecticut. Trowbridge v. Jefferson Auto Co., 92 Conn. 569, 103 Atl. 843.

Louisiana. Johnson v. Levy, 122 La. 118, 47 So. 422.

Minnesota. McGuire v. J. Neils Lumber Co., 97 Minn. 293, 107 N. W. 130.

Rhode Island. Parkinson v. Murphy, — R. I. —, 107 Atl. 235.

Wisconsin. Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576; Ambler v. Sinaiko, 168 Wis. 286, 170 N. W. 270.

to perform it, or to recognize it as a valid obligation, is a sufficient renunciation.² If an offer has been accepted, the declaration of the offeror to the effect that he made no such offer and that he will not perform amounts to a renunciation.³ The declaration of one of the parties to a contract to intermarry, to the effect that he wishes to have nothing to do with the other party, is equivalent to a refusal to perform the contract to marry.⁴

§ 2902. Renunciation must be clear and unequivocal. To operate as a breach by renunciation, however, the party who renounces the contract must do so by a distinct, unequivocal and absolute refusal to perform the contract or to recognize it as binding upon him.¹ If a contract provides that A is to have the use of certain

² Connecticut. *Trowbridge v. Jefferson Auto Co*, 92 Conn. 569, 103 Atl. 843.

Kentucky. *Wallingford v. Aitkins* (Ky.), 72 S. W. 794; *Hobbs v. Ray* (Ky.), 96 S. W. 589, 29 Ky. L. Rep. 999.

Louisiana. *Johnson v. Levy*, 122 La. 118, 47 So. 422.

Minnesota. *McGuire v. J. Neils Lumber Co*, 97 Minn. 293, 107 N. W. 130.

Vermont. *Ellis' Admr v. Durkee*, 79 Vt. 341, 65 Atl. 94.

Wisconsin. *Davidor v. Bradford*, 129 Wis. 521, 109 N. W. 576; *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270.

"By refusing to accept the tendered payments of purchase money the defendants may have lost some of their rights, but such refusal was not of itself a repudiation of the contract, and did not give the plaintiff a right of action, when the time for the conveyance to be made had not arrived and no right to or request or demand for the possession of the lands or any of them under the contract is alleged." *Hall v. Northern & Southern Co*, 55 Fla. 235, 46 So. 178; *Parkinson v. Murphy*, — R. I. —, 107 Atl. 235.

³ *Ellis' Administrator v. Durkee*, 79 Vt. 341, 65 Atl. 94.

It is said that the failure of the ad-

versary party to perform after such renunciation may create a "presumption of mutual assent to a rescission." *Mowry v. Kirk*, 19 O. S. 375.

⁴ *Parkinson v. Murphy*, — R. I. —, 107 Atl. 235.

¹ Alabama. *Ollinger & Bruce Dry Dock Co v. Gibbony*, — Ala. —, 81 So. 18.

Delaware. *Hartnett v. Baker* (Del.), 56 Atl. 672.

Iowa. *Henderson v. Henderson*, 136 Ia. 564, 114 N. W. 178; *Schillinger v. Bosch Ryan Grain Co*, 145 Ia. 750, 122 N. W. 961 [for former opinion see 116 N. W. 132].

Kentucky. *Hollerbach & May Contract Co. v. Wilkins*, 130 Ky. 51, 112 S. W. 1126.

Maryland. *Mount Vernon Brewing Co v. Teschner*, 108 Md. 158, 16 L. R. A. (N.S.) 758, 69 Atl. 702.

Minnesota. *McGuire v. J. Neils Lumber Co*, 97 Minn. 293, 107 N. W. 130.

Montana. *Long v. Needham*, 37 Mont. 408, 96 Pac. 731.

New York. *St. Regis Paper Co v. Santa Clara Lumber Co*, 186 N. Y. 89, 78 N. E. 701.

North Carolina. *Edwards v. Proctor*, 173 N. Car. 41, 91 S. E. 584; *LaSalle Extension University v. Ogburn*, 174 N. Car. 427, 93 S. E. 986.

realty and to pay taxes thereon and keep it in repair, A's act in leasing such realty does not amount to a repudiation of the contract, since by the terms thereof A was not bound to remain in possession personally.² If by the contract between the property owner and the contractor, the property owner is to pay premiums for the bond of the contractor, the fact that the bond which the property owner tenders to the contractor contains a formal recital of payment of the premium by the contractor does not show a renunciation of such provision of the contract by the property owner.³ A request for suspension of performance and for a conference before performance was resumed, in order that the parties might agree upon the precise method thereof, does not amount to a renunciation.⁴ A letter written by an agent of a corporation, who has made a contract on its behalf, referring to it as a quasi-agreement by the corporation, quoting the resolution under which he is acting, questioning his authority under such resolution to make the agreement and suggesting that the adversary party await further action of the board of directors of the corporation before proceeding, is not renunciation.⁵

If the renunciation alleged consists of words and conduct of the parties about which there is a dispute of fact, the question of renunciation is for the jury.⁶

§ 2903. Dispute as to meaning of contract. A dispute as to the meaning of the contract has been held not to amount to a renunciation thereof,¹ at least if such dispute is left for subsequent adjustment.² If one party demands as performance more than the adversary party concedes, and the parties then negotiate for arbitration of such dispute, such conduct is not such renunciation as justifies

Oregon. Krebs Hop Co. v. Livesley, 51 Or 527, 92 Pac. 1084.

Tennessee. John Deere Plow Co. v. Shellabarger, 140 Tenn. 123, 203 S. W. 756.

West Virginia. Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338; Roberts v. American Column & Lumber Co., 76 W. Va. 200, 85 S. E. 535.

² *Henderson v. Henderson*, 136 Ia. 564, 114 N. W. 178.

³ *Schillinger v. Bosch-Ryan Grain*

Co., 145 Ia. 750, 122 N. W. 961 [for former opinion see 116 N. W. 132].

⁴ *Ollinger & Bruce Dry Dock Co. v. Gibbony*, — Ala. —, 81 So. 18.

⁵ *Pinchback v. Bessemer Mining Co.*, 117 N. Car. 484, 23 S. E. 425.

⁶ *Gunther v. Gunther*, 181 Mass. 217, 63 N. E. 402.

¹ *Ackley v. Hunter-Benn & Co.'s Co.*, 166 Ala. 295, 51 So. 964; *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895.

² *Ackley v. Hunter-Benn & Co.'s Co.*, 166 Ala. 295, 51 So. 964.

the adversary party in treating the contract as discharged.³ If there is a genuine dispute as to the meaning of the contract, and one party to such contract claims as contract rights thereunder more than he actually has under such contract, such claim does not of itself amount to a renunciation of the contract.⁴ If A is bound by a contract with B to deliver ice to B at some time during the season, letters written by A, arguing against the propriety of B's insisting upon performance at a time when the market price of ice was so much higher than it was when A had received ice from B, in exchange for which this ice was demanded, and requesting a personal interview, do not amount to a renunciation.⁵ If a life insurance company makes illegal assessments, but does nothing further to repudiate liability under the contract, this is not breach by renunciation.⁶ The principal's claiming that the agent under a contract for buying cotton should furnish the principal with an invoice and further description of the cotton, as well as the samples stipulated for in the contract, is not renunciation.⁷ If A has agreed to deliver to B such quantity of a given article as B may order between certain maximum and minimum limits, A's claim that he has the right to refuse to deliver more than the minimum quantity is not of itself a breach by renunciation.⁸ If one party claims by virtue of the contract a right to forfeit it under existing conditions, his ineffectual attempt to declare such forfeiture is not a renunciation.⁹ The fact that one of the parties has made an overcharge when he renders his statement, and that he

³ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701.

⁴ *Alabama. Ackley v. Hunter-Benn & Co.'s Co.*, 166 Ala. 295, 51 So. 964.

Illinois. Lundahl v. Hansen, 147 Ill. 504, 35 N. E. 741.

Montana. Long v. Needham, 37 Mont. 408, 96 Pac. 731.

New York. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

Tennessee. Southern Publishing Association v. Clements Paper Co., 139 Tenn. 429, L. R. A. 1918D, 580, 201 S. W. 745.

Vermont. Emack v. Hughes, 74 Vt. 382, 52 Atl. 1061.

⁵ *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984.

⁶ *Lee v. Mutual Reserve Fund Life Association*, 97 Va. 160, 33 S. E. 556.

⁷ Injunction will lie to determine the rights of the policyholders or members, and to restrain the insurance company from demanding illegal assessments. *Tusant v. Grand Lodge Ancient Order of United Workmen*, 183 Ia. 489, L. R. A. 1918F, 452, 163 N. W. 690.

⁸ *Bell v. Maximus*, 85 Tex. 140, 19 S. W. 1070.

⁹ *Southern Publishing Association v. Clements Paper Co.*, 139 Tenn. 429, L. R. A. 1918D, 580, 201 S. W. 745.

¹⁰ *Lundahl v. Hansen*, 147 Ill. 504, 35 N. E. 741.

demands more than is due by the terms of the contract, does not justify the adversary party in treating the contract as discharged.¹⁰

It has been held, however, that a demand by one of the parties for performance in excess of that required by the contract, if persisted in down to the time of performance, excuses the adversary party from proceeding with performance while such dispute continues;¹¹ and accordingly the adversary party is not liable for delay caused by such dispute.¹²

§ 2904. Request or demand for modification as breach. As has already been stated, a prior valid contract can not be abrogated or modified by an alleged new contract unless both parties assent thereto.¹

An attempt to get a favorable modification of a contract is not a renunciation thereof.² A claim by one of the parties to a contract that the terms of the contract had been modified by a subsequent new contract, does not amount to a renunciation of the original contract.³

If, however, one party manifests his intention in unequivocal language not to perform the contract unless the adversary party consents to a modification thereof, this may amount to a breach,⁴ but it can not relieve him from liability under his contract. If one of the parties to the contract notifies the adversary party that he will not perform unless such adversary assents to the modi-

¹⁰ *LaSalle Extension University v. Ogburn*, 174 N. Car. 427, 93 S. E. 986 (obiter).

¹¹ *Edward E. Gillen Co. v. John H. Parker Co.*, — Wis. —, 171 N. W. 61.

¹² *Edward E. Gillen Co. v. John H. Parker Co.*, — Wis. —, 171 N. W. 61.

¹ See § 2458.

See also, *Tusant v. Grand Lodge Ancient Order of United Workmen*, 183 Ia. 489, L. R. A. 1918F, 452, 163 N. W. 690; *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

² *Bernstein v. Meech*, 130 N. Y. 354, 20 N. E. 255.

³ *Bannister v. Victoria Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338.

⁴ *Connecticut. Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

Georgia. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112, 59 L. R. A. 122, 42 S. E. 378.

Iowa. Davis v. Campbell, 93 Ia. 524, 61 N. W. 1053.

Kansas. Guild v. Atchison, Topeka & Santa Fe Ry., 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77, 45 Pac. 82.

Massachusetts. Martin v. Meles, 179 Mass. 114, 60 N. E. 397.

New York. National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965.

Ohio. Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 80 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

fication of the contract by the addition of certain new terms, such conduct amounts to a renunciation of the contract.⁵ Such conduct is a breach, but does not operate as a new contract. If a party to a building contract demands that the adversary party assent to the modification of the plans before he proceeds with performance, such conduct is renunciation which the adversary party may treat as breach.⁶ If A has agreed to construct an ice plant and refuses to complete it unless the adversary party will waive a claim for damages, such refusal is a breach.⁷ A refusal to perform a contract of sale unless the adversary party consents to a modification of the

⁵ Connecticut. *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl 843.

Delaware. *Johnson Forge Co. v. Leonard*, 3 Penn. (Del.) 312, 94 Am. St. Rep. 86, 51 Atl. 305.

Massachusetts. *Stephenson v. Cady*, 117 Mass. 6.

New Jersey. *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27.

New York. *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

Ohio. *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

⁶ *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

"It is also urged that even if the defendant erred in the claim made by it during its controversy with the plaintiff, that did not necessarily justify the plaintiff in abandoning the work. Doubtless there was a locus poenitentiae some reasonable time during which the defendant might have become aware that it was in error and receded from its position. It is not every unfounded or illegal claim a party may make during the prosecution of a large contract that justifies the other in abandoning the contract for a breach. But on this question the learned referee has found that the

plans furnished by the defendant for an earth dam with masonry core 'were never withdrawn, nor was the plaintiff ever advised that they would be withdrawn, or that the original plans would be restored.' It is true that the learned referee in his second conclusion of law finds that the acts of the defendant referred to in his findings of fact did not constitute a breach of the contract on its part; and it is also true that on appeal we may treat a conclusion of law as a finding of fact, if in reality it is such. But no one knew better than the learned referee who tried this cause the distinction between findings of fact and conclusions of law, and it is apparent that his disposition of the case was governed by what he deemed the rules of law laid down in the decisions of the appellate tribunals on the earlier appeals. We should not be astute to construe as a finding of fact that which the referee never intended to be such. There is no finding that the defendant was willing to carry out the contract on its part, and under our construction of the rights of the parties the facts found by the referee negative any such willingness." *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965.

⁷ *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

price, amounts to a renunciation of the contract.⁸ If a contract for the sale of goods provides for its sale on credit, the refusal of the seller to deliver the goods unless the buyer will deliver notes for the purchase price thereof before such goods are delivered, amounts to a renunciation of the contract,⁹ especially if the seller demands that such notes be delivered at a place other than that fixed by the contract for the delivery of the goods.¹⁰

§ 2905. Renunciation as to present or future time. To amount to renunciation the declaration of the party renouncing must refer to the present time, and must show that he does not look upon it as binding him. His statement while performing in good faith that he intends to abandon at some time in the future does not amount to breach by renunciation.¹ If the parties have reduced the contract to writing under the agreement that it should be sent to one of them when in final form for his signature, his previous statement to the agent of the adversary party that he would not sign such contract unless it was modified in a certain respect, is not a renunciation.² A statement of a party to the effect that he has not at that time the financial ability to perform certain covenants which call for future performance, does not amount to a repudiation of the contract if he recognizes it as in effect and attempts in good faith to perform.³

⁸ *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

⁹ *Petersburg Fire, Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

¹⁰ *Petersburg Fire, Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

¹ *England. Johnstone v. Milling*, L. R. 16 Q. B. Div. 460.

United States. Smoot's Case, 82 U. S. (15 Wall.) 36, 21 L. ed. 107.

Iowa. Nancolas v. Hitafer, 136 Ia. 341, 12 L. R. A. (N.S.) 864, 112 N. W. 382.

Kentucky. Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126.

West Virginia. Swiger v. Hayman, 56 W. Va. 123, 107 Am. St. Rep. 899, 48 S. E. 839 (obiter).

Texas. Kilgore v. Educational Society, 90 Tex. 139, 37 S. W. 598.

See also, *Maud v. Maud*, 33 O. S. 147, in which, however, it is possible that there was no renunciation at all but merely a demand for performance in accordance with its terms and a refusal to consent to any alteration.

² *Hollerbach & May Contract Co. v. Wilkins*, 130 Ky. 51, 112 S. W. 1126.

³ *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Nancolas v. Hitafer*, 136 Ia. 341, 12 L. R. A. (N.S.) 864, 112 N. W. 382.

Contra, Hobbs v. Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756.

§ 2906. Renunciation of part of contract. It is sometimes said that renunciation can not be regarded as a breach unless it is renunciation of the entire contract, or of the entire performance which is due under the contract.¹ This statement of the law is too extreme and probably is not intended to be taken literally. From its nature renunciation is generally a breach of the entire contract;² but if one of the parties has refused in advance to perform a part of the contract, but has expressed his willingness to perform the rest of the contract, it would seem that the rules which apply to the relation of the covenants to the entire contract in breach in general,³ should apply to cases of this sort; and that if such renunciation is a renunciation of a vital term of the contract on the one hand, it should operate as a discharge of the entire contract at the election of the adversary party, although the renunciation is not a renunciation of the entire contract;⁴ while if the renunciation is of a minor or subsidiary provision for which compensation can be made in damages, the adversary party can not treat such renunciation as a discharge of the entire contract.⁵

§ 2907. Damages in case of breach by renunciation. If a contract is broken by renunciation before performance is due, the adversary party may recover damages occasioned by such breach, but he can not, without performance, recover upon the contract as if he had performed the same.¹ Under a contract giving to A the option to sell a certain business for twenty-five thousand dollars or more, his commission to be whatever he sells it for in excess of twenty-five thousand dollars, A can not recover from the vendor as if he had performed where the vendor refuses to allow him to perform.² If A repudiates a contract whereby he has agreed to pay for scales which B is to build on A's premises, B can not thereafter forward such scales and recover the contract price.³ If, on the

¹ *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731; *Bannister v. Victoria Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338.

² See §§ 2882 et seq.

³ See §§ 2981 et seq.

⁴ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132]; *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084.

See § 2986.

⁵ *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731; *Bannister v. Victoria*

Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338.

See §§ 2981 et seq.

¹ *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12.

See § 2884 and ch. LXXXVII.

² *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12.

³ *Moline Scale Co. v. Beed*, 52 Ia. 307, 35 Am. Rep. 272, 3 N. W. 96. (B has not performed the contract as he has not built the scales.)

other hand, the broker has secured a customer for his principal before the principal has repudiated the contract, the principal is bound to pay the compensation agreed upon.⁴ If the party in default elects to treat the contract as a valid and subsisting obligation, the damages which he may recover for the breach are to be measured as of the time fixed by the contract for performance, if the party who has repudiated the contract persists in his refusal to perform.⁵ Under a contract to deliver certain articles as the adversary party may need them, the time for estimating the damage of the party who is not in default can not be changed in accordance with his wish by the renunciation of such contract by the adversary party;⁶ but the party not in default may buy such property as he needs it, and the damages will be fixed by the difference between the contract price and the market price at such times as the party not in default may actually need such articles.⁷ This view does not affect A's right of action, but merely the measure of his damages.

On the other hand, if the party who is not in default elects to treat such renunciation as a breach, it has been held that he may treat the amount of his damages as fixed by the condition of affairs at the date of such renunciation.⁸ If a contract of sale is renounced by the seller before the time of performance, the buyer may purchase such articles at once, and the measure of damages will be the difference between the contract price and the market price at the date of such renunciation.⁹ If one of two joint buyers renounces his contract with the other, such other may settle at once with the vendor.¹⁰

B. RENUNCIATION WHEN PERFORMANCE IS DUE

§ 2908. Renunciation when performance is due—General principles. If a party to a contract repudiates the contract, or refuses to perform it when the time for performance on his part has

⁴ *McDermott v. Mahoney*, 139 Ia. 292, 115 N. W. 32, 116 N. W. 788.

⁵ *Long v. Conklin*, 75 Ill. 32; *Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 16 L. R. A. (N.S.) 758, 60 Atl. 702.

⁶ *Long v. Conklin*, 75 Ill. 32.

⁷ *Long v. Conklin*, 75 Ill. 32.

⁸ *McAllister v. Safley*, 65 Ia. 719, 23 N. W. 139; *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300, 21 Pac.

637; *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.

See § 2898.

⁹ *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

¹⁰ *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.

arrived, or while the adversary party is performing the contract on his part, such renunciation is held to amount to a breach which operates as a discharge,¹ even in jurisdictions in which it is held that there can not be a breach by renunciation before the time for performance has arrived.² If the adversary party has already done everything to be done by him under the terms of the contract, a right of action exists in his favor at once.³ If he has not performed, such breach gives a right of action to the adversary party at once, though he has not performed the covenants of the contract on his part to be performed.⁴ Breach by renunciation during performance excuses further performance by the adversary party as a condition precedent to recovery on his part.⁵ Such breach also excuses performance of other acts which by the terms of the con-

¹ **England.** *General Billposting Co. v. Atkinson* [1900], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

United States. *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed 814; *Edward Hines Lumber Co. v. Alley*, 73 Fed 603; *Shubert v. Rosenberger*, 204 Fed 934, 45 L. R. A. (N.S.) 1062; *Knotts v. Clark Construction Co.*, 249 Fed. 181

California. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

District of Columbia. *Landvoigt v. Paul*, 27 D. C. App 423.

Georgia. *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760

Massachusetts. *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

Minnesota. *Benson v. Larson*, 95 Minn. 438, 111 Am. St. Rep. 479, 104 N. W. 307.

Nebraska. *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

Nevada. *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

New York. *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516.

Ohio. *Petersburg Fire, Brick & Tile Co. v. American Clay Machinery Co.*, 80 O. S. 365, L. R. A. 1015B, 536, 106 N. E. 33.

Pennsylvania. *Dobbling v. York Springs Ry.*, 207 Pa. St. 123, 56 Atl. 349.

Washington. *Bishop v. T. Ryan Construction Co.*, — Wash. —, 180 Pac. 126.

Wisconsin. *Richards v. Manitowoc & Northern Traction Co.*, 140 Wis. 85, 121 N. W. 937.

² *Douglass v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590; *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

³ *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425.

⁴ *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929; *Thompson v. Brown*, 106 Ia. 367, 76 N. W. 819; *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590; *Chapman v. Ry.*, 146 Mo. 481, 48 S. W. 646.

⁵ *McElwee v. Improvement Co.*, 54 Fed. 627; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A.

tract would have been conditions precedent, which would have to be performed before performance by the adversary party could be required.⁶ Further demand is not necessary to put the party breaking the contract in default, even if such demand and tender of performance would otherwise be a covenant concurrent with the covenants of the party breaking the contract.⁷ In cases of breach during performance it is no defense that the work done under the contract has been of no benefit to the party in default.⁸

§ 2909. What amounts to renunciation. Conduct relied upon as renunciation must be unequivocal.¹ Conduct induced by the belief that the adversary party has himself abandoned the contract can not be treated as renunciation.² Renunciation does not exist because of a request for a modification or rescission³ of the contract.

A notice by an unauthorized agent of a private corporation,⁴ or of a public corporation,⁵ can not operate as a discharge of a contract to which such corporation is a party. Repudiation of a contract between a partnership and another, if made by one of the partners, discharges the contract.⁶

To constitute discharge the renunciation must go to the entire contract. A refusal to perform one of several covenants, and one not the vital feature of the contract, is not discharge.⁷

A renunciation of a vital term of the contract operates as a discharge of the entire contract.⁸ A renunciation by the employer

(N.S.) 1171, 85 Pac. 929; *Textor v. Hutchings*, 62 Md. 150; *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

See, apparently contra, *Mowry v. Kirk*, 19 O. S. 375.

⁶ *Anderson v. McDonald*, 31 Wash. 274, 71 Pac. 1037.

See § 2892.

⁷ *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043; *McWilliams v. Brookens*, 39 Wis. 334; *Bigelow v. Chicago, Burlington & Northern Ry.*, 104 Wis. 109, 80 N. W. 95.

⁸ *Thompson v. Brown*, 106 Ia. 367, 76 N. W. 819.

¹ *Hall v. Northern & Southern Co.*, 55 Fla. 235, 46 So. 178; *Houghton v. Callahan*, 3 Wash. 158, 28 Pac. 377.

² *Newton v. Van Dusen*, 47 Minn. 437, 50 N. W. 820.

³ *McGregor v. Ross*, 96 Mich. 103, 53 N. W. 658.

⁴ *Bradford Belting Co. v. Gibson*, 68 O. S. 442, 67 N. E. 888.

⁵ *Tempe v. Corbell* (Ariz.), L. R. A. 1915E, 581, 147 Pac. 745.

⁶ *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *Gross v. Lewis*, 54 W. Va. 433, 46 S. E. 174.

⁷ *Central Appalachian Co. v. Buchanan*, 73 Fed. 1006; *Grunwald v. Hahn*, 176 Pa. St. 37, 34 Atl. 972.

⁸ *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336]; *Gibson v. Wheldon*, 82 Vt. 175, 72 Atl. 909.

See § 2986.

of a contract of employment during performance, operates to discharge the employe from a covenant on his part not to compete with his employer for a certain time after the termination of such contract.⁹ If A has employed B to do certain work, a notice by A to B that A has employed C to do such work is a renunciation which B may treat as a discharge,¹⁰ even if A suggests that B should assist C.¹¹ Tender of defective performance does not of itself amount to a renunciation;¹² and if, on demand for complete performance, such performance is tendered, the prior tender of defective performance does not operate as a discharge.¹³

§ 2910. Effect of renunciation. Renunciation when performance is due amounts to breach, with all the consequences thereof.¹ The party in default can not, after renunciation during performance, which has been treated by the adversary party as a breach amounting to a discharge, elect to treat the contract as still in force.² After a contractor has treated a contract as discharged on notice from the adversary party to stop work, a subsequent notice by such party several months later, to resume performance, does not prevent such prior notice from operating as a discharge,³ especially if the contractor has so altered his position that it is impracticable for him to resume performance.⁴ Refusal to perform waives the duty of the adversary party to make a subsequent tender.⁵

§ 2911. Specific examples of renunciation. If the purchaser of land under an executory contract refuses to accept the debt or to pay for the land, such refusal excuses the vendor from tendering performance.¹ Under a contract to repurchase certain notes on thirty days' notice, refusal to take such notes when notice is given excuses tender at the end of thirty days.² A notice by a railroad

⁹ *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

¹⁰ *Gibson v. Wheldon*, 82 Vt. 175, 72 Atl. 909.

¹¹ *Gibson v. Wheldon*, 82 Vt. 175, 72 Atl. 909.

¹² *Borrowman v. Free*, L. R. 4 Q. B. D. 500; *Elgar v. Newhall*, — Mass. —, 126 N. E. 661.

¹³ *Elgar v. Newhall*, — Mass. —, 126 N. E. 661.

¹ See § 2908.

² *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906; *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815.

³ *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

⁴ *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

⁵ See §§ 2872 and 3023 et seq.

¹ *McWilliams v. Brookens*, 30 Wis. 334.

² *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043.

company which has agreed to furnish cars that it will not furnish such cars, excuses further demand therefor.³ Refusal by one who has agreed to furnish logs to be sawed at a specified price excuses further performance or tender. The fact that the adversary party thereafter sells his mill does not prevent him from recovering damages.⁴ If a party to a contract refuses to pay the other when payment is due, and refuses to take any steps to determine the amount which is actually due, the adversary party may treat such refusal as a discharge.⁵

If the party for whom a building or construction contract is to be performed, orders the contractor to cease performance, such conduct operates as a discharge of the contract.⁶ If a property owner refuses to make payments to the contractor in instalments as required by the terms of the contract, the contractor may treat such refusal as a discharge and maintain an action at once to recover damages.⁷ If the owner renounces a building contract during performance, the contractor may recover at the contract rate for what has been performed, including a percentage of the contract price which by the contract was to be retained if the contract was performed.⁸ If A has entered into a contract with B, by which B is to construct a tunnel for A, and A is to furnish timber, A's refusal to furnish timber discharges B from further performance.⁹ If the contractor refuses to construct a building in accordance with the terms of the contract, the property owner may treat such refusal as a discharge;¹⁰ and the effect of such refusal as a discharge is not obviated by the subsequent offer of the contractor to perform in a manner different from that required by the contract.¹¹ A repudiation of a building contract excuses the contractor from the obligation of procuring or attempting to procure the certificate of the engineer as a condition precedent to payment,¹² or from reference to arbitration.¹³ Abandonment of a build-

³ *Bigelow v. Chicago, Burlington & Northern Ry.*, 104 Wis. 109, 80 N. W. 95.

⁴ *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177.

⁵ *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 128.

⁶ *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

⁷ *Knotts v. Clark Construction Co.*, 249 Fed. 181.

⁸ *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

⁹ *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

¹⁰ *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

¹¹ *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510.

¹² *Smith v. Wetmore*, 167 N. Y. 234, 60 N. E. 419.

¹³ *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543.

ing contract by the contractor excuses the owner from complying with a clause which requires, as a condition precedent to his taking possession of the building, a written certificate of the architect that the contractor is not doing the work satisfactorily, and three days' notice to the contractor.¹⁴ If a contractor who has partly performed a contract to remodel an old building refuses to complete it, a right of action in favor of the owner exists at once.¹⁵

Refusal by one who has hired a special train to take it unless the carrier will guarantee arrival at a specified time, discharges the carrier for all liability if it repays the money paid under the contract.¹⁶

One who has agreed to support another, and during performance refuses to furnish support any longer,¹⁷ or refuses to furnish support at a reasonable place selected by the obligee, if the latter has the right to select such place,¹⁸ breaks such contract and is liable for damages. A breach exists if he repudiates the obligation of such contract, even if he offers to support the grantor as a matter of charity.¹⁹

One who has employed another for a specified time breaks such contract if he discharges such employe without cause during such time, and the employe may sue at once for damages for the entire contract.²⁰ If A accepts employment under a contract to work for one year as employe, and then to be received into partnership for one year, and he is discharged without cause during the first year, A may at once sue for breach of the entire contract.²¹ It is not necessary for the employe to tender services further or to remain in readiness to perform.²² Furthermore, in most jurisdictions the employe can not recover the full contract price, even if he tenders performance or remains in readiness to perform.²³ If the employer

¹⁴ *George A. Fuller Co. v. Doyle*, 87 Fed. 687.

¹⁵ *Chapman v. Beltz*, 48 W. Va. 1, 35 S. E. 1013.

¹⁶ *Wilcox v. Ry.*, 52 Fed. 264, 17 L. R. A. 804, 3 C. C. A. 73.

¹⁷ *Parker v. Russell*, 133 Mass. 74; *Schell v. Plumb*, 55 N. Y. 592.

¹⁸ *Tuttle v. Burgett*, 53 O. S. 498, 53 Am. St. Rep. 640, 30 L. R. A. 214, 42 N. E. 427.

¹⁹ *Walker v. Walker*, 104 Ia. 505, 73 N. W. 1073.

²⁰ *Pierce v. Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, 43 L. ed. 591;

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; *East Tennessee, Virginia & Georgia Ry. v. Staub*, 75 Tenn. (7 Lea) 397; *Stubbe v. Waldeck*, 78 Wis. 437, 47 N. W. 833. For other cases on this point, see § 2562 and ch. LXXXVII.

²¹ *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509.

²² *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

²³ *Southworth v. Rosendahl*, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717.

See § 2562.

demands performance, which is substantially more hazardous than that contemplated by the terms of the contract, in such a way as to show that he will not accept any other performance, he renounces the contract.²⁴ If A and B have entered into a contract by which B is to be permitted to remove certain articles from A's realty, A's refusal to permit B to perform is such a breach that B may sue at once without showing that A has converted such articles to his own use.²⁵

If a debtor has agreed as a compromise to pay a certain amount "on demand," his act in insisting that his creditor shall collect such amount from certain pending litigation is such a renunciation that the creditor may bring an action at once to recover the amount of the original claim.²⁶

If A and B have entered into a contract to marry "in the fall," and A notifies B in October that he will not perform, B may bring an action at once.²⁷

C. VOLUNTARY INABILITY TO PERFORM

§ 2912. Voluntary inability to perform—General principles. If one of the parties to a contract acts voluntarily in such a manner as to make it impossible for him to perform the contract, such conduct on his part amounts to breach of such contract.¹ This is

²⁴ *Makletzova v. Diaghileff*, 227 Mass. 100, 116 N. E. 231.

²⁵ *Paas Packing Co. v. Torch*, 87 Miss. 604, 40 So. 228.

²⁶ *Shubert v. Rosenberger*, 204 Fed. 934, 45 L. R. A. (N.S.) 1062.

²⁷ *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516.

¹ *England*, *Planche v. Colburn*, 6 Bing. 14; *Palmer v. Temple*, 9 Ad. & El. 508; *Ogdens v. Nelson* [1905], A. C. 109.

United States, *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. ed. 423; *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353 [affirming, *Schlottman v. E. I. Du Pont de Nemours Powder Co.*, 210 Fed. 356].

Louisiana, *Lloyd v. Dickson*, 116 La. 90, 40 So. 542.

Massachusetts, *Fames v. Savage*, 14 Mass. 425.

Ohio, *Loren v. Hillhouse*, 40 O. S. 302; *Black v. Albery*, 89 O. S. 240, 106 N. E. 38; *Suter v. Farmers' Fertilizer Co.*, — Ohio —, 126 N. E. 304.

Oklahoma, *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453.

Oregon, *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084.

Utah, *Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483.

Vermont, *Dyer v. Lalor*, — Vt. —, 109 Atl. 30.

Washington, *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494.

Wisconsin, *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Lyle v. McCormick Harvesting Machine Co.*, 108 Wis. 81, 51 L. R. A. 906, 84 N. W. 18; *Moha v. Hudson Boxing Club*, 164 Wis. 425, L. R. A. 1917B, 1238, 160 N. W. 266.

sometimes spoken of as breach of an implied covenant or an implied condition;² but there is no more of an implied condition in this case than in any other case of breach. By making performance on his own part impossible, the party who has thus acted has shown by his acts that he renounces the contract, or that he does not intend to perform it. This is a form of breach which is much like renunciation before performance.³ The only difference is that in renunciation in the limited sense, the intention not to perform is indicated by the declaration of the party who renounces the contract; while in breach by making performance on his own part impossible, the party who renounces the contract does so by his acts and conduct. There are therefore many cases in which a party manifests his intention not to perform by acts in which the adversary party knows of such intention; and in cases of this sort the result can be explained either on the theory of renunciation by declaration or of the voluntary creation of an inability to perform,⁴ although it is not a disability in the sense of a personal disability, but merely of an actual inability to perform.

While it is spoken of as impossibility,⁵ it is not impossibility of the sort that operates as a discharge. In that sense, impossibility is a standardized impossibility, without reference to the ability of the individual in question to perform or not to perform.⁶ In the sense of voluntary creation of impossibility, the impossibility seems to consist of the actual inability of the party in question to perform.⁷

§ 2913. What amounts to voluntary inability to perform—General principles. The act of the party who makes performance on his own part impossible must be such as makes performance absolutely impossible and not merely improbable.¹ At the same time it is generally held that a party who has power to perform when he

²Ogdens v. Nelson [1904], 2 K. B. 410; Lloyd v. Dickson, 116 La. 90, 40 So. 542; Genet v. Canal Co., 136 N. Y. 593, 19 L. R. A. 127, 32 N. E. 1078.

³See §§ 2882 et seq.

⁴This is frequently spoken of as a voluntary inability, disability or disqualification. Loren v. Hillhouse, 40 O. S. 302; Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 Pac. 494; Teachenor v. Tibbals, 31 Utah 10, 86 Pac. 483.

⁵E. I. Du Pont de Nemours Powder Co. v. Schlottman, 218 Fed. 353 [affirming, Schlottman v. E. I. Du Pont de Nemours Powder Co., 210 Fed. 356]; Krebs & Co. v. Livesley, 51 Or. 527, 92 Pac. 1084; Moha v. Hudson Boxing Club, 164 Wis. 425, L. R. A. 1917B, 1238, 160 N. W. 266.

⁶See §§ 2667 et seq.

⁷Ogdens v. Nelson [1905], A. C. 109. See § 2913.

¹See §§ 2014 et seq and 2037.

makes the contract, and who subsequently puts it out of his own power to perform, discharges the contract although he may subsequently acquire power to perform with the consent of a third person.²

If A has agreed to sell a specific thing to B, or if A's performance depends upon his possession of a specific thing, A's act in selling such thing before performance is generally regarded as a breach,³ although it is, of course, possible that A may repurchase such property before the time for performance has arrived.⁴ If A has agreed to pay a certain amount out of the profits of property which B has transferred to him, A's act in selling such property to C operates as a breach, and B may maintain an action against A,⁵ even though by the terms of the original contract A had incurred

²England. *Telegraph Despatch Co. v. McLean*, L. R. 8 Ch. 658.

United States. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. ed. 423.

South Dakota. *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

Utah. *Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483.

Vermont. *White v. Lumiere North American Co.*, 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121.

Wisconsin. *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Lyle v. McCormick Harvesting Machine Co.*, 108 Wis. 81, 51 L. R. A. 906, 84 N. W. 18.

³England. *Telegraph Despatch Co. v. McLean*, L. R. 8 Ch. 658; *Synge v. Synge* [1894], 1 Q. B. 466; *Ogdens v. Nelson* [1904], 2 K. B. 410.

United States. *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. ed. 423; *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

Georgia. *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630.

Michigan. *Weaver v. Aitcheson*, 65 Mich. 285, 32 N. W. 436.

South Dakota. *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

Utah. *Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483.

Wisconsin. *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Lyle v. McCormick Harvesting Machine Co.*, 108 Wis. 81, 51 L. R. A. 906, 84 N. W. 18.

⁴See on this question, 1 Rolfe's Abridg. 248F, pl. 1.

⁵*Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896.

"The finding that there were no net profits derived from an actual sale of ore may be accepted as correct, if by that is meant profits in cash, and yet that, under the circumstances here disclosed, can and ought not to be held fatal to the plaintiff's recovery. Tibbals knew what Marioneaux's contract was before he purchased his interest in the mine, and according to the uncontradicted testimony of the plaintiff, told the latter that he would pay three-eighths of the \$850, which amounts to what is involved in this suit. Having bought subject to that contract, he was bound by it the same as any other purchaser under it, and it would be clearly unwarranted, inequitable and unjust to hold that under the terms of the instrument the purchasers could extract such vast amounts of ore, stack it up on the dump and in the mine, refrain from selling it and converting it into cash until they sold the

no personal liability except that of operating such property, and although A had not guaranteed any profits.⁶ A's contract to employ B to sell specific realty⁷ is discharged by A's conveying such realty to another. In some jurisdictions, however, it is said that A's sale to C does not operate as a discharge of A's contract to sell to B,⁸ since A may be able to secure a good title thereafter,⁹ or he may have reserved B's rights in his contract to sell to C.¹⁰ It has been held that if A, after agreeing to convey specific realty to B, conveys it to X, who knows of B's contract, B can enforce the contract as against X, and therefore can not treat such sale as a discharge.¹¹ This is especially true if the conveyance to X is expressly made subject to B's rights.¹²

mine, and then sell it and the mine for one lump sum; and, in that way, rid themselves of all liability, under the contract, for the purchase price.

"A construction of that instrument which would countenance such a transaction, would be in contravention of every principle of justice and fair dealing between men. Can it be doubted that when that agreement was made, the parties intended that the ore, as it was extracted, should be sold, without unreasonable delay, as is usual in the business of mining? We think not. Nor does anything appear from the context of the instrument to indicate that such was not the intention of the parties. It is clear that there was an abundance of ore extracted before the mine was sold, saying nothing of that which was extracted afterwards, to have paid out of the net proceeds thereof, if it had been sold, the balance of the purchase price, and therefore, it is equally clear that the defendant can not escape liability, under the contract, by his failure to insist upon the sale of the ore, and payment of balance, before sale of the mine to the corporation. He can not escape liability by putting it out of his power to perform his contract in the particular way provided in the instrument. The law is that where one, as in this instance, voluntarily puts it out of his power to do what he agreed to do, in the

way agreed upon, he commits a breach of contract and becomes liable generally. *Wolf v. Marsh*, 54 Cal. 228; *Johnson v. Schenck*, 15 Utah 490, 50 Pac. 921; *Heard v. Bowers*, 23 Pick. (Mass.) 455; *Newcomb v. Brackett*, 16 Mass. 161; *Burton v. Shotwell*, 13 Bush. (Ky.) 271; *McIntyre v. Ajax Min. Co.*, 20 Utah 323, 60 Pac. 552; *Buttrick v. Holden*, 8 Cush. (Mass.) 233; *James v. Burchell*, 82 N. Y. 108; *Reusens v. Mexican Nat. Const. Co.* (C. C.), 22 Fed. 522. We do not consider it important to discuss any other question presented." *Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483.

⁶*Teachenor v. Tibbals*, 31 Utah 10, 86 Pac. 483; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896.

⁷*Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630.

⁸*Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Shively v. Semi-Tropic Land and Water Co.*, 99 Cal. 259, 33 Pac. 848; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857.

⁹*Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320.

¹⁰*Shively v. Semi-Tropic Land and Water Co.*, 99 Cal. 259, 33 Pac. 848.

¹¹*Kreibich v. Martz*, 119 Mich. 343, 78 N. W. 124; *Fargo v. Wade*, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

¹²*Fields v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530; *Fargo*

If, however, A has agreed to sell to B property which is not specific, but is to correspond to a given description, and thereafter A without B's assent selects certain articles, intending to deliver them in performance of such contract, his selection of such articles is not conclusive and his subsequent sale of them is therefore not a discharge.¹³

If B actually enjoys the benefit of performance on A's part, the fact that A has performed an act which might have made performance impossible does not discharge B from liability upon his contract after such performance.¹⁴ If A has agreed to permit B to use A's patent, and A subsequently transfers his rights to C without B's knowledge, such transfer does not discharge B from liability to A upon the original contract if B has in fact made use of such patent during the period fixed by the original contract.¹⁵ If a party makes performance on his own part impossible and the adversary party wishes to treat the contract as in effect, he must perform the precedent covenants on his part to be performed and he must offer to perform the concurrent covenants on his part to be performed.¹⁶

v. Wade, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

"The principle contended for by defendant's counsel, if upheld, might result in defeating every option for the purchase of real property the value of which had increased after the right to buy the premises had been given. In this state there is no statute prohibiting the alienation of land, and when an option to purchase any real property has been given, the owner of the premises has an estate therein which he can transfer, and the party accepting the title, if he has notice or knowledge of the privilege conferred by the writing, necessarily takes the premises cum onere. An option given by the owner of land for a valuable consideration, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowledge thereof. *Mueller v. Northmann*, 116 Wis. 468, 96 Am. St. Rep. 997, 93 N. W. 538. At any time prior to the expiration of the time limited, Wade could have relinquished his right

to purchase the land, and, had he done so, no recovery of any sum of money subsequently accruing could have been had against him. He can not, however, insist upon a continuation of the validity of the option without being liable for the instalments maturing thereon. If the real property was thus obtained, burdened with the option, all the advantages accruing to the vendor from the contract, including the right to receive and collect the instalments maturing on account thereof, should also be transferred, particularly so when they were expressly assigned for that purpose." *Fargo v. Wade*, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

¹³ *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938.

¹⁴ *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

¹⁵ *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

¹⁶ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

§ 2914. Specific illustrations. If A agrees to mine coal on B's land, paying a specified royalty to B on the amount mined, such royalty not to be less than a specified minimum sum annually, A impliedly agrees to do nothing to incapacitate himself from mining all the coal on B's land that can profitably be mined. Accordingly, if A mines a lower vein first, so that it is impossible for A to mine the upper veins thereafter, this is a breach. A is liable in actual damages, and it has been held that he can not escape liability by paying the minimum royalty.¹ If A agrees with B to operate a certain mill for five years, A's sale of such mill to X, without requiring X to perform such agreement, is a breach.² If an insurance company terminates its business and transfers its policies and assets to another company, the insured may treat this as a breach and recover whatever he may be entitled to out of the assets.³ If A has entered into a contract to box with B for ten rounds, and A disables B by a foul blow at an early period of such contest, A can not recover his compensation;⁴ and it has been said that this principle applies whether the foul blow was delivered intentionally or accidentally.⁵ If A and B, who are partners, have entered into a contract by which they agree to sell goods to C, and D agrees to become surety for C, the act of A and B in dissolving such partnership before performance discharges D.⁶ If A and B, acting as partners, have employed X, the dissolution of the firm is a breach of the contract of employment.⁷ If A has employed X to carry on a certain business, A's act in selling such business to B is a breach of A's contract with X.⁸ If A has entered into an agreement by which he is to secure a certain position for B, A's act in making a similar contract with C operates as a discharge which gives to B a right of action.⁹ If A has entered into a contract to marry B, and A then marries C, such conduct on A's part is a renunciation of his contract with B.¹⁰

¹ Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 19 L. R. A. 127, 32 N. E. 1078.

² Hudson v. Archer, 9 S. D. 240, 68 N. W. 541.

³ Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 28 L. ed. 423.

⁴ Moha v. Hudson Boxing Club, 164 Wis. 425, L. R. A. 1917B, 1238, 160 N. W. 266.

⁵ Moha v. Hudson Boxing Club, 164 Wis. 425, L. R. A. 1917B, 1238, 160 N. W. 266.

⁶ Black v. Albery, 89 O. S. 240, 106 N. E. 38.

See § 2681.

⁷ Brace v. Calder [1895], 2 Q. B. 253.

⁸ White v. Lumiere North American Co., 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121.

⁹ Lloyd v. Dickson, 116 La. 90, 40 So. 542.

¹⁰ Dyer v. Lalor, — Vt. —, 109 Atl. 30.

§ 2915. Voluntary inability affecting part of contract. In most of the cases the act which makes performance impossible on the part of the party who performs such act, affects all the covenants on his part to be performed, and operates as a total breach.¹ It is not necessary, however, that the creation of an impossibility should affect all the covenants of the contract to be performed by the party who has made his own performance impossible; but as in the case of breach in general,² breach may exist where performance of a part only of the contract is made impossible if this is a vital term of the contract.³ If a party is disabled from performing a minor covenant,⁴ or an independent covenant,⁵ such conduct is a breach of such covenant, but it does not operate as a discharge of the entire contract. If A has agreed to sell certain realty to B, and before the time fixed for performance an agent of A, acting under authority which was given before such contract, sells an inconsiderable part of such realty to X, such conduct operates as a breach, but the breach is of so minor a character as not to operate as a discharge of the entire contract.⁶ If A has agreed to float B's logs and to sort them from logs belonging to other owners, B's conduct in buying all of the logs with which his own were confused does not operate as a breach of the entire contract, although it discharges A from his duty to sort out B's logs;⁷ and in such case B can not insist on a reduction of the purchase price because it has cost A less to perform than would have been the case if B had not bought such logs.⁸ If A agrees to saw timber on tract 1, which belongs to B, and subsequently by a supplementary agreement such contract is made to include timber on tract 2, which B has purchased after the original contract was made, B's conduct in delivering timber from tract 2 to C to be sawed is a breach of the cove-

¹ United States. *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

Georgia. *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630.

Michigan. *Weaver v. Aitcheson*, 65 Mich. 285, 32 N. W. 436.

New York. *Genet v. Delaware & Hudson Canal Co.*, 136 N. Y. 593, 13 L. R. A. 127, 32 N. E. 1078.

South Dakota. *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

² See § 2981.

³ *Krebs Hop Co. v. Livesley*, 51 Or.

527, 92 Pac. 1084 [citing, *Weintz v. Hafner*, 78 Ill. 27].

⁴ *Heard v. Bowers*, 40 Mass. (23 Pick.) 455; *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

⁵ *Barker & Stewart Lumber Co. v. Edward Hines Lumber Co.*, 137 Fed. 300.

⁶ *Heard v. Bowers*, 40 Mass. (23 Pick.) 455.

⁷ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

⁸ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

nant of the supplementary contract; but as this is an independent covenant, the original contract is not discharged thereby.⁹

§ 2916. Voluntary inability—Effect on liability of party in default. The party who has made performance impossible can not discharge himself thereby from liability under the contract.¹ One who agrees to buy all the ice necessary for his business can not discharge his own liability by selling his business.² One who agrees to buy all the coal necessary for three specified steamships for one year, can not discharge his liability by selling one of these steamships.³

§ 2917. Voluntary inability—Effect on rights and liabilities of adversary party. In case of voluntary inability to perform, the adversary party who is not in default may treat such act as discharging him from further liability under the contract.¹ A agreed to pay to B seventy-five dollars in goods. A made an assignment for the benefit of creditors. This was held to disable A from performance, so that B, without demand, could set off such amount against a debt due from him to A.² Some courts hold that he may treat the contract as in force, if a continuing contract, and sue for instalments as they become due thereunder. Under a contract whereby A agrees to pay B royalties, if A makes it impossible for himself to perform, B may treat such act as an entire breach and sue for damages, or he may treat the contract as in force and sue for the instalments as they become due.³ While the act of a party

⁹ *Barker & Stewart Lumber Co. v. Edward Hines Lumber Co.*, 137 Fed. 300.

This is rather a case of a breach of a severable contract than a breach of an independent covenant. See §§ 2904 et seq.

¹ *Hickey v. O'Brien*, 123 Mich. 611, 81 Am. St. Rep. 527, 49 L. R. A. 594, 82 N. W. 241; *Jackson v. Rogers*, — S. Car. —, 96 S. E. 692.

² *Hickey v. O'Brien*, 123 Mich. 611, 81 Am. St. Rep. 227, 49 L. R. A. 594, 82 N. W. 241.

³ *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 20 N. E. 142.

¹ *England. Ogdens v. Nelson* [1905], A. C. 109 [affirming (1904), 2 K. B.

410, which affirmed (1903), 2 K. B. 287].

United States. E. I. Du Pont de Nemours Powder Co. v. Schlottman, 218 Fed. 353 [affirming, *Schlottman v. E. I. Du Pont de Nemours Powder Co.*, 210 Fed. 356].

Georgia. Day v. Jeffords, 102 Ga. 714, 29 S. W. 591.

Michigan. McCreery v. Green, 33 Mich. 172.

Nebraska. Apking v. Hoefler, 74 Neb. 325, 104 N. W. 177.

² *Laybourn v. Seymour*, 53 Minn. 105, 39 Am. St. Rep. 579, 54 N. W. 941.

³ *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 843, 24 Atl. 170.

in making performance on his own part impossible may operate as a discharge if the adversary party elects to treat it as a discharge, such adversary party can not treat it as a discharge if performance has continued and if he has in fact enjoyed the benefits of full performance.⁴ The party who is not in default may bring action at once, even if the time for performance has not yet arrived.⁵ If A agrees to pay a certain sum of money to B when A collects a note executed by C, which B has transferred to A, A's act in selling such note is a discharge of such contract, and B may maintain an action thereon at once.⁶ If A has agreed to give a lease to B when C's lease ends, and A gives a lease to X before C's lease ends, B may maintain an action at once against A for breach of such covenant, although C's lease has not yet ended.⁷ If A agrees to devise,⁸ or to sell,⁹ or to deliver as payment of a debt,¹⁰ specific property to B, A's sale of such property is a breach of such contract, and gives to B the right to sue upon such contract before the time fixed for performance. If A has entered into a contract with B, by which B agrees to buy from A for four years and A agrees to distribute certain profits among those who deal with him, A's act in selling his business before the expiration of such period is a breach,¹¹ and B may set off damages for such breach against a claim for goods sold and delivered.¹²

⁴ *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

⁵ *England. Ford v. Tiley*, 6 Barn. & C. 325; *Synge v. Synge* [1894], 1 Q. B. 466.

United States. Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 23 L. ed. 423.

California. Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985.

Colorado. Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596.

Maine. Brackett v. Knowlton, 109 Me. 43, 82 Atl. 436.

New York. Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 19 L. R. A. 127, 32 N. E. 1078.

Ohio. McArthur v. Ladd, 5 Ohio 514; *Loren v. Hillhouse*, 40 O. S. 302.

Oklahoma. Stark v. Duvall, 7 Okla. 213, 54 Pac. 453; *Deming Investment Co. v. Christensen*, 60 Okla. 148, 150 Pac. 663 (obiter).

Oregon. Colgan v. Farmers' & Mechanics' Bank, 59 Or. 469, 106 Pac. 1134, 114 Pac. 460, 117 Pac. 807; *Learned v. Holbrook*, 87 Or. 576, 170 Pac. 530.

Pennsylvania. Keck v. Bieber, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170.

Washington. Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 Pac. 494.

⁶ *Loren v. Hillhouse*, 40 O. S. 302.

⁷ *Ford v. Tiley*, 6 Barn. & C. 325.

⁸ *Synge v. Synge* [1894], 1 Q. B. 466.

⁹ *Weaver v. Aitcheson*, 65 Mich. 285, 32 N. W. 436.

¹⁰ *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

¹¹ *Ogdens v. Nelson* [1904], 2 K. B. 410.

¹² *Ogdens v. Nelson* [1904], 2 K. B. 410.

D. PREVENTION OF PERFORMANCE BY ADVERSARY PARTY

§ 2918. Prevention of performance by adversary party—General principles. One of the parties to the contract may so act that he makes it actually impossible for the adversary party to perform, or so that he delays performance on the part of the adversary party before the time fixed by the terms of the contract for performance. In some cases, impossibility in this sense is not impossibility of the technical kind which would have operated as a discharge of the contract if such impossibility had not been caused by one of the parties thereto,¹ but it consists of some act or omission which makes performance more difficult, dangerous, or expensive, although it remains possible in the technical sense of the term.² In other cases the act of the party to the contract causes impossibility of such a sort that it would have amounted to a technical impossibility which would have discharged the adversary party if it had not been due to the fault of one of the parties to the contract.³ In either case it must be considered apart from technical impossibility, since on the one hand it discharges the adversary party whether it amounts to such technical impossibility or not;⁴ and, on the other hand, the party who has caused such impossibility in this sense is not himself discharged from liability, but remains liable either for compensation under the contract or for damages, as the case may be,⁵ since the party who has caused such impossibility in this sense has broken the contract.

The term "renunciation" is ordinarily used where the party who renounces the contract intends to do so and notifies the adversary party of such intention, either by his words or by his conduct. In prevention of performance, the party who prevents performance does not always intend his conduct to have this result,⁶ and he frequently does not give the adversary party an opportunity of knowing that performance has been prevented, until the adversary party has commenced performance or, in some cases, until he has performed the greater part of the covenants into which he has entered. The act of the party who has prevented the adversary party from performing is analogous to renunciation on his part;⁷ and many of the cases of prevention of performance could be explained as well on the theory of renunciation as on the theory

¹ See §§ 2667 et seq.

² See §§ 2705 et seq.

³ See §§ 2667 et seq.

⁴ See § 2924.

⁵ See §§ 2922 and 2923.

⁶ See §§ 2919 et seq.

⁷ See §§ 2882 et seq.

that one of the parties has voluntarily prevented the other from performing. It differs from renunciation, however, since, in many cases, the party who is prevented from performing does not know of the existence of the facts which prevent him from performing in time to alter his position so as to mitigate damages.⁸ The two forms of breach are, however, much alike, and in many cases practically identical.

The nature of breach of this sort is so closely connected with the consequences that arise therefrom, that many of the general principles of breach of this sort can best be discussed in connection with such consequences.⁹

§ 2919. What amounts to prevention of performance by adversary party. Actual violence, threats of imprisonment, and the like, which constitute duress, excuse performance which is prevented thereby.¹

In order to amount to a prevention of performance by the adversary party, the conduct on the part of the party who is alleged to have prevented performance must be wrongful, and, accordingly, in excess of his legal rights.² A lease of property to be used for saloon purposes does not imply an agreement by the lessor or his assignee to sign the petition for the license of such saloonkeeper.³ Employment by an owner of a non-union laborer, because of whom the contractor's workmen struck, does not amount to the owner's preventing the contractor from performing his contract.⁴ Whether a party to an instalment contract may treat the entire contract as discharged if the adversary party is in default or not,⁵ he is not excused for delay in performance after such default if he elects to treat the contract as in effect, unless he is able to show that such default contributed to such delay.⁶ If the owner is in default in paying instalments under a building contract, and the contractor elects to continue performance, he can not make use of such default as a defense to an action by the owner to recover liquidated damages for delay unless the contractor is able to show that such

⁸ See ch. LXXXVII.

⁹ See §§ 2922 et seq.

¹ Sellers v. Catron, 5 Ind. Terr. 263, 82 S. W. 742.

² Serber v. McLaughlin, 97 Ill. App. 104; Lansdowne v. Reihmann (Ky.), 124 S. W. 353.

³ Lansdowne v. Reihmann (Ky.), 124 S. W. 353.

⁴ Serber v. McLaughlin, 97 Ill. App. 104.

⁵ See §§ 3008 et seq.

⁶ Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

default on the part of the owner was the cause of such delay on his part.⁷

In order to operate as a discharge, the conduct of the party who is claimed to be in default must be such as in legal effect prevents performance, as distinguished from conduct which merely makes performance unpleasant or inconvenient.⁸ Profane and insulting language,⁹ or threats of personal violence,¹⁰ do not make performance impossible and can not be treated as discharging the contract.

The act of one party which makes performance by the other much more hazardous than was contemplated originally, operates as a prevention of performance.¹¹ A agreed to take down trusses from an exposition building at five dollars per truss. While A was working upon such contract the owners of the building removed the shafting, rafters and bracing to such an extent that part of the building fell, and two of A's employes were killed. It was held that A could abandon the contract, consider it as discharged, and recover the profit that he would have earned had he completed his contract.¹²

To operate as a discharge it is not necessary that the party who makes performance by the other impossible, should take active steps thereto. It is sufficient if he omits to do something which he should do, and such omission causes the impossibility.¹³ A agreed to furnish certain materials to B for a building in which B was the principal contractor, the material to be paid for after it was accepted by the supervising architect. A shipped a carload of material, which was seized under a writ of attachment issued against B before it was placed in the building. It was held that A could recover, though such material was never accepted by the supervising architect.¹⁴ Omitting to secure a right of way which

⁷Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

⁸Smoot's Case, 82 U. S. (15 Wall.) 36, 21 L. ed. 107; Cole v. Alexander, 113 Ga. 1154, 39 S. E. 477; Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569; Thompson v. Brown, 106 Ia. 367, 76 N. W. 819.

⁹Used by one drilling a well under contract. Thompson v. Brown, 106 Ia. 367, 76 N. W. 819.

¹⁰Made by a vendor of realty under an executory contract of sale, to the vendee in possession; whereupon he gave up possession and brought suit

for the value of improvements. Cole v. Alexander, 113 Ga. 1154, 39 S. E. 477.

¹¹Lynch v. Sellers, 41 La. Ann. 375, 5 L. R. A. 682, 6 So. 561.

¹²Lynch v. Sellers, 41 La. Ann. 375, 5 L. R. A. 682, 6 So. 561.

¹³United States v. Jack, 124 Mich. 210, 82 N. W. 1049.

¹⁴United States v. Jack, 124 Mich. 210, 82 N. W. 1049.

For a case presenting similar facts, see Leek Milling Co. v. Langford, 81 Miss. 723, 33 So. 492.

thereby falls into the hands of a competing railroad and makes the construction of the extension agreed upon impracticable, discharges one who has agreed to advance money for such extension.¹⁵ A purchaser of realty can not avoid a contract of sale because of an encumbrance which has been caused by such purchaser after such contract of sale.¹⁶ A delay caused by plumbers, working under an independent contract with the owner of a building, can not authorize a deduction from the contract price, provided for in the contract on account of default of the contractor.¹⁷

Under a principle analogous to the doctrine of voluntary creation of impossibility of performance, it has been held that if a beneficiary under an insurance policy kills the insured, he forfeits his rights under the insurance policy and it should be paid to the insured's estate.¹⁸ The assignee of the beneficiary's interest under the policy can claim no interest thereunder.¹⁹ It has been held that a policy of life insurance, whether payable to the estate of the insured or to a designated beneficiary, is forfeited if the insured is executed for murder under sentence of a court of competent jurisdiction,²⁰ and that the beneficiary will not be permitted, in an action on the policy, to show that the insured was in fact innocent,²¹ or that he committed the crime when insane.²²

¹⁵ *Porter v. Blair*, 83 Fed. 104.

¹⁶ *Mayes v. Martell*, 87 Wash. 105, 151 Pac. 247.

¹⁷ *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 603, 31 N. E. 271.

¹⁸ *England. Cleaver v. Mutual Reserve Fund Life Association* [1892], 1 Q. B. 147.

United States. New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 501, 29 L. ed. 997.

Iowa. Schmidt v. Northern Life Association, 112 Ia. 41, 84 Am. St. Rep. 323, 51 L. R. A. 141, 83 N. W. 800; *McDonald v. Mutual Life Ins. Co.*, 178 Ia. 863, 160 N. W. 289.

Ohio. Filmore v. Metropolitan Life Ins. Co., 82 O. S. 208, 92 N. E. 26.

See, *Life Insurance—Suicide and Execution for Crime*, by Geo. Richards, 22 Yale Law Journal, 292.

Oklahoma. Equitable Life Assurance Society v. Weightman, — Okla. —, 160 Pac. 629.

¹⁹ *Schmidt v. Northern Life Association*, 112 Ia. 41, 84 Am. St. Rep. 323, 51 L. R. A. 141, 83 N. W. 800.

²⁰ *Amicable Society v. Bolland*, 4 Bligh (N.S.) 194, 2 Dow. & C. 1; *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. ed. 216 [affirming, 105 Fed. 419, 59 L. R. A. 393]; *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419; *Scarborough v. American National Insurance Co.*, 171 N. Car. 353, L. R. A. 1918A, 896, 89 S. E. 492.

Contra, on the theory that this amounts to a corruption of blood or forfeiture of estate for conviction. *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 122 Am. St. Rep. 54, 14 L. R. A. (N.S.) 356, 83 N. E. 542.

²¹ *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. ed. 216 [affirming, 105 Fed. 419, 59 L. R. A. 393].

²² *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 47 L. ed. 216 [affirming, 105 Fed. 419, 59 L. R. A. 393].

Demanding performance in an illegal manner is equivalent to making performance impossible,²² although it is also analogous to refusing performance unless a modification, and in this case an illegal modification, is assented to,²⁴ which is a form of renunciation.²⁵

If the contract could not be performed in any event, conduct by one party which would have made performance impossible had it been possible before, does not amount to an actionable breach, as no damage exists. A agreed with B to pay a certain sum if B should collect a claim of A's against X in full. If such claim was in fact uncollectible, A's assignment of such claim did not amount to a breach.²⁶

§ 2920. Specific illustrations—Prevention of test, measurement, etc. If the party who makes complete performance impossible has received the substance of that for which he contracted, and if his act makes literal performance impossible, the adversary party may recover as though he had performed in full.¹ If A sells to B property which is to meet the requirements of a certain test, B can not prevent liability on his part by making the performance of such test impossible.² Where A agreed to furnish air-propellers to remove the smoke from B's tempering-room, B to furnish the power from a shaft in such room, and the machine to be subject to thirty days' successful trial, it was held that the fact that the shaft broke, and that B declined to furnish a new shaft, prevented thirty days' successful trial, and left B liable to A for the contract price.³ A sold a horse to B for an agreed price, and B was to pay one hundred dollars more if on a speed trial within ninety days such horse trotted as fast as another specified horse. B declined to make such

²² *Hunt v. Adams*, 81 Me 356, 3 L. R. A. 609, 17 Atl. 299. (Demanding ordinary labor on Sunday excuses employe for abandoning employment.)

²⁴ See § 2904.

²⁵ See § 2904.

²⁶ *Barsby v. Warren*, 47 Neb. 275, 66 N. W. 409.

¹ *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353 [affirming, *Schlottman v. E. I. Du Pont de Nemours Powder Co.*, 210 Fed. 356]; *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600; *Kinney v. Phila-*

delphia Watch Case Co., 76 N. J. L. 735, 71 Atl. 269.

² *Deyo v. Hammond*, 102 Mich 122, 25 L. R. A. 719, 60 N. W. 455; *Howard v. Mfg. Co.*, 162 N. Y. 347, 56 N. E. 986.

See also, *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 C. C. A. 161 [affirming, *Schlottman v. E. I. Du Pont de Nemours Powder Co.*, 210 Fed. 356].

³ *Howard v. American Mfg. Co.*, 162 N. Y. 347, 56 N. E. 986.

test, because the horses were not in proper condition for the test within ninety days, and he did not allow such test to be made afterwards. It was held that on proof of the fact that the horse sold was as fast as the other A could recover the extra one hundred dollars.⁴ A floating dock, which is to be tested by means of a suitable vessel furnished by the government within two months after the dock is completed, need not be tested if the government does not furnish a suitable vessel for such test, and the builder may recover the contract price to become due when such test was made, without making such test.⁵ If a contract to make compensation for the purchase of a manufacturing plant provides for additional compensation in case the output reaches a certain amount, and the purchaser makes performance impossible by dismantling the plant and preventing the test, the party to whom such extra compensation was to have been made may recover reasonable compensation for the services if he can show such additional value.⁶

If the vendee agrees to measure property in a certain way before payment is due, and then makes such measurement impossible, the vendor may recover upon proof of the quantity furnished.⁷ Thus A agreed to furnish to a city stone to be crushed, which after crushing was to be used to macadamize certain streets, and the stone was to be measured upon the streets when finished. A furnished such stone, and it was crushed; but the city did not place it upon the streets. The city was not thereby discharged from liability.⁸ Under a contract for removing tar which provides that A's suspension of work for ten days shall give to B the right to terminate the contract, A suspended work for nine days; on the tenth day A was ready to resume, but B had given his employes a holiday and there was no one to do the weighing provided for by the contract. These facts were held not to justify B in terminating the contract.⁹

§ 2921. Building contracts. A common illustration of the doctrine that one who makes performance by the other impossible, or delays it, thereby discharges the contract, or excuses delay, is

⁴Deyo v. Hammond, 102 Mich. 122, 25 L. R. A. 719, 60 N. W. 455.

⁵International Bow & Stern Dock Co. v. United States, 60 Fed. 523.

⁶E. I. Du Pont de Nemours Powder Co. v. Schlottman, 218 Fed. 353, 134 C. C. A. 161 [affirming, Schlottman

v. E. I. Du Pont de Nemours Powder Co., 210 Fed. 356].

⁷Harper v. Sterling, 84 Ill. App. 62.

⁸Harper v. Sterling, 84 Ill. App. 62.

⁹Brown v. Monumental Co., 98 Md. 1, 55 Atl. 391.

found in building contracts. If the owner by his own acts delays the contractor in completing the building, the owner can not recover damages, nor can he enforce a covenant for paying liquidated damages in case of delay.¹ If the contractor has himself suffered damages by reason of the delay, he may recover such damages from the owner.² A delay caused by the failure of the owner's architects to furnish plans and specifications;³ or to approve plans furnished by the contractor;⁴ or by the owner's delay⁵ or refusal⁶ to furnish necessary levels; or by the failure of the owner to furnish materials agreed to be furnished;⁷ or to do

¹ *United States. King Iron Bridge & Mfg. Co. v. St. Louis*, 43 Fed 768, 10 L. R. A. 826; *Wyandotte, etc., Ry. v. Bridge Co.*, 100 Fed. 107, 40 C. C. A. 325; *Atlantic City v. Warren Bros. Co.*, 226 Fed 372, 141 C. C. A. 202; *Miller v. United States*, 49 Ct. Cl. 276; *American Dredging Co. v. United States*, 49 Ct. Cl. 350; *Morris v. United States*, 50 Ct. Cl. 154 (obiter).

Illinois. Lehmann v. Warren, 209 Ill. 264, 70 N. E. 600; *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Louisiana. Hebert v. Weil, 115 La. 424, 39 So. 389; *Blymer Ice Machine Co. v. McDonald*, 48 La. Ann. 439, 19 So. 459.

Maryland. Black v. Woodrow, 39 Md. 194.

Michigan. Malcomson-Houghten Co. v. Gregorian Building Co., 191 Mich. 678, 158 N. W. 126.

Minnesota. Davis v. Crookston Waterworks, Power & Light Co., 57 Minn. 402, 47 Am. St. Rep. 622, 59 N. W. 482.

New York. Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

Pennsylvania. Murphy v. Orne, 185 Pa. St. 250, 39 Atl. 959; *Hunn v. Pennsylvania Institution for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

² *Langford v. United States*, 95 Fed. 933; *Indianapolis Northern Traction*

Co. v. Brennan, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503; *Atlantic & Danville Ry. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13; *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

³ *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237; *Mahoney v. Church*, 47 La. Ann. 1064, 17 So. 484; *Hunn v. Pennsylvania Institution for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

So under a contract to construct machinery according to plans, which were not furnished in time *Jeffrey Mfg. Co. v. Iron Co.*, 93 Fed. 408.

See also, *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

⁴ *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

⁵ *Boden v. Maher*, 105 Wis. 539, 81 N. W. 661.

⁶ *Olson v. Snake River Valley Ry.*, 22 Wash. 139, 60 Pac. 156.

⁷ *Williams v. Yates (Ky.)*, 113 S. W. 503; *Davis v. Crookston Waterworks, Power & Light Co.*, 57 Minn. 402, 47 Am. St. Rep. 622, 59 N. W. 482; *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

See also, in a contract to make an image. *Ambrosini v. Pelaggle*, — Vt. —, 108 Atl. 916.

the masonry work agreed upon;⁸ or to construct a foundation,⁹ or piers,¹⁰ or metal work,¹¹ or roof timbers;¹² or to construct the building if this is necessary to enable the contractor to perform,¹³ agreed to be constructed by the owner and necessary to be constructed before the contractor can proceed with his work, can not make the contractor liable to the owner, either for actual damages or under a clause providing for liquidated damages. So a contractor is not liable for damages for delay caused by failure of the owner to furnish a right of way,¹⁴ or to construct a road over which the contractor is to haul material.¹⁵ If A and B enter into a contract by which A agrees to prepare a site for a pier and B agrees to construct a pier thereon, A is liable in damages for his delay in preparing such site.¹⁶

Conversely, an owner who has to do certain work upon the house himself, may recover from the contractor, although he has not done such work, where the contractor delayed performance and kept control of the house, and the work to be done by the owner could not well be done until the contractor had completed his work.¹⁷ The contractor is not liable for damage caused by the owner's furnishing defective plans, thereby making certain repairs and changes necessary.¹⁸ Delay in inspection provided for by the contract and necessary before the contractor can proceed discharges him from liability for delay.¹⁹ If a building is to be paid for when the owner is satisfied that no liens have been placed on the property, the owner can not withhold payment because of a lien on the property for material bought under such contract from a third person by the owner.²⁰ The contractor may recover damages which are due to the fact that the material which the owner has furnished

⁸ Underwood v Wolf, 131 Ill. 425,
19 Am St Rep 40, 23 N. E. 598.

⁹ Standard Gaslight Co v. Wood, 61
Fed 74.

¹⁰ King Iron Bridge & Mfg. Co. v.
St Louis, 43 Fed 768, 10 L. R. A. 826.

¹¹ Langford v. United States, 95 Fed.
933.

¹² Vaughn v. Digman (Ky.), 43 S.
W 251.

¹³ Board of Education v. Roxbury
Township, — N. J. —, 107 Atl. 259.
(Contract for installing a system of
heating and ventilation in a school
building.)

¹⁴ Chicago, Milwaukee & St. Paul Ry.
v. Clark, 92 Fed. 968, 35 C. C. A. 120.

¹⁵ Corbett v. Anderson, 85 Wis. 218,
54 N. W. 727.

¹⁶ Miller v. United States, 49 Ct. Cl.
276.

¹⁷ Cavode v Principal, 110 Mich. 672,
68 N. W. 987.

¹⁸ Coon v. Citizens' Water Co., 152
Pa. St. 644, 25 Atl. 505.

¹⁹ Erickson v. United States, 107 Fed.
204.

²⁰ Vanderhoof v. Shell, 42 Or. 578,
72 Pac. 126.

in accordance with the contract is defective.²¹ If the contractor has a certain time in which to remove defects, the act of the owner in removing or destroying the work of the contractor before he has an opportunity to remove such defects discharges the contractor from his liability upon such covenant,²² and he may recover as though he had performed such covenant in full.²³

The act of the principal contractor in making performance impossible on the part of a subcontractor has the same consequences as prevention of performance by the owner.²⁴ The contractor can not recover damages from the subcontractor if the latter treats the contract as discharged by such act of the principal contractor.²⁵ If the plans are defective and neither the contractor nor the subcontractor has assumed the risk thereof, it is said that the subcontractor may recover for the value of his performance, but that he can not recover profits which he would have made if the plans had permitted performance.²⁶ If the contract contains an express provision to the effect that the principal contractor will compensate the subcontractor for delay in furnishing labor and material, the principal contractor is liable for such delay although such delay is due to the fault of the property owner and not to the fault of the principal contractor.²⁷

§ 2922. Party who prevents performance not discharged from liability. If one party to a contract makes it impossible for the other party to perform the contract or delays the performance of it, the party who thus makes performance impossible on the part of the other, can not treat the default of the adversary party, which is thus caused, as discharging himself from liability.¹ The

²¹ *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929 (timber for a tunnel).

²² *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600; *Kinney v. Philadelphia Watch Case Co.*, 76 N. J. L. 735, 71 Atl. 269.

²³ *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600.

²⁴ *Campfield v. Sauer*, 189 Fed. 576, 38 L. R. A. (N.S.) 837; *Gill v. Hale & Kilburn Co.*, 257 Fed. 906; *Seventh St. Planing Mill Co. v. Schaefer (Ky.)*, 99 S. W. 341, 30 Ky. L. Rep. 623.

²⁵ *Campfield v. Sauer*, 189 Fed. 576, 38 L. R. A. (N.S.) 837; *Seventh St. Planing Mill Co. v. Schaefer (Ky.)*, 99 S. W. 341, 30 Ky. L. Rep. 623.

²⁶ *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, L. R. A. 1915C, 671, 142 Pac. 675.

²⁷ *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636.

¹ *United States v. United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Great Falls v. Theis*, 79 Fed. 943; *Blodgett v. Zinc Co.*, 120 Fed. 893; *Campfield v. Sauer*, 189 Fed. 576, 38 L. R. A.

party who is prevented from performing further may recover damages for the breach of the contract, or compensation for what he has done without performing fully.² A sold a monument to B,

(N.S.) 837; *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202; *Crocker v. United States*, 49 Ct. Cl. 85; *Miller v. United States*, 49 Ct. Cl. 276; *Morris v. United States*, 50 Ct. Cl. 154.

California. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

Colorado. *Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822; *Miser Gold Mining & Milling Co. v. Moody*, 37 Colo. 310, 86 Pac. 335; *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546; *Burrell v. Masters*, — Colo. —, 176 Pac. 316.

Connecticut. *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937.

Illinois. *Christopher & Simpson Architectural Iron & Foundry Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166; *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600; *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641.

Indian Territory. *Degnan v. Nowlin*, 5 Ind. Terr. 312, 82 S. W. 758.

Indiana. *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65; *Shirk v. Lingeman*, 26 Ind. App. 630, 59 N. E. 941.

Iowa. *Loftus v. Riley*, 83 Ia. 503, 50 N. W. 17.

Kentucky. *Seventh St. Planing Mill Co. v. Schaefer* (Ky.), 99 S. W. 341, 30 Ky. L. Rep. 623; *Williams v. Yates* (Ky.), 113 S. W. 503.

Louisiana. *Hebert v. Weil*, 115 La. 424, 30 So. 389.

Massachusetts. *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590; *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022.

Michigan. *Gates v. Detroit & Macki-*

nac Ry. Co., 147 Mich. 523, 111 N. W. 101; *Malcolmson-Houghten Co. v. Gregorian Building Co.*, 191 Mich. 678, 158 N. W. 128.

New Hampshire. *Famous Players Film Co. v. Salomon*, — N. H. —, 106 Atl. 282.

New York. *Howard v. American Mfg. Co.*, 162 N. Y. 347, 56 N. E. 986; *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81; *Patterson v. Mayerhofer*, 204 N. Y. 96, 97 N. E. 472.

Ohio. *Filmore v. Metropolitan Ins. Co.*, 82 O. S. 208, 92 N. E. 26; *Klausermeyer v. Cleveland Trust Co.*, 89 O. S. 142, 105 N. E. 278 (obiter).

Oregon. *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126.

Pennsylvania. *Hunn v. Pennsylvania Institution for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812; *Kress House Moving Co. v. George Hogg Co.*, 263 Pa. St. 191, 106 Atl. 351.

Tennessee. *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Utah. *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

Vermont. *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863.

Washington. *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

West Virginia. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634.

Wisconsin. *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326; *Loehr v. Dickson*, 141 Wis. 332, 30 L. R. A. (N.S.) 495, 124 N. W. 203.

²*United States. E. I. Du Pont Nemours Powder Co. v. Schlottman*, 218 Fed. 353 [affirming, *Schlottman v. E.*

upon which were to be inscribed four lines of verse to be furnished by B. It was held that if B refused to furnish the lines of verse, A could erect the monument without the verse and recover the contract price, less the cost of inscribing such lines of verse.³ A agreed to construct certain wood-work in B's building. Before it was completed the roof of the building fell, through the negligence of B's employes. A was allowed to recover for the part of the work that had been done, although it was injured by such fall.⁴ One who agrees to support another at the house of such other, is discharged from further liability and permitted to sue in assumpsit for work done upon demand of the owner of the house that the other leave the premises.⁵ If A, who is a mortgagee under a construction mortgage, agrees to make certain payments to a subcontractor when the principal contractor has completed the work, and A subsequently agrees with the principal contractor that certain items may be omitted, A can not resist making such payment to the subcontractor on the ground that the principal contractor did not complete the work in accordance with the terms of the original contract.⁶ Though no test was provided for, A, who furnishes piping to carry off shavings and dust from certain machinery and places an exhaust fan furnished by B, can recover, although owing to a defect in the fan the result is not successful.⁷ If a contract for the sale of a heating plant contains a provision to the effect that the contractor has a year in which to make good any defects which

I. Du Pont de Nemours Powder Co., 210 Fed. 350].

Arkansas. *Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187.

Connecticut. *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937; *Beattie v. New York, N. H. & H. R. R. Co.*, 84 Conn. 555, 80 Atl. 709.

Illinois. *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641.

Indiana. *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503.

Indian Territory. *Degnan v. Nowlin*, 5 Ind. Terr. 312, 82 S. W. 758.

Maryland. *Black v. Woodrow*, 39 Md. 194; *North v. Mallory*, 94 Md. 305, 51 Atl. 89.

Rhode Island. *Parker v. Macomber*,

17 R. I. 674, 16 L. R. A. 858, 24 Atl. 404.

Washington. *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, L. R. A. 1915C, 671, 142 Pac. 675.

West Virginia. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634.

Wisconsin. *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 53 L. R. A. 826, 85 N. W. 268.

³ *Eastern Granite Co. v. Heim*, 89 Ia. 698, 57 N. W. 437.

⁴ *Teakle v. Moore*, 131 Mich. 427, 91 N. W. 636.

⁵ *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 404.

⁶ *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022.

⁷ *May Mantel Co. v. Blow-Pipe Co.*, 93 Ga. 778, 21 S. E. 142.

may develop therein, the act of the owner in removing the entire plant during such time, and while the contractor is attempting to remove such defects, operates as a discharge of the contractor from liability imposed by such covenant;⁸ and he may recover the full contract price.⁹

While the party prevented from further performance can recover damages, he can not recover the full contract price as if he had performed in full if his performance is in fact less than substantial performance.¹⁰

§ 2923. Party who prevents performance liable in damages.

The party who has prevented the adversary party from performing has himself committed a breach for which he is liable in damages.¹ He can not set up the failure of the adversary party to perform, as a defense to such action.² If A agrees to perform certain work for B for which B is to furnish certain material, B's failure to furnish such material does not operate as a discharge of B's liability of the contract; but B is liable for such default on his part.³ If A has agreed to manufacture certain articles for B in accordance with specifications which B is to furnish, A may recover damages because of B's failure to furnish specifications, although A has not proceeded to manufacture such articles upon his own specifications.⁴ If a canning company which has bought a crop of growing peas under a contract by which the seller is to submit samples to the canning company a few days before the crop is ready to harvest, whereupon the canning company is to notify him when to deliver the crop, omits to exercise proper diligence in examining the crop

⁸ *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600.

⁹ *Lehmann v. Warren*, 209 Ill. 264, 70 N. E. 600.

¹⁰ *Kentucky Union Lumber Co. v. Martin (Ky.)*, 49 S. W. 191.

¹ *United States. Miller v. United States*, 49 Ct. Cl. 276.

Indiana. Indianapolis Northern Traction Co. v. Brennan, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503.

New York. Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472.

Tennessee. Gardner v. Deeds, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Wisconsin. Olson v. Viroqua, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

² *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518; *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472.

³ *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503; *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

⁴ *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

on receiving such samples, such omission is a breach which renders the canning company liable for damages caused thereby.⁵ A intended to buy certain property at a foreclosure sale, and he entered into a contract with B by which he agreed to resell such property to B. At the foreclosure sale B outbid A. It was held that B was liable for breach of such contract, and that A could recover the difference between the contract price and B's bid.⁶

§ 2924. Party whose performance is prevented discharged from further performance. The party who is prevented by the act of the adversary party from performing the contract further may treat such conduct as a discharge of the contract.¹ The delay of the government in approving plans for an unreasonable time operates at least as an extension of time for performance.² The act of a vendor, who has obtained a decree of foreclosure conditioned upon the failure of the vendee to pay the purchase price, in preventing the vendee from having an opportunity to make such payment, is said to operate as a breach, so as to impose upon the vendor liability for damages which naturally result therefrom.³ If A sells property to B under a contract which gives B the option to return such property in a specified time, A's act in leaving the state before such time has elapsed and in not returning until after such time has elapsed, excuses B's delay in tendering such property if such tender is made in a reasonable time after A's return.⁴ If a lighting company delays the completion of its plant in order to ascertain the result of a referendum election upon the ordinance under which it is to act, and such delay results in its delay in reducing the rate for electricity furnished for commercial purposes, such facts do not prevent the lighting company from recovering for electricity furnished to the city.⁵ One who has prevented the performance of a contract for the transfer of mining claims by failing to return the deed therefor to the grantee after it has been returned to the grantors for correction, can not take advantage of

⁵ *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546.

⁶ *Patterson v. Meyerhofer*, 204 N. Y. 66, 97 N. E. 472.

¹ *Gill v. Hale & Kilburn Co.*, 257 Fed. 906; *Sellers v. Catron*, 5 Ind. Terr. 263, 82 S. W. 742; *Board of Education v. Roxbury Township*, — N. J. —, 107 Atl. 259.

² *American Dredging Co. v. United States*, 49 Ct. Cl. 350

³ *Loehr v. Dickson*, 141 Wis. 332, 30 L. R. A. (N.S.) 495, 124 N. W. 293.

⁴ *Edmonds v. Evarts*, 146 Mich. 485, 100 N. W. 844

⁵ *Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187.

such failure to perform as a breach.⁶ If A has agreed to support B, and B makes performance on A's part impossible,⁷ by refusing to remain at a proper place to receive such support,⁸ or by treating A in such a way that A is justified in leaving,⁹ B can not treat A's failure to furnish support as a discharge.

§ 2925. Party whose performance is prevented discharged from liability for damages. The party who makes performance impossible can not recover damages from the adversary party for not performing.¹ No recovery for damages can be had for delay in delivering a chattel sold if the delay is due to the fault of the vendee.² If A has agreed to sell certain articles to B to be placed in sacks which B is to furnish, B's failure to furnish sacks operates as a discharge of A's covenant, and B can not recover damages for A's failure to perform.³ A agreed to deliver hay to the United States, and it was an implied term of the contract that he was to cut the hay in the Yellowstone Valley, where the only available grass was growing. The United States then had this grass cut by others. This was held to discharge A from liability from furnishing hay.⁴ A agreed to construct a boat for B. Two months

⁶ *Miser Gold Mining & Milling Co. v. Moody*, 37 Colo. 310, 86 Pac. 335.

⁷ *Wood v. Leeka*, 262 Ill. 607, 104 N. E. 1048; *Soper v. Cisco*, 85 N. J. Eq. 165, 95 Atl. 1016.

⁸ *Soper v. Cisco*, 85 N. J. Eq. 165, 95 Atl. 1016.

⁹ *Wood v. Leeka*, 262 Ill. 607, 104 N. E. 1048.

¹ *United States v. United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Chicago, Milwaukee & St. Paul Ry. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625; *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. ed. 948; *Campfield v. Sauer*, 189 Fed. 576, 38 L. R. A. (N.S.) 837.

California. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 Pac. 966.

Georgia. Day v. Jeffords, 192 Ga. 714, 29 S. E. 591.

Kentucky. Seventh St. Planing Mill Co. v. Schaefer (Ky.), 99 S. W. 341, 30 Ky. L. Rep. 623.

Montana. Butte Land & Investment Co. v. Williams, 55 Mont. 39, 1 A. L. R. 1634, 173 Pac. 550.

New York. Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

Pennsylvania. Kress House Moving Co. v. George Hogg Co., 263 Pa. St. 191, 106 Atl. 351.

² *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. ed. 948 [affirming, 15 D. C. App. 198]; *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503; *Maher v. Lumber Co.*, 86 Wis. 530, 57 N. W. 357.

³ *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

⁴ *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46.

before time at which such boat was to be completed A became insolvent, made a general assignment for the benefit of creditors, and B took possession of the boat. This was held to discharge A from liability for not completing the boat within the time specified.⁵ If A has agreed to use seed furnished by B for raising seed of a certain quality which he is to deliver to B, B's act in furnishing improper seed prevents him from making use of the fact that the seed which A had raised was below the standard fixed by the contract, as a defense.⁶ A provision in a contract for the use of films for moving pictures, to the effect that the lessee is liable for films destroyed while in his possession, is discharged by the act of the lessor in sending a film in so defective a condition that the use of such film, even though proper, will result in its destruction.⁷ If A and B have entered into a contract by which A is to operate a coal mine and B is to provide supplies to enable A to perform, B's failure to furnish such supplies is a breach on his part which excuses A for failure to perform the contract on his part.⁸ If A has entered into a contract with B to cut logs on B's land and to deliver them to B, B's act in refusing to permit A to cut logs until he has hauled those which have been cut discharges A from liability for failure to perform his contract in time, at least if it was possible for A to have performed the contract when B required him to discontinue performance.⁹ Under a contract by which A agrees to furnish a certain amount of timber per annum for transportation, and B agrees to furnish cars, A is discharged from liability for failure to furnish the requisite amount of timber if such failure is due to B's failure to furnish the requisite number of cars.¹⁰ If the owner of a house interferes with the performance by the contractor of a contract for moving it, the contractor is not liable for damages thus caused.¹¹ If a contractor has agreed to furnish certain material to a subcontractor and he fails to do so, he can not recover damages from the subcontractor for refusing to continue performance.¹² No deduction can be made from the contract price of a

⁵ Vandegrift v. Engineering Co., 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

⁶ Burrell v. Masters, — Colo. —, 176 Pac. 316.

⁷ Famous Players Film Co. v. Salomon, — N. H. —, 106 Atl. 282.

⁸ Degnan v. Nowlin, 5 Ind. Terr. 312, 82 S. W. 758.

⁹ Morgan v. Tucker, 78 Vt. 56, 61 Atl. 863.

¹⁰ Gates v. Detroit & Mackinac Ry. Co., 147 Mich. 523, 111 N. W. 101.

¹¹ Kress House Moving Co. v. George Hogg Co., 263 Pa. St. 191, 106 Atl. 351.

¹² Seventh St. Planing Mill Co. v. Schaefer (Ky.), 99 S. W. 341, 30 Ky. L. Rep. 623.

building for defects due to the action of the architect employed by the owner.¹³ Under a contract to pay to a broker a commission for effecting a sale, the broker can not recover his commission if he has advised the purchaser that the title is bad when in fact the defect could readily have been corrected.¹⁴ An agreement to pay A, who was acting as superintendent of a department of a corporation, an additional salary for the last term of his services if his contract is not renewed is discharged when such corporation sells its business to another corporation, in which sale A takes an active part.¹⁵ Under a contract to furnish support at the obligor's home, no recovery can be had if the obligee leaves without good cause and without demanding support elsewhere.¹⁶ On the other hand, if the obligor breaks up housekeeping and goes to live with a relative and can not furnish a home, breach exists, even if the obligee is asked to remain until the crops are removed.¹⁷

E. NON-PERFORMANCE

§ 2926. Non-performance as breach. In the types of breach thus far discussed, the party who breaks the contract has manifested his intention by word or deed to disregard the obligation of the contract, and no longer to recognize it as binding upon him. Breach may also exist where one party, without repudiating the contract in any way, or indicating his intention not to be bound thereby, or not to perform it, either omits performance, or tenders a performance which is not even a substantial performance of the obligation imposed upon him by the contract.¹ In jurisdictions in

¹³ *White v. School District*, 159 Pa. St. 201, 28 Atl. 136.

¹⁴ *Butte Land & Investment Co. v. Williams*, 55 Mont. 39, 1 A. L. R. 1034, 173 Pac. 550.

¹⁵ *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 37 Atl. 638. After such sale was made A refused to consent to a novation of his contract offered by the new corporation.

¹⁶ *Adams v. Cook*, 200 Pa. St. 258, 49 Atl. 954.

¹⁷ *Milks v. Milks*, 129 Mich. 164, 88 N. W. 402.

¹ *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731; *Hebert v. Weil*, 115 La. 424, 39 So. 389; *Kennedy v. Meilicke Calculator Co.*, 90 Wash. 239, 155 Pac.

1043; *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

See on this subject, generally, *Acts of Omission as Breaches of Covenants for Title*, by T. F. Martin, 23 Law Quarterly Review, 331; *Liability of Bank to the Maker of a Check for the Wrongful Dishonor Thereof*, by Ernest W. Huffcut, 2 Columbia Law Review, 193; *The Rights of Railway Passengers in Respect of Unpunctuality*, by W. M. Acworth, 3 Journal of Comparative Legislation (N.S.), 31, and *Compensation for Misdescription in Sales of Land*, by William Webster, 3 Law Quarterly Review, 54.

See §§ 2927 et seq.

which breach by anticipation is not recognized or is looked upon with disfavor, non-performance is regarded as the essential fact which is necessary to establish breach.² In England, on the other hand, language has been used which seems to indicate that the courts do not regard non-performance as such breach as will operate as a discharge of the contract, unless the party in default has renounced the contract, or unless it is shown that he is unable to perform.³ This rule was first laid down in instalment contracts,⁴ and most of the cases cited in support of this rule are cases of instalment contracts,⁵ but the principle does not seem to be limited to instalment contracts. At the same time, the principle is applied in cases in which the facts are held to show a renunciation or an inability to perform; and any suggestion that mere non-performance is not a discharge is therefore an obiter.⁶ Where the contract is held not to be discharged and no renunciation is held to exist, it is doubtful if any breach is shown.⁷ It may be doubted if any jurisdiction will hold that the party who is not in default is bound to perform where there is a material breach of a precedent covenant or of a concurrent covenant,⁸ even though the party who is in

² *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731; *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.) 388, 98 N. W. 872.

³ "But I think this case may be, and in fact has been, decided on broader lines than those laid down in the notes to *Portage v. Cole* (1 Wms. Saund. 319-1), as to mutual and independent covenants. I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge, C. J., in *Freeth v. Burr* ([1874], L. R. 9. C. P. at p. 213), and approved in *Mersey Steel Company v. Naylor* ([1884], 9 App. Cas. 434), in the House of Lords, 'that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.' I think the court of appeal had ample ground for drawing this inference from the conduct of the appellants here in dismissing the respondent in deliberate

disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part." *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537].

⁴ See § 3010.

⁵ See, *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434, and *Freeth v. Burr*, L. R. 9 C. P. 208.

⁶ See discussion of this doctrine, in *In re Rubel Bronze & Metal Co. and Vos* [1918], 1 K. B. 315.

⁷ *Harrison v. Walker* [1919], 2 K. B. 459. (A quarrel between co-owners of a bungalow: held, not to discharge the contract for use in common, neither party having attempted to renounce the contract or to exclude the other, and there probably being no implied covenant that co-owners of a bungalow would not quarrel.)

⁸ See §§ 2951 et seq.

default insists that he will perform, and even though he is in fact able to perform.

The question of what constitutes breach turns on the answer to the questions: (1) What was the party, who is alleged to be in default, bound to do under the contract? and (2) What has he in fact done? The first question is primarily one of construction; the second, one of fact.

§ 2927. Breach need not be wilful. The existence and the fact of breach are not, in any way, dependent upon the intention or wish of the party in default to break the contract, or upon the amount of care and faith used by the party who is in default,¹ whether the breach is treated as a ground of discharge,² or as giving a right of action for damages.³ If an attempt to consolidate a corporation fails because the parties who undertake such consolidation are unable to secure the necessary funds, the contract for such consolidation is broken so that no recovery can be had for services rendered thereunder without regard to the intention or misfortune of such parties in not being able to secure such funds.⁴ If a compulsory winding up of a corporation because of insolvency is not a discharge of its continuing contracts of employment, because of

¹England. *Measures Brothers, Ltd. v. Measures* [1910], 2 Ch. 248 [affirming] (1910), 1 Ch. 336].

United States. *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

Connecticut. *Jones v. Marlborough*, 70 Conn. 583, 40 Atl. 460.

Iowa. *Cornell v. Rodabaugh*, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599.

Massachusetts. *Douglas v. Lowell*, 104 Mass. 268, 80 N. E. 510.

Mississippi. *Vicksburg Water Supply Co. v. Gorman*, 70 Miss. 360, 11 So. 680.

New Jersey. *Fry v. Miles*, 71 N. J. L. 293, 59 Atl. 246.

New York. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.

Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

Wisconsin. *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

²*Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Baltimore v. Schaub*, 96 Md. 534, 54 Atl. 106; *Fry v. Miles*, 71 N. J. L. 293, 59 Atl. 246; *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

³*Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; *Walsh v. Fisher*, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437; *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

⁴*Fry v. Miles*, 71 N. J. L. 293, 59 Atl. 246.

impossibility of performance,⁵ it amounts to a breach of such contracts,⁶ although such breach is not intentional or wilful on the part of the corporation.⁷ It is a breach, though not a wilful breach, for one under contract for the season to quit because a strike is ordered, and he is a union man and the strikers threaten personal violence.⁸ The fact that the breach is due to the failure or inability of third persons with whom the party in default has made contracts to enable him to perform his contract does not excuse such breach.⁹ Thus default in a building contract on the part of the contractor is not excused because due to the default¹⁰ or inability to perform,¹¹ on the part of a subcontractor or materialman. Still less is the default of a subcontractor, materialman or employe a discharge available by the chief contractor where he has not in good faith endeavored to perform his contract with them so as to induce performance on their part,¹² as where he fails to return when he agrees, and the wages of his employes are in arrears and their supplies are not furnished.¹³ So a party to a contract binding him to be "responsible for any and all wrong use of said electrotypes" is liable for use of them, in violation of the contract by one to whom he has sold his interest in such business.¹⁴ A contract to replace defective parts of a machine¹⁵ is broken where the performance is prevented by reason of a strike. The fact that non-performance is due to a bona fide misconstruction of the contract does not prevent such non-performance from amounting to breach.¹⁶

The question whether the breach was wilful or not is often, however, important in determining whether the party in default

⁵ See § 2687.

⁶ See §§ 2688 et seq.

⁷ *Measures Brothers, Ltd., v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

⁸ *Walsh v. Fisher*, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

⁹ *Davis v. Ford*, 81 Md. 333, 32 Atl. 280; *Reichenbach v. Sage*, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354; *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

¹⁰ *Davis v. Ford*, 81 Md. 333, 32 Atl. 280. (In this case, however, the contractor made no bona fide effort to

perform his contract with the materialman.) *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

¹¹ *Reichenbach v. Sage*, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354. (Due to the severity of the weather.)

¹² *Davis v. Ford*, 81 Md. 333, 32 Atl. 280.

¹³ *Hanson v. Smith*, 94 Fed. 960, 36 C. C. A. 581.

¹⁴ *Meyer v. Estes*, 104 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

¹⁵ *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465.

¹⁶ *Douglas v. Lowell*, 104 Mass. 268, 80 N. H. 510.

may recover a reasonable compensation for work done by him under the contract.¹⁷

To be distinguished from cases referred to in this section are cases where one party in effect only contracts to arrange with third persons to complete the performance for the benefit of the adversary party. Of such nature are the contracts of carriers, who are to carry over their own line and deliver to a connecting carrier. On doing this, they are not liable for any default of the connecting carrier.¹⁸ A vendor was to ship "within thirty days by sail or steam at seller's option." It was held that he had performed by delivering in good faith to a vessel bound to clear in such time, though for lack of a full cargo it did not in fact do so.¹⁹

On the other hand, the fact that the transaction has resulted in loss to the party seeking relief does not establish the fact of breach.²⁰ Thus A agreed to raft lumber for X, and A employed B to do the work under A's orders. B performed according to A's orders. The work was not completed in time to perform A's contract with X, and X recovered a judgment against A for breach. These facts gave A no right of action against B.²¹ It has been held that a contract to give instruction as to the method of cultivating sugar beets is not broken if improper instructions are given through honest mistake of judgment, as long as there is no fraud or gross ignorance.²²

§ 2928. Specific illustrations of breach—Contract for sale of realty. A contract for the sale of realty is broken by the failure or inability of the vendor to furnish title, or at least a marketable title, to the realty which he has covenanted to convey, at the time fixed by the terms of the contract for making such conveyance.¹

¹⁷ See ch LXXXVIII.

¹⁸ See § 740.

¹⁹ *Ledon v. Havemeyer*, 121 N. Y. 179, 8 L. R. A. 245, 24 N. E. 297.

²⁰ *Penobscot Lumbering Association v. Bussell*, 92 Me. 256, 42 Atl 408.

²¹ *Penobscot Lumbering Association v. Bussell*, 92 Me. 256, 42 Atl 408.

²² *Smith v. Billings Sugar Co.*, 37 Mont 128, 15 L. R. A. (NS) 837, 94 Pac. 839. (From the construction placed on the contract by the majority of the court, it is quite likely that the manufacturer of sugar had not cove-

nanted to give instructions to the employes of the grower.)

¹ *England*, *Weston v. Savage*, 10 Ch. Div. 736.

California, *Crim v. Umbesen*, 155 Cal. 697, 132 Am St Rep. 137, 103 Pac. 178.

Idaho, *Boyd v. Boley*, 25 Ida 584, 139 Pac 139.

Minnesota, *Williams v. Gilbert*, 120 Minn 299, 139 N. W. 502.

Nebraska, *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (NS) 1, 131 N. W. 736.

If the parties in interest are before the court, and a decree has been rendered barring their claims, such title is marketable as far as such interests are concerned.² If the parties in interest are not before the court, a decree which attempts to quiet or perfect the title is of no legal effect against the claims of such parties; and if the title was doubtful before such decree was rendered, it remains unmarketable in spite of such decree.³

If the contract for the sale of realty is executory, it is broken by failure of title as to a material part thereof.⁴ A contract for the sale of a building is broken if such building projects over a public street or way.⁵ A contract for the sale of timber land is broken if the vendor has given an outstanding, valid, enforceable option for the sale of timber thereon.⁶ A material deficiency in the area amounts to a breach of such contract.⁷

An executory contract for the sale of realty is also broken by the existence of encumbrances thereon in violation of the provisions of the contract.⁸ If a contract of sale is signed by the vendor alone, and if it does not provide for a covenant against encum-

Kansas. *Williams v. Bricker*, 83 Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 998.

Minnesota. *Howe v. Coates*, 97 Minn. 385, 4 L. R. A. (N.S.) 1170, 107 N. W. 397.

Ohio. *Lewis v. White*, 16 O. S. 444.

Oklahoma. *Martin v. Spaulding*, 40 Okla. 191, 137 Pac. 882.

Pennsylvania. *Rugg v. Midland Realty Co.*, 261 Pa. St. 453, 104 Atl. 685.

Wisconsin. *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

² *Buchan v. German-American Land Co.*, 180 Ia. 911, L. R. A. 1918A, 84, 164 N. W. 119.

³ *Howe v. Coates*, 97 Minn. 385, 4 L. R. A. (N.S.) 1170, 107 N. W. 397.

⁴ **England.** *Jacobs v. Revell* [1900], 2 Ch. 858.

United States. *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475.

Iowa. *Stonebrook v. Wisner*, 171 Ia. 109, L. R. A. 1916E, 834, 153 N. W. 351.

New Jersey. *Reutler v. Ramsin*, 91 N. J. L. 262, 102 Atl. 351.

New York. *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

Ohio. *Hayes v. Skidmore*, 27 O. S. 331.

Oklahoma. *Groves v. Stouder*, — Okla. —, 161 Pac. 239.

Vermont. *Brown v. Aitken*, 88 Vt. 148, 92 Atl. 22.

Wisconsin. *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

⁵ *Stonebrook v. Wisner*, 171 Ia. 109, L. R. A. 1916E, 834, 153 N. W. 351; *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

⁶ *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

⁷ *Caughron v. Stinespring*, 132 Tenn. 636, L. R. A. 1916C, 403, 179 S. W. 152.

⁸ **England.** *In re Haedicke* [1901], 2 Ch. 666.

California. *Tandy v. Waesch*, 154 Cal. 108, 97 Pac. 69.

brances, the vendee can not treat such contract as broken by reason of the refusal of the vendor's wife to release her dower in such property.⁹

The omission or refusal of the vendor to convey in accordance with the terms of the contract is a breach thereof.¹⁰ Whether a vendor is liable on a contract by which he has agreed to convey his homestead, but in which contract his wife is not joined, is a question upon which there is a divergence of authority; some courts holding that the vendor is liable because of his failure to perform,¹¹ while other courts hold that he is not liable, since the statutory and constitutional provisions with reference to a homestead are intended to prevent the sale thereof unless husband and wife join therein.¹²

If the vendee fails to pay for the realty at the time fixed by the provisions of the contract, if time is of the essence of such contract,¹³ especially if he admits his inability to pay,¹⁴ or if the contract contains a forfeiture clause,¹⁵ or if the vendee fails to pay in

Iowa. *Tague v. McColm*, 145 Ia. 179, 123 N. W. 960.

Minnesota. *Johnson v. Herbst*, 140 Minn. 147, 167 N. W. 356.

Missouri. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480.

⁹ *People's Savings Bank Co. v. Parissette*, 68 O. S. 450, 67 N. E. 896.

¹⁰ Iowa. *Carroll v. Mundy*, — Ia. —, 4 A. L. R. 811, 170 N. W. 790.

Michigan. *Droppers v. Marshall*, 203 Mich. 173, 4 A. L. R. 1266, 168 N. W. 1001.

Minnesota. *Schmidt v. Scandinavian Canadian Land Co.*, 136 Minn. 14, 161 N. W. 218.

New Jersey. *Zimmerman v. Branyan*, 62 N. J. L. 478, 41 Atl. 689.

Wisconsin. *Isaacs v. Bardon*, 114 Wis. 142, 89 N. W. 913.

¹¹ *Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 So. 359 (obiter); *Droppers v. Marshall*, 203 Mich. 173, 4 A. L. R. 1266, 168 N. W. 1001.

¹² *Wheelock v. Countryman*, 133 Ia. 289, 110 N. W. 598; *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018; *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544.

¹³ *United States v. Coughran v. Bigelow*, 164 U. S. 301, 41 L. ed. 442 [affirming, *Coughran v. Bigelow*, 9 Utah 200, 34 Pac. 511].

California. *Smith v. Post*, 167 Cal. 69, 138 Pac. 705.

Georgia. *Lytle v. Scottish-American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402.

Ohio. *Hutcheson v. McNutt*, 1 Ohio 14. (Purchaser not bound to make payment at all; title to pass if payment made.)

Oklahoma. *Hurley v. Anicker*, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

Washington. *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884; *Converse v. La Barge*, 92 Wash. 282, 158 Pac. 958.

For a case in which time is not of the essence, see *Smith v. Berkau*, 123 Ark. 90, 184 S. W. 429.

¹⁴ *Smith v. Post*, 167 Cal. 69, 138 Pac. 705.

¹⁵ *Whiteman v. Perkins*, 56 Neb. 181, 76 N. W. 547; 258 Pa. St. 362, 101 Atl. 1051; *Converse v. La Barge*, 92 Wash. 282, 158 Pac. 958.

a reasonable time, especially if the vendor has given him reasonable notice requiring performance on his part,¹⁶ such conduct of the vendee amounts to a breach. A contract by which the purchaser of certain property agrees to deposit the proceeds thereof in a certain bank to the credit of the vendor, as part payment of the purchase price, is broken by his act in depositing such proceeds in another bank to his own credit.¹⁷

§ 2929. Contract for sale of personalty. A contract for the sale of personalty is broken by failure on the part of the seller to deliver such goods in substantial compliance with the terms of the contract.¹ Material delay in the time of delivering the goods amounts to a breach.²

A promise by the seller to deliver goods f. o. b. cars requires the seller to obtain the cars and to load the goods thereon.³ Whether the time in which the goods are shipped by the seller is reasonable or not, depends, however, upon the difficulty of getting cars because of a general shortage thereof.⁴ Failure on the part of the seller to declare the full value of the goods to the carrier, which

¹⁶ *McMurray v. Spicer*, L. R. 5 Eq. 527; *Fuller v. Hovey*, 84 Mass. (2 All.) 324, 79 Am. Dec. 782; *Kirby v. Harrison*, 2 O. S. 326, 59 Am. Dec. 677.

¹⁷ *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717.

¹ *Alabama*. *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

Arkansas. *Isbell-Brown Co. v. Stevens Grocer Co.*, 118 Ark. 17, 175 S. W. 1158.

Kansas. *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 6 L. R. A. (N.S.) 928, 85 Pac. 551.

New Mexico. *Culp v. Sandoval*, 22 N. M. 71, L. R. A. 1917A, 1157, 159 Pac. 956.

North Dakota. *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 232, 152 N. W. 359.

Pennsylvania. *White v. Wolf*, 185 Pa. St. 369, 39 Atl. 1011.

Washington. *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

A contract to ship goods within a certain time is broken, so as to discharge the buyer, by shipping the goods too late. *Reuter v. Sala*, 4 C. P. D. 239.

It is also broken by shipping them too early. *Bowes v. Shand*, 2 App. Cas. 455 [reversing, 2 Q. B. D. 112, which reversed 1 Q. B. D. 470].

² *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 232, 152 N. W. 359.

³ *Kansas*. *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 6 L. R. A. (N.S.) 928, 85 Pac. 551.

New Mexico. *Culp v. Sandoval*, 22 N. M. 71, L. R. A. 1917A, 1157, 159 Pac. 956.

Washington. *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

⁴ *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

results in a loss to the buyer by reason of the destruction of such goods, is a breach of the seller's duty.⁵

A contract for the sale of goods is broken on the part of the seller by a failure of title to the goods or to a substantial part thereof.⁶ Such failure, however, must exist at the time of the performance, and not at the time the contract is made.⁷ A contract to sell and deliver goods is not broken when made by the fact that the seller does not have title thereto at the time.⁸

A contract for the sale of goods is broken on the part of the seller by a material deficiency in quantity,⁹ or by a substantial defect in quality,¹⁰ if such defects are not waived by the purchaser. An executory contract for the sale of goods is broken by a substantial breach of a warranty thereof.¹¹ However, an express provision to the effect that there is no warranty prevents a failure to deliver goods of the quality designated from being a breach.¹² A contract to replace parts which break under ordinary service because of defective material or workmanship, is broken by refusal to replace parts which are not in themselves defective but which break because of the defective character of other parts of the same machine or appliance.¹³

⁵ *Miller v. Harvey*, 221 N. Y. 54, L. R. A. 1917F, 559, 110 N. E. 781.

⁶ *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N. W. 451.

⁷ *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

⁸ *Page v. Ford*, 65 Or. 450, 47 L. R. A. (N.S.) 247, 131 Pac. 1013.

⁹ *Kuhlman v. Wood*, 81 Ia. 128, 46 N. W. 738.

¹⁰ *United States. Delaware, Lackawanna & Western Ry. v. United States*, 231 U. S. 363, 58 L. ed. 269 (obiter).

Iowa. Roper v. Wells, 182 Ia. 237, 165 N. W. 385.

Kansas. Fairbanks v. Walker, 70 Kan. 903, 17 L. R. A. (N.S.) 558, 92 Pac. 1129.

Kentucky. United States Fidelity & Guaranty Co. v. Travelers' Ins. Machine Co., 167 Ky. 382, 180 S. W. 815.

Wisconsin. Fox v. Wilkinson, 133 Wis. 337, 14 L. R. A. (N.S.) 1107, 113

N. W. 609; *Stein v. Jasculca*, 105 Wis. 317, 162 N. W. 182.

¹¹ *United States. Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393.

Iowa. Fulton Bank v. Mathers, 183 Ia. 226, 166 N. W. 1050.

Kentucky. Glover Machine Works v. Cooke-Jellico Coal Co., 173 Ky. 675, 191 S. W. 510.

Nebraska. Toledo Computing Scale Co. v. Fredericksen, 95 Neb. 689, 146 N. W. 957.

Washington. Fairbanks Steam Shovel Co. v. Holt, 79 Wash. 361, L. R. A. 1915B, 477, 140 Pac. 394; *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

¹² *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, 37 L. R. A. (N.S.) 79, 132 N. W. 902.

¹³ *American Locomotive Co. v. National Wholesale Grocery Co.*, 226 Mass. 314, L. R. A. 1917D, 1125, 116 N. E. 404.

A contract for the sale of goods is broken by the failure of the buyer to pay therefor in accordance with the terms of the contract.¹⁴ Failure to pay for goods bought under an entire contract before the entire quantity has been delivered is not breach, however, in the absence of an express provision for payment in instalments.¹⁵ The refusal of the buyer to accept the goods when they are tendered, amounts to a breach.¹⁶ The omission of the seller to furnish receptacles for the goods, in accordance with the terms of the contract, is a breach thereof.¹⁷

§ 2930. Breach of contract for work, labor, and personal services. A contract for work and labor is broken by the act of the employe in quitting his employment without legal excuse;¹ or by his incompetency;² or by his wilful disobedience to the lawful orders of his employer.³ It is not necessary that actual injury resulting from such wilful disobedience should be shown.⁴

Misconduct on the part of the employe, at least misconduct affecting the performance of the contract of employment, amounts

¹⁴ *Read v. Hutchinson*, 3 Campb. 352; *United Machinery Co. v. Etzel*, 89 Conn. 336, 94 Atl. 356; *Lombard Water Wheel Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 6 L. R. A. (N.S.) 180, 63 Atl. 555; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

¹⁵ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

¹⁶ *Moore v. United States*, 196 U. S. 157, 49 L. ed. 428.

¹⁷ *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

¹ *Nash v. H. R. Gladding Co.*, 118 Mich. 529, 77 N. W. 7.

² *United States. Lyon v. Pollard*, 87 U. S. (20 Wall.) 403, 22 L. ed. 361.

Georgia. Hattaway v. Sanderlin, 145 Ga. 219, 88 S. E. 941.

Kansas. Manross v. Uncle Sam Oil Co., 88 Kan. 237, 128 Pac. 335.

Maryland. Keedy v. Long, 71 Md. 385, 5 L. R. A. 759, 18 Atl. 707.

Massachusetts. Casavant v. Sherman, 213 Mass. 23, 90 N. E. 475.

³ *England. Turner v. Mason*, 14 T. Lees. & W. 112.

United States. Development Co. v. King, 161 Fed. 91, 24 L. R. A. (N.S.) 812; *In re Milwaukee Motor Co.*, 246 Fed. 671, L. R. A. 1918C, 1027.

Kentucky. Thomas v. Houston, Stanwood & Gamble Co., 146 Ky. 156, 37 L. R. A. (N.S.) 950, 142 S. W. 214.

Minnesota. Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

North Dakota. McGregor v. Harm, 19 N. D. 599, 30 L. R. A. (N.S.) 649, 125 N. W. 885.

Ohio. Beckman v. Garrett, 66 O. S. 136, 64 N. E. 62.

Pennsylvania. Matthews v. Park, 146 Pa. St. 384, 23 Atl. 208.

Wisconsin. Green v. Somers, 163 Wis. 96, 157 N. W. 529.

⁴ *Beckman v. Garrett*, 66 O. S. 136, 64 N. E. 62.

to a breach thereof.⁵ Wilful absence on the part of the employe, especially if at a time at which such absence will interfere seriously with the employer's affairs,⁶ or the attempt of the employe to organize a rival business and enter into competition with his employer during the term of the employment,⁷ amounts to breach of a contract of employment. It has been held, however, that the act of the employe in organizing a corporation to carry on a competing business after the term of his contract of employment, is not of itself a breach.⁸

An architect is guilty of breach of his contract with his employer if he fails to use ordinary care and skill in preparing plans and specifications;⁹ or if he prepares plans for a building, the cost of which will exceed substantially the limit imposed by the employer;¹⁰ or if he directs the contractor to construct the building in a manner different from that specified in the plans upon which the owner and the contractor had agreed.¹¹

A contract for work, labor and personal services is broken by the failure of the employer to pay the agreed compensation in substantial compliance with the terms of the contract.¹² A contract for the employment of a sales agent is broken by the act of the principal in furnishing defective goods.¹³ A contract for the employment of an attorney is broken by the act of the client in declaring that the attorney has deceived his client and has lied to

⁵ England. *Baillie v. Kell*, 4 Bing. N. Cas. 638.

Colorado. *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

Illinois. *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896.

Iowa. *Miller v. Jones*, 178 Ia. 168, 159 N. W. 671.

Ohio. *Beckman v. Garrett*, 66 O. S. 136, 64 N. E. 62.

Oklahoma. *Board of Education v. Gossett*, 56 Okla. 95, 155 Pac. 856.

Oregon. *Foreman v. School District No. 25*, 81 Or. 587, 159 Pac. 1155.

See also, *Mackenzie v. Minis*, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

⁶ In re *Milwaukee Motor Co.*, 246 Fed. 671, L. R. A. 1918C, 1027; *Beck-*

man v. Garrett, 66 O. S. 136, 64 N. E. 62.

⁷ *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

⁸ *Myers v. Roger J. Sullivan Co.*, 166 Mich. 193, 34 L. R. A. (N.S.) 1217, 131 N. W. 521.

⁹ *Bayshore Development Co. v. Bonfoey*, — Fla. —, L. R. A. 1918D, 889, 78 So. 507.

¹⁰ *Hight v. Klingensmith*, 75 Ark. 218, 87 S. W. 138; *Williar v. Nagle*, 109 Md. 75, 71 Atl. 427.

¹¹ *Foeller v. Heintz*, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

¹² *Canal Co. v. Gordon*, 73 U. S. (6 Wall.) 561, 18 L. ed. 894; *Dobbins v. Higgins*, 78 Ill. 440.

¹³ *Kennedy v. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043.

him.¹⁴ A contract to furnish medical services at a given date and place is broken by failure to do so, although at the time the physician who had agreed to furnish such services could not leave the patient whom he was then attending.¹⁵ A contract to furnish medical services is not broken, however, by the refusal of the physician to accompany the patient to another state, if the contract does not show that the parties contemplated a change of domicile.¹⁶ A contract for the employment of one for a given position is broken by the act of the employer in demanding that the employee work at a subordinate position, though at the same salary.¹⁷

An ordinary contract of employment is not broken by the act of the employer in refusing to allow the employee to work, if the employer pays or offers to pay the compensation provided for by the terms of the contract.¹⁸ Accordingly, the act of an employer in discharging an employee without giving the notice required by the contract, but paying full pay for the time for which such notice was to have been given, is not such a discharge of the entire contract as justifies the employee in attempting to secure the customers of the employer in violation of a covenant in the contract to the effect that the employee would not solicit customers of such employer.¹⁹ The cases in which this result was reached were cases involving the employment of an agent to transact business, in which employment the court thought that the opportunity to continue the work was not an essential feature of the work.²⁰ A different result might be reached in case of a contract of employment in which the opportunity to do the work and to become known in such connection was a vital term of the contract, as in the employment of an actor, an opera singer, a baseball player, and the like.

A contract to the effect that an employer will not employ any but members of a given union as long as such union can furnish the number of employees which he needs, is not broken by the act

¹⁴ *Genrow v. Flynn*, 166 Mich. 564, 35 L. R. A. (N.S.) 960, 131 N. W. 1115.

¹⁵ *Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, 69 So. 664.

¹⁶ *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 28 L. R. A. (N.S.) 1112, 91 N. E. 1041.

¹⁷ *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 27 L. R. A. (N.S.) 1011, 126 N. W. 541.

¹⁸ *Turner v. Sawdon* [1901], 2 K. B. 653; *Konski v. Peet* [1915], 1 Ch. 530.

See to the opposite effect where the employer had sold his business, and, apparently, had assigned his interest in the contract of employment. *White v. Lumiere North American Co.*, 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121.

¹⁹ *Konski v. Peet* [1915], 1 Ch. 530.

²⁰ *Turner v. Sawdon* [1901], 2 K. B. 653; *Konski v. Peet* [1915], 1 Ch. 530.

of a former member of such union in remaining in the employment of such employer after he has ceased being a member of such union, so as to give a right to such union to interfere with the continuance of such employment.¹¹

§ 2931. Contracts for services other than personal. A contract requiring a manufacturer to furnish an experienced and successful sales agent to a dealer to whom he sells his goods, is not broken by the fact that the agent whom he recommends is in fact dishonest, unless the manufacturer acted negligently or in bad faith in recommending him.¹ A contract to instruct a beet-grower as to the method of growing beets, is not broken by failure to instruct laborers whom he has employed,² nor by advice to him to wait for experienced laborers, at least if no other laborers could be obtained.³ A contract to furnish pasture for cattle is broken by failure to furnish water for the cattle, as well as grass.⁴ A contract to furnish street-car advertising in a certain number of street-cars running at a certain place, which in fact covers practically all of the street-cars at such place, is broken by inserting such advertisements on the same number of street-cars out of a much greater number which run over a much longer route.⁵ A contract for advertising which guarantees a certain number of subscribers is broken by a failure to furnish substantially the number of subscribers agreed upon;⁶ and delinquent subscribers can not be counted in determining such number, even though they are classed as "paid subscribers" by the custom of the business.⁷ A contract to pay certain towage services is not broken by refusal to pay the cost of breaking ice so as to tow the vessel.⁸

§ 2932. Contract not to compete. A contract not to compete in business, if valid, is broken by engaging in such business at such place,¹ or by his manufacturing the medical preparation in which he has agreed not to compete, under another name, claiming it to

¹¹ *Shinsky v. Tracey*, 226 Mass 21, L. R. A. 1917C, 1053, 114 N. E. 957.

¹ *John Slaughter Co. v. Standard Machine Co.*, 148 N. Car. 471, 62 S. E. 599.

² *Smith v. Billings Sugar Co.*, 37 Mont. 128, 15 L. R. A. (N.S.) 837, 94 Pac. 839.

³ *Smith v. Billings Sugar Co.*, 37 Mont. 128, 15 L. R. A. (N.S.) 837, 94 Pac. 839.

⁴ *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915E, 590, 148 Pac. 766.

⁵ *Abrahams v. Campbell* [1911], Scotch Cas. 353, [1911] 1 S. L. T. 4.

⁶ *Cream of Wheat Co. v. Arthur H. Crist Co.*, 222 N. Y. 487, 1 A. L. R. 150, 110 N. E. 74.

⁷ *Cream of Wheat Co. v. Arthur H. Crist Co.*, 222 N. Y. 487, 1 A. L. R. 150, 110 N. E. 74.

⁸ *M. P. Smith & Sons Co. v. Trexler Lumber Co.*, 216 Fed. 134, L. R. A. 1915B, 1086.

¹ *Knowles v. Jones*, 182 Ala. 187, 62 So. 514 (obiter); *Nelson v. Hiatt*, 38

be superior to that sold before.² A contract not to compete as an attorney within a given area is broken by furnishing advice by letter to persons who reside in such area, or by attempting to collect claims as an attorney from debtors who live in such area, although the place of business of such person is located outside of such area.³

In order to amount to a breach of such covenant, it is not necessary that the business should be carried on in the name of the party who has entered into such covenant not to compete,⁴ or that he should be the beneficial owner thereof.⁵

If a corporation which he has organized and in which he is a stockholder,⁶ or a partnership of which he is a member,⁷ competes in such business, the contract is broken. Breach exists if he holds himself out as a partner in a firm, though he is not one in fact,⁸ or if he acts as an employe or agent of a competitor,⁹ or if he acts as managing agent,¹⁰ or as salesman,¹¹ or as a skilled workman,¹² as

Neb. 478, 56 N. W. 1029; *Cowan v. Fairbrother*, 118 N. Car. 406, 54 Am. St. Rep. 733, 32 L. R. A. 829, 24 S. E. 212.

² *Gregory v. Spicker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576.

³ *Edmundson v. Render* [1905], 2 Ch. 320.

⁴ *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Ammon v. Keill*, 95 Neb. 695, 52 L. R. A. (N.S.) 503, 146 N. W. 1009; *Siegel v. Marcus*, 18 N. D. 214, 20 L. R. A. (N.S.) 769, 119 N. W. 358.

⁵ *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064.

⁶ *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228; *Kramer v. Old*, 119 N. Car. 1, 56 Am. St. Rep. 650, 34 L. R. A. 380, 25 S. E. 813.

Equity will enjoin him from acting as a stockholder, except for the purpose of selling his stock or receiving his proportionate share of such business after it is dissolved. *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228.

⁷ *Borley v. McDonald*, 69 Vt. 300, 38 Atl. 60.

⁸ *Daniels v. Brodle*, 54 Ark. 216, 11 L. R. A. 81, 15 S. W. 467.

⁹ *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Ammon v. Keill*, 95 Neb. 695,

52 L. R. A. (N.S.) 503, 146 N. W. 1009; *Siegel v. Marcus*, 18 N. D. 214, 20 L. R. A. (N.S.) 769, 119 N. W. 358.

¹⁰ *Smith v. Webb*, 176 Ala. 596, 40 L. R. A. (N.S.) 1191, 58 So. 913; *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *King v. Fountain*, 126 N. Car. 196, 35 S. E. 427; *Siegel v. Marcus*, 18 N. D. 214, 20 L. R. A. (N.S.) 769, 119 N. W. 358.

The fact that he is conducting a branch for a principal who is located in another place, does not prevent such conduct from amounting to a breach of a covenant not to compete in the place in which such branch is located. *Smith v. Webb*, 176 Ala. 596, 40 L. R. A. (N.S.) 1191, 58 So. 913.

Such party can not hold himself out as manager of a competing business, even though he does not take part therein, if such conduct will injure the good will of the business which he has sold. *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025.

¹¹ *McCausland v. Hill*, 23 Ont. App. 738.

See to the same effect, in case of agent, *Meyers v. Merrillion*, 118 Cal. 352, 50 Pac. 662.

¹² *Ammon v. Keill*, 95 Neb. 695, 52 L. R. A. (N.S.) 503, 146 N. W. 1009.

in a contract not to compete as a barber.¹³ One who has agreed not to compete breaks such covenant if he competes as trustee for the owner of such business.¹⁴ A contract not to act as employe for any share of the proceeds, interest in the business or compensation based on sales is not broken by working in such business as employe on a salary.¹⁵ If a partnership agrees not to engage in a certain business, such contract is broken if one of its members so engages.¹⁶ A contract not to compete is not broken by engaging in a different though closely allied business;¹⁷ nor by making a contract to engage in such business after the time shall expire during which he was not to compete;¹⁸ nor by assisting his wife to start in the same business with her own money;¹⁹ nor by the act of unauthorized parties who sell his goods within the territory covered by the contract not to compete.²⁰ A contract not to engage in business as long as A is in such business ends when A organizes a corporation and sells his business to it;²¹ but it does not end if the corporation is merely nominal, and A owns all the stock and controls the business;²² and such contract is said not to be discharged if A is one of the large stockholders in such new corporation and one of the officers thereof.²³ If A agrees with B not to engage in a certain business, such contract is not discharged by the fact that A and B subsequently form a partnership, the property of which is on dissolution to belong to whichever of them bids the most for it.²⁴ A

¹³ Pohlman v. Dawson, 63 Kan. 471, 88 Am. St. Rep. 240, 54 L. R. A. 913, 65 Pac. 689.

¹⁴ Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064.

¹⁵ Haley Grocery Co. v. Haley, 8 Wash. 75, 35 Pac. 505.

¹⁶ Love v. Stidham, 18 D. C. App. 306, 53 L. R. A. 397.

Contra, Streichen v. Fehleisen, 112 Ia. 612, 84 N. W. 715 [sub nomine, Steichen v. Fehleisen, 51 L. R. A. 412].

¹⁷ Breck v. Ringler, 129 N. Y. 656, 29 N. E. 833. (Contract not to engage in zinc etching not broken by engaging in electrotyping and stereotyping and occasionally buying a zinc etching.)

¹⁸ Southland Frozen Meat & Produce Export Co. v. Nelson [1898], A. C. 442.

¹⁹ Smith v. Hancock [1894], 2 Ch. 377.

²⁰ Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 309, 53 N. W. 501.

²¹ Bagby & Rivers Co. v. Rivers, 87 Md. 400, 67 Am. St. Rep. 357, 40 L. R. A. 632, 40 Atl. 171.

Contra, if A retains a substantial interest in such corporation. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

²² Ragadale v. Nagle, 106 Cal. 332, 39 Pac. 628.

²³ Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

²⁴ Drown v. Forrest, 63 Vt. 557, 14 L. R. A. 80, 22 Atl. 612.

For similar facts see, Scudder v. Kilfoil, 57 N. J. Eq. 171, 40 Atl. 602.

sale of the good will of a business is broken by the vendor's soliciting the business of his old customers,²⁵ or by using the former trade name, even if it is his own.²⁶ A contract not to compete in abstracting public records is not broken by doing the clerical work of making an uncertified and unexamined copy of another abstract;²⁷ nor is such contract broken by the fact that the promisor buys his abstracts at a reduced rate from a competitor of the promisee.²⁸

One who has agreed not to compete in business with one to whom he has sold such business, does not break such covenant by lending money to a subsequent competitor of such purchaser.²⁹ It is said that a covenant not to compete in business is not broken by transferring the telephone number of the original business to a competitor of the purchaser of such business.³⁰ A contract by a partnership not to compete in business is held not to be broken by the fact that one of the parties acts as a broker for the purchase of such goods if such goods are shipped directly from the seller to the buyer.³¹

§ 2933. Building and construction contracts. A building contract is broken on the part of the contractor by his failure to construct the building or other structure in accordance with the terms of the contract.¹ What constitutes performance,² and who assumes the risk as to the sufficiency of the plans,³ and the right of the contractor to recover for performance which is less than substantial performance,⁴ are discussed elsewhere. A contract by a landlord to furnish a waterproof basement is not broken by the fact that the basement is flooded through the windows by reason of an unprecedented flood in a creek near by.⁵

²⁵ *Ranft v. Reimers*, 200 Ill. 336, 60 L. R. A. 291, 65 N. E. 720.

²⁶ *Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485, 8 L. R. A. 570, 19 Atl. 820; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404.

²⁷ *Linn County Abstract Co. v. Beechley*, 124 Ia. 146, 99 N. W. 702.

²⁸ *Linn County Abstract Co. v. Beechley*, 124 Ia. 146, 99 N. W. 702.

²⁹ *Reeves v. Sprague*, 114 N. Car. 647, 19 S. E. 707; *Finch Bros. v. Michael*, 167 N. Car. 322, L. R. A. 1915B, 1204, 83 S. E. 458.

³⁰ *Finch Bros. v. Michael*, 167 N. Car. 322, L. R. A. 1915B, 1204, 83 S. E. 458.

³¹ *Jayne & Keve Bros. Lumber Co. v. Tumer*, 132 Ia. 7, 109 N. W. 307.

¹ *Keys v. Garben*, 149 Ia. 304, 128 N. W. 337; *Cornish, Curtis & Greene Co. v. Antrim Co-operative Dairy Association*, 82 Minn. 215, 84 N. W. 724; *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676.

² See § 2784 and §§ 2793 et seq.

³ See § 2775.

⁴ See ch. LXXXVIII.

⁵ *Ozark Grocer Co. v. Crandall*, 131 Ark. 481, L. R. A. 1918B, 824, 199 S. W. 551.

A building contract is broken on the part of the owner by his failure to deliver possession in the time fixed by the contract;⁶ or by his failure to do work preliminary to that which is to be done by the contractor, in accordance with the terms of the contract;⁷ or by his failure to furnish material, in accordance with the terms of the contract, which the contractor is to use;⁸ or by the failure of the owner to furnish plans in accordance with the terms of the contract, or to furnish them in time.⁹ A building contract is also broken by the failure of the owner to make payments in accordance with the terms of the contract;¹⁰ but unless there is a provision for payment by the owner while the contractor is still performing, payment is not due until the contract has been performed by the contractor.¹¹ Failure to repay money which has been paid by mistake is not breach of a bond for the faithful performance of a construction contract.¹²

§ 2934. Breach of contract for transportation. A contract for transportation is broken on the part of the carrier by failure to deliver at the time agreed upon, if the contract fixes the time at which delivery is to be made.¹ If the contract does not provide for the time at which delivery is to be made, the carrier is bound to deliver in a reasonable time in view of all the circumstances; and,

⁶ *Atlantic & Danville Ry. Co. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13.

⁷ *United States. King Iron Bridge & Manufacturing Co. v. St. Louis*, 43 Fed. 768, 10 L. R. A. 826 [appeal dismissed on motion of plaintiff in error, *St. Louis v. Iron Bridge & Manufacturing Co.*, 149 U. S. 769, 37 L. ed. 960].

Alabama. Hardaway-Wright Co. v. Bradley, 163 Ala. 596, 51 So. 21.

Kentucky. Pittsburgh Filter Mfg. Co. v. Smith, 176 Ky. 554, 196 S. W. 150.

New York. Gutmann v. Crouch, 134 N. Y. 585, 31 N. E. 275.

Oregon. Vanderhof v. Shell, 42 Or. 578, 72 Pac. 126.

⁸ *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Williams v. Yates* (Ky.),

113 S. W. 503; *Starr v. Gregory Consolidated Mining Co.*, 6 Mont. 485, 13 Pac. 195; *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

⁹ *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711.

¹⁰ *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Shulte v. Hennessy*, 40 Ia. 352; *Rowland Lumber Co. v. Rosa*, 100 Va. 275, 40 S. E. 922.

Question avoided in *Camp v. Treanor*, 142 N. Y. 478, 37 N. E. 463.

¹¹ *Stewart v. Newbury*, 220 N. Y. 379, 2 A. L. R. 519, 115 N. E. 984. See § 2958.

¹² *United States v. Breymann*, 228 Fed. 808.

¹ *Deming v. Grand Trunk Ry.*, 48 N. H. 455, 2 Am. Rep. 267; *Vittucci Co. v. Canadian Pacific Ry.*, 102 Wash. 686, 174 Pac. 331.

accordingly, he is liable for failure to use due diligence to make delivery.²

In the absence of special contract, the common carrier is liable for all loss of the goods or injury thereto except that which is due to the act of God or of a public enemy,³ although by special contract he may relieve himself from all liability for loss except that which is due to his own negligence and that of his employees.⁴ A carrier is liable absolutely for delivering goods to the wrong person, unless such wrongful delivery is due to the fault of the consignor or the consignee.⁵ The fact that the consignee has sold his business and that the carrier in good faith delivers the goods to the purchaser of such business, does not excuse such wrongful delivery,⁶ even though the purchaser of such business has received goods on former occasions as the agent of the consignee.⁷ A contract for the transportation of goods is broken by the failure of the consignee to pay the freight in accordance with the terms of the contract.⁸ A contract by which A agrees to furnish goods to be

² Colorado. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

Maine. *Smith v. Bangor & Aroostook Ry.*, 115 Me. 223, 98 Atl. 737.

Michigan. *Young v. Grand Rapids & Ind. Ry.*, 201 Mich. 39, 167 N. W. 11.

Minnesota. *Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry.*, 94 Minn. 269, 110 Am. St. Rep. 361, 69 L. R. A. 509, 102 N. W. 709.

New York. *Tierney v. New York Central Ry.*, 76 N. Y. 305; *Groot v. Oregon Short Line Ry.*, 34 Utah 152, 96 Pac. 1019.

³ See § 740.

⁴ See §§ 741 et seq.

⁵ United States. *North Pennsylvania Ry. v. Commercial National Bank*, 123 U. S. 727, 31 L. ed. 287.

Arkansas. *Chicago, R. I. & P. Ry. v. Pfeifer*, 90 Ark. 524, 22 L. R. A. (N.S.) 1107, 119 S. W. 642.

Michigan. *Stowe v. United States Express Co.*, 179 Mich. 349, 146 N. W. 158.

Minnesota. *Barnum Grain Co. v. Great Northern Ry.*, 102 Minn. 147, 112 N. W. 1030.

Ohio. *Oskamp v. Southern Express Co.*, 61 O. S. 341, 56 N. E. 13.

Vermont. *Kommel v. Champlain Transportation Co.*, — Vt. —, 2 A. L. R. 275, 105 Atl. 253.

Washington. *Coovert v. Spokane, Portland & S. Ry.*, 80 Wash. 87, 141 Pac. 324.

West Virginia. *Dudley v. Chicago Ry.*, 58 W. Va. 604, 112 Am. St. Rep. 1027, 3 L. R. A. (N.S.) 1135, 52 S. E. 718 (obiter).

⁶ *Kommel v. Champlain Transportation Co.*, — Vt. —, 2 A. L. R. 275, 105 Atl. 253.

⁷ *Kommel v. Champlain Transportation Co.*, — Vt. —, 2 A. L. R. 275, 105 Atl. 253.

⁸ Kansas. *Atchison Ry. v. Stannard*, 99 Kan. 720, 162 Pac. 1176.

Minnesota. *Chicago, Milwaukee & St. Paul Ry. v. Greenberg*, 130 Minn. 428, 166 N. W. 1073.

New Jersey. *Erie Ry. Co. v. Wanauque Lumber Co.*, 75 N. J. L. 878, 69 Atl. 168.

West Virginia. *Baltimore & Ohio Ry. v. Luella Coal Co.*, 74 W. Va. 289, 52 L. R. A. (N.S.) 398, 81 S. E. 1044.

transported by B in such a way as to make use of the means of transportation which B can employ, is broken by A's failure to furnish such goods to be transported.⁸

§ 2935. Breach of contract to make a will. A contract to make a will can not be broken by non-performance until the death of the testator,¹ since the testator has the whole of his life in which to perform. As in the case of other contracts,² his renunciation of such a contract during his lifetime confers an immediate right of action upon the promisee.³ A contract to make a will is broken when the testator dies without making a will in substantial compliance with the terms of such contract.⁴ Such breach may occur where testator dies without making a will at all;⁵ or where he executes a will but fails to comply with the Wills Act;⁶ or where he devises property of substantially less value than he had agreed to devise;⁷ or where he devises a less estate than he had agreed to devise;⁸ or where the will is executed so short a time before his death that, under the local Wills Act, the gift fails, as in case of a gift to a charity.⁹ The fact that he does not comply with the terms of the contract in the belief that the provision which he actually

Wisconsin. *Great Northern Ry. v. Hocking Valley Fire Clay Co.*, 166 Wis. 465, 166 N. W. 41.

¹ *Fletcher v. Verser*, 79 Ark. 271, 110 Am. St. Rep. 75, 96 S. W. 384.

² *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107; *Skinner v. Rasche*, 165 Ky. 108, 176 S. W. 942; *Maud v. Maud*, 33 O. S. 147.

³ See §§ 2885 et seq.

⁴ *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750; *Parsell v. Stryker*, 41 N. Y. 480 (obiter).

⁵ **Massachusetts.** *Mills v. Smith*, 103 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765.

Montana. *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742.

New Jersey. *Riley v. Allen*, 54 N. J. Eq. 495; *Lawrence v. Prosser*, 88 N. J. Eq. 43, 101 Atl. 1040.

New York. *Phalen v. United States Trust Co.*, 186 N. Y. 178, 7 L. R. A. (N.S.) 734, 78 N. E. 943.

North Carolina. *Earnhardt v. Clement*, 137 N. Car. 91, 49 S. E. 49.

Pennsylvania. *In re Hoffner's Estate*, 161 Pa. St. 331, 29 Atl. 33.

Tennessee. *Green v. Orgain* (Tenn. Ch.), 46 S. W. 477.

See, however, as to an indefinite contract of this sort, *Bunting v. Dobson*, 125 Ga. 447, 54 S. E. 102.

⁶ *Mills v. Smith*, 193 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765 (failure to make codicil in accordance with contract).

⁷ *Green v. Orgain* (Tenn. Ch.), 46 S. W. 477.

⁸ *Phalen v. United States Trust Co.*, 186 N. Y. 178, 7 L. R. A. (N.S.) 734, 78 N. E. 943 (contract for absolute gift, devise in trust).

⁹ *Lawrence v. Prosser*, 88 N. J. Eq. 43, 101 Atl. 1040; *Earnhardt v. Clement*, 137 N. Car. 91, 49 S. E. 49.

¹⁰ *In re Hoffner's Estate*, 161 Pa. St. 331, 29 Atl. 33.

makes will be more beneficial to the promisee than the provision which is required by the terms of the contract,¹⁰ as where he devises property to the children of the promisee, to keep the promisee's husband from wasting it,¹¹ does not prevent such non-compliance from amounting to a breach.

§ 2936. Breach of other contracts. A contract to furnish support is broken by the failure to furnish such support,¹ or by treating the party who is to receive such support, with such harshness that he is unwilling to remain at the house of the adversary party to receive such support.² It has been held that it is broken by refusal to furnish support at any reasonable place selected by the obligee.³ A contract to care for one "in her old days" is broken by caring for her for five years and rendering no services for the next sixteen years.⁴ A contract to care for a certain child as for one of his own children, is broken by placing her when insane in the county asylum among common paupers.⁵ A contract to support one's parent requires kind treatment as well as the necessities of life.⁶ A contract by A, whereby he engages accommodations at B's hotel for C, is broken by C's failure to accept and to pay for such accommodations.⁷ A contract to furnish water and to construct a reservoir, is broken by failure to construct such reservoir,⁸ and by furnishing water which is polluted by sewage.⁹ A contract between a city and a water company, which is not exclusive by its terms, is not broken by the act of the city in constructing its own water plant.¹⁰ A contract for the construction of a passenger elevator, by which the owner agrees to obtain a water pressure of eighty pounds to the square inch, is not broken where such pressure is furnished but where the city refuses to permit the owner to

¹⁰ Riley v. Allen, 54 N. J. Eq. 495.

¹¹ Riley v. Allen, 54 N. J. Eq. 495.

¹ Ptacek v. Pisa, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221; Bruer v. Bruer, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813; Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156.

² Tysor v. Adams, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

³ Tuttle v. Burgett, 53 O. S. 498, 53 Am. St. Rep. 649, 30 L. R. A. 214, 42 N. E. 427.

⁴ Teats v. Flanders, 118 Mo. 660, 24 S. W. 126.

⁵ Vancleave v. Clark, 118 Ind. 61, 3 L. R. A. 519, 20 N. E. 527.

⁶ Lathrop v. Mayer, 86 Mo. App. 355.

⁷ Danenhower v. Hayes, 35 D. C. App. 65, 33 L. R. A. (N.S.) 698.

⁸ Columbus v. Mercantile Trust Co., 218 U. S. 645, 54 L. ed. 1193.

⁹ Columbus v. Mercantile Trust Co., 218 U. S. 645, 54 L. ed. 1193.

¹⁰ Helena Water Works Co. v. Helena, 195 U. S. 383, 49 L. ed. 245.

make use of city water because the elevator is so constructed that on stopping it there is a variance in pressure in excess of five pounds to the square inch.¹¹ The bond of a public warehouseman is not broken until the storage receipt is presented and delivery is refused;¹² and, accordingly, a surety on the bond of such warehouseman when articles were stored, is not liable for the refusal of the warehouseman to deliver several years later after different renewal bonds have been given.¹³ A covenant in a bond, requiring the debtor to pay interest without deduction for any taxes which it may be required to pay or retain by law, is said not to be broken by the refusal of the corporation to pay the federal income tax which the corporation is required to withhold at its source, since such income tax is not levied upon the bonds or upon the interest as such.¹⁴ A contract by which A agrees to become surety for X to B, up to a certain amount and no more, and which provides that B shall not give credit to X in excess of such amount, is broken by B's giving credit in excess of the amount provided for by the contract.¹⁵ If a municipal corporation has agreed to apply its judgment fund to the payment of certain specific judgments in order of their entry, the city can not take advantage of the fact that the judgment creditor subsequently permitted such judgment to become dormant in reliance upon such promise.¹⁶

F. INVOLUNTARY INABILITY TO PERFORM

§ 2937. Inability to perform executory covenant as breach. If it can be shown that the adversary party to an executory contract is not able to perform on his part, and that he will necessarily be unable to perform when the time for performance arrives, such fact operates as a discharge of the adversary party.¹ If B is in fact insolvent, such insolvency operates as a discharge of a covenant in

¹¹ *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

¹² *North Dakota v. Farmers' Co-operative Elevator Co.*, — N. D. —, L. R. A. 1918E, 233, 167 N. W. 223.

¹³ *North Dakota v. Farmers' Co-operative Elevator Co.*, — N. D. —, L. R. A. 1918E, 233, 167 N. W. 223.

¹⁴ *Urquhart v. Marion Hotel Co.*, 128 Ark. 283, L. R. A. 1917F, 203, 194 S. W. 1.

¹⁵ *Koppitz-Melchers Brewing Co. v. Schultz*, 68 O. S. 407, 67 N. E. 719.

¹⁶ *Beadles v. Smyser*, 209 U. S. 393, 52 L. ed. 849 [reversing, 17 Okla. 162, 87 Pac. 292].

¹ *German-American Security Co.'s Assignee v. McCulloch* (Ky.), 89 S. W. 5, 28 Ky. L. Rep. 133; *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

a contract by which A has agreed to extend credit to B.² If the contract is one of sale, the seller need not surrender possession of the goods under such circumstances, unless the buyer is willing to pay cash therefor and to waive the covenant of the contract which provides for credit.³ If the seller under such circumstances tenders the goods and demands cash, and the buyer refuses to pay cash, the seller may treat such conduct as a breach and may recover damages.⁴ The seller can not recover damages without offering to perform, although he may demand cash.⁵

If the buyer or his creditors insist upon the performance of the contract on the part of the seller and offer cash, it is said that the seller must accept such payment in cash and must perform.⁶ The correctness of this theory may well be doubted. The covenant for credit is ordinarily intended for the benefit of the buyer; but it is a term of the contract which can not be modified without the assent

²England. *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *Bloxam v. Sanders*, 4 Barn. & C. 941, 7 Dowl. & R. 396.

United States, *Florence Mining Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424; *Texas Co. v. International & G. N. Ry. Co.*, 250 Fed. 742.

Alabama. *Robertson v. Davenport*, 27 Ala. 574.

Iowa. *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 7 L. R. A. 139, 44 N. W. 363; *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637.

Minnesota, *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113.

Mississippi. *Hunter v. Talbot*, 11 Miss. (3 Smedes & M.) 754.

New York. *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292.

Ohio. *Diem v. Koblitz*, 49 O. S. 41, 34 Am. St. Rep. 531, 29 N. E. 1124.

Oklahoma. *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216.

Texas. *Ullman v. Babcock*, 63 Tex. 68.

Wisconsin. *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

³England. *Ex parte Chalmers*, L. R.

8 Ch. App. 289; *Bloxam v. Sanders*, 4 Barn. & C. 941, 7 Dowl. & R. 396.

United States. *Texas Co. v. International & G. N. Ry. Co.*, 250 Fed. 742.

Iowa. *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 7 L. R. A. 139, 44 N. W. 363; *Sprague v. Iowa Mercantile Co.*, — Ia. —, 172 N. W. 637.

Minnesota. *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113.

Mississippi. *Hunter v. Talbot*, 11 Miss. (3 Smedes & M.) 754.

New York. *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292.

Ohio. *Diem v. Koblitz*, 49 O. S. 41, 34 Am. St. Rep. 531, 29 N. E. 1124.

Oklahoma. *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216.

Texas. *Ullman v. Babcock*, 63 Tex. 68.

⁴*Texas Co. v. International & G. N. Ry. Co.*, 250 Fed. 742; *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

⁵*Florence Mining Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424; *Roberts Cotton Oil Co. v. Morse*, 97 Ark. 513, 135 S. W. 334.

⁶*New England Iron Co. v. The Gilbert Elevated R. R. Co.*, 91 N. Y. 153.

of the parties thereto.⁷ Refusal by one party to perform unless the adversary party assents to a modification of the terms of the contract, is ordinarily regarded as breach by renunciation.⁸ Probably what is meant is that payment must be secured to the seller if the buyer has become insolvent after the contract of sale was made; and usually the objection of the seller is not to accepting cash in place of credit, but to performing the contract under any circumstances. From the nature of the case, the question usually arises only where the market value of the property is such that it is more profitable to the seller to treat the contract as discharged and to sell the goods at the market price, than it is to perform the original contract, since it is only under circumstances of this sort that the creditors of the buyer will contribute to a fund for the purpose of enabling the buyer to perform, or the court will order the receiver or assignee to perform the contract. It is likely that if the seller were willing to perform, but demanded security for future payment at the time fixed by the terms of the original contract instead of payment in cash, he could not be compelled to accept cash. If the original contract provided for payment in cash, and by a subsequent modification thereof provision is made for credit, and the buyer thereafter becomes insolvent, it is said that the seller may treat the covenant for credit as discharged, but that in such case he is bound by the original contract to deliver for cash.⁹ Whether in such cases the receiver of the insolvent buyer may prevent insolvency from operating as a breach by selling the contract to a third person who is solvent and who is ready to perform, is a question upon which there is a conflict of authority. It has been held that the sale of the contract does not prevent breach, and that unless the receiver acts with reasonable promptness to pay for the goods the contract is discharged.¹⁰ On the other hand, it has been held that one to whom the receiver has sold the contract may recover damages if the original seller refuses performance.¹¹ The insolvency of an insurance company and the transfer of its assets, amount to a breach of its contracts of insurance.¹²

The insolvency of one of the parties to the contract is not a discharge of the contract on the theory of impossibility,¹³ although in

⁷ See § 2458.

⁸ See § 2904.

⁹ *Pardee v. Kanady*, 100 N. Y. 121.

¹⁰ *Sprague v. Iowa Mercantile Co.*,
— Ia. —, 172 N. W. 637.

¹¹ *Roberts Cotton Oil Co. v. Morse*,
97 Ark. 513, 135 S. W. 334.

¹² *Lovell v. St. Louis Mutual Life*
Ins. Co., 111 U. S. 264, 28 L. ed. 423.

¹³ See § 2707.

some jurisdictions the dissolution of a corporation, whatever the ground therefor may be, operates as a discharge of executory contracts.¹⁴

The appointment of a receiver on the ground of insolvency is said not to amount to discharge of such contract in itself;¹⁵ but in other cases, the insolvency of a party to an executory contract and the appointment of a receiver for his property is said to amount to a breach.¹⁶ It is possibly the unwillingness of the receiver or assignee and the creditors to perform, rather than the insolvency of the promisor and the appointment of a receiver or assignee that operates as a breach.

Notice given by B to A of the fact that B is insolvent, has been held to be equivalent to notice that B will not be able to perform a contract which requires the payment of money.¹⁷

§ 2938. Bankruptcy as breach. The bankruptcy of a party to an executory contract is said to operate as a breach of such contract.¹ This has been explained on the theory that a party to an executory contract impliedly agrees that he will not permit himself to be disabled from performing by insolvency or bankruptcy; and that accordingly such insolvency or bankruptcy is a breach of such implied term.² While this explanation may not interfere with the proper application of the general doctrine, it would seem unnecessary to invoke it to justify the adversary party in treating bankruptcy, especially bankruptcy of a corporation, as a breach of an executory contract which can not be performed by the bankrupt under such circumstances without violation of the rights of the remaining creditors. Since the party who is to extend credit ought not to be required to give credit in cases of the insolvency or bankruptcy of the adversary party, such conduct must be either breach or discharge on the ground of impossibility. It may be added that

¹⁴ See § 2087.

¹⁵ *Texas Co. v. International & G. N. Ry. Co.*, 250 Fed. 742; *Roberts Cotton Oil Co. v. Morse*, 97 Ark. 513, 135 S. W. 334.

¹⁶ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721.

¹⁷ *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109, 31 N. E. 756.

See § 2938.

¹ *Lesser v. Gray*, 236 U. S. 70, 50 L. ed. 471 (breach unless discharge; in either case, discharge in bankruptcy is bar); *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; *In re Neff*, 157 Fed. 57, 28 L. R. A. (N.S.) 349; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

² *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

it is possible for such conduct to amount to breach, although the claim for damages arising out of such breach may not be a provable claim in bankruptcy.³

A contract by a transfer company for baggage and livery at a hotel is discharged by the bankruptcy of such corporation.⁴ The bankruptcy of a corporation to which a lease for years has been granted, together with the refusal of the receiver to accept such lease, amounts to a breach of such contract.⁵

§ 2939. Dissolution of corporation as breach. In many jurisdictions the dissolution of a corporation is held to operate as a breach of the executory contracts of the corporation,¹ except in case of certain special forms of contracts² or under special circumstances.³ The voluntary liquidation of a corporation is said to operate as a breach of its executory contracts.⁴

§ 2940. Belief in future inability or breach as discharge. The fact that A has reasonable cause to believe, and does believe, that B will be unable to perform his part of the contract, does not of itself discharge A from performing his part.¹ The fact that it is highly improbable that B will be able to perform the contract does not discharge A if the time for performance has not come and B has not as yet failed to perform.² As long as the time for performance has not yet arrived, the fact that so much time has elapsed

³ See ch. LXXXVI.

⁴ *Central Trust Co. v. Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

⁵ *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539.

¹ See § 2688.

² See § 2689.

³ See § 2690.

⁴ *Ogdens v. Telford* [1905], A. C. 109 [affirming (1904), 2 K. B. 410, which affirmed (1903), 2 K. B. 287].

¹ *Michigan. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788.

New Jersey. Holt v. United Security Life Ins. & Trust Co., 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

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North Dakota. Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70.

Oklahoma. Clements v. Jackson County Oil & Gas Co., — Okla. —, L. R. A. 1917C, 437, 161 Pac. 210; *Elwood Oil & Gas Co. v. McCoy*, — Okla. —, 179 Pac. 2.

Tennessee. Brady v. Oliver, 125 Tenn. 595, 41 L. R. A. (N.S.) 60, 147 S. W. 1135.

Vermont. Hathaway v. Sabin, 63 Vt. 527, 22 Atl. 633; *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863.

² *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941; *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N. S.) 60, 147 S. W. 1135; *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863.

since the contract was made, and so little time is left for performance that in all probability the promisor will not be able to perform, does not discharge the adversary party.³ This is especially true where time is not of the essence of the contract.⁴ Even if the contract reserves to A the right to "annul" the contract if in his judgment the contractor is not prosecuting the work faithfully and diligently, A's exercise of his option under such provision is proper, but it does not amount to breach on the part of B if B still has time in which performance is possible.⁵ If goods are sold on credit, the fact that commercial agencies give to the seller unsatisfactory reports as to the financial condition of the buyer, does not justify the seller in demanding payment from the buyer before the time fixed by the terms of the contract.⁶ The fact that B has not the financial means for performing the contract before such performance is due, does not justify the adversary party in treating such contract as discharged.⁷ A contract to build a boat is not discharged by the contractor's making a general assignment for the benefit of creditors. Neither is such assignment a breach. Accordingly, if the party for whom the boat is to be built takes possession of it before the time within which it was to be completed, this is a breach on his part and he can not have damages for non-performance.⁸ The fact that A doubts B's solvency does not justify A's breaking the contract.⁹

If the contract is one which provides for delivery and payment in instalments, and the purchaser is in default for one instalment, it is said that if the buyer has reason to believe that he will be unable to perform, the buyer may treat such contract as discharged

³ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481; *Vandergrift v. Cowles Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941; *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N. S.) 60, 147 S. W. 1135; *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863.

⁴ *Holt v. United Security L. Ins. & T. Co.*, 70 N. J. L. 585, 21 L. R. A. (N. S.) 691, 72 Atl. 301.

⁵ *United States v. O'Brien*, 220 U. S. 321, 55 L. ed. 481.

⁶ *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788.

⁷ *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216; *Elwood Oil & Gas Co. v. McCoy*, — Okla. —, 179 Pac. 2.

⁸ *Vandergrift v. Cowles Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

⁹ *Jewett Publishing Co. v. Butler*, 159 Mass. 517, 22 L. R. A. 253, 34 N. E. 1087; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788; *Southern Lumber Co. v. Supply Co.*, 89 Mo. App. 141; *Clements v. Jackson County Oil & Gas Co.*, — Okla. —, L. R. A. 1917C, 437, 161 Pac. 216.

as to future instalments.¹⁰ In many jurisdictions, however, such default on the part of the buyer operates as a discharge of the contract with reference to the future instalments without regard to the apparent inability of the buyer to perform.¹¹

The fact that a party to an executory contract can not perform under conditions as they exist when the contract is made, and that he must enter into transactions with a third person in order to acquire the property which he has agreed to transfer, does not of itself show that he will be unable to perform; and the adversary party can not treat such condition of affairs as a breach.¹² The fact that A sells property to B which A does not own at the time that he enters into such contract, does not amount to a breach on A's part,¹³ nor does the fact that the title is not perfect when the contract is made.¹⁴

III

RELATION OF COVENANTS TO ONE ANOTHER

A. GENERAL PRINCIPLES

§ 2941. Relation of covenants to one another—Classification. Whether breach discharges the adversary party from further performance, depends upon the relation, or want of relation, between the covenants entered into and broken by the party who breaks the contract, and the covenants entered into by the adversary party, for the discharge of which such breach is invoked.¹ Stipulations or covenants entered into by the respective parties to the contract may be: (1) independent of each other;² or (2) mutually dependent, one upon the other.³ The question of whether covenants are dependent or independent, is a question of the intention of the parties as deduced from the terms of the contract.⁴ If the parties intend that performance by each of them is in no way conditioned upon performance by the other, the covenants are independent.⁵

¹⁰ *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

¹¹ See § 3011.

¹² *Hanson v. Fox*, 155 Cal. 106, 20 L. R. A. (N.S.) 338, 99 Pac. 489; *Trask v. Vinson*, 37 Mass. (20 Pick.) 105.

¹³ *Trask v. Vinson*, 37 Mass. (20 Pick.) 105.

¹⁴ *Hanson v. Fox*, 155 Cal. 106, 20 L. R. A. (N.S.) 338, 99 Pac. 489.

¹ See §§ 2951 et seq.

See also, *Dependency of Mutual Promises in the Civil Law*, by Samuel Williston, 13 *Harvard Law Review*, 80.

² See §§ 2971 et seq.

³ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849 [affirmed, *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335].

See §§ 2951 et seq.

⁴ See § 2948.

⁵ See §§ 2971 et seq.

If the parties intend performance by one to be conditioned upon performance by the other, the covenants are mutually dependent.⁶ Covenants which are mutually dependent may bear to each other one of two relations: (1) they may be the one precedent and the other subsequent;⁷ or (2) they may be concurrent.⁸ If the parties intend that a covenant by A is to be performed before a covenant by B is to be performed, A's covenant is precedent, and B's is subsequent; the two being mutually dependent.⁹ If the parties intend that A is to perform the covenant on his part at the same time that B is to perform the covenant on his part, A's covenant and B's covenant are said to be concurrent.¹⁰

§ 2942. Nomenclature. While the courts generally employ the names "independent," "precedent" and "concurrent" covenants, especially in recent cases, the use of these terms is by no means uniform, and, especially in the earlier cases, the same ideas have been expressed by very different terms. A covenant which is now called "independent" was at one time called "mutual,"¹ or "absolute" and "reciprocal."² In many cases the failure to perform a

⁶ *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717; *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771 (obiter).

See §§ 2951 et seq.

⁷ *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717; *Hughes v. Crooker*, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429; *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

See §§ 2951 et seq.

⁸ See §§ 2961 et seq.

⁹ See §§ 2951 et seq.

"Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been under-

stood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance." *New Orleans v. Texas & Pacific Ry.*, 171 U. S. 312, 43 L. ed. 178.

See §§ 2961 et seq.

¹ *Ware v. Chappell*, Style 186; *Beany v. Turner*, 1 Lev. 293; *Thorpe's Case*, March 75.

For a similar use of "mutual" see, *Kinney v. Federal Laundry Co.*, 75 N. J. L. 497, 68 Atl. 111.

² *Gibbons v. Prewd*, *Hardres* 102.

"The performance on the defendant's part is not *sub modo*, or conditional, but absolute and reciprocal by reason of the agreement; for it is not in consideration that the plaintiff should convey all her estate, etc., but in consideration that the plaintiff did agree to it; and the consideration upon which the

precedent covenant and the failure to perform a concurrent covenant have the same effect as discharging the adversary party from duty to perform on his part; and occasionally a covenant which is properly classed as a concurrent covenant is spoken of as a precedent covenant where the breach of such covenant operates as a discharge of the adversary party from his duty to perform the covenants on his part.³ The fact that the breach of a condition frequently has the same consequences as the breach of a covenant,⁴ has occasionally led to the term "absolute" as applied to independent covenants, and to the term "conditional" as applied to dependent covenants.⁵ Failure to perform a covenant, the breach of which operates as a discharge, is still said to be ground for cancellation.⁶ At modern law the use of the term "mutual" is regarded as showing that the covenants are dependent, and ordinarily concurrent.⁷ If a covenant is concurrent it is felt to be sufficient to call it "dependent."⁸

§ 2943. Confusion in nomenclature due to resemblance in legal effect. The practical difference between the various classes of covenants when considered with reference to their relation to one another consists in the extent to which it is necessary for one of the parties to perform or to tender performance by formal tender, or to offer performance without a formal tender, in order to enforce the covenants on the part of the adversary party against such adversary party.

action is grounded is a mutual promise to perform the agreement. 5 H. 7, 10b As if I covenant to marry a man's daughter, and he covenants to give me a hundred pounds, so here the agreement and promise, which is reciprocal, and gives the defendant a remedy upon breach made by the plaintiff, is the consideration, and not the performance of any act by the plaintiff. * * * the defendant's agreement does not depend upon the plaintiff's performing of any act, but is, that in consideration that the plaintiff agreed to do such a thing, the defendant agreed to do another thing, and the consideration is no other than the reciprocal promise of one to the other, which is executory, and upon

which the parties have mutual remedies; and it is a general rule that when the defendant has a remedy for the consideration of a promise, that consideration needs not be averred to be performed, which is our case." *Gibbons v. Prewd*, Hardres 102.

³ *Thorpe v. Thorpe*, 12 Mod. 455.

⁴ See § 2576.

⁵ *Thorpe's Case*, March 75.

⁶ *Harriman National Bank v. Sel-domridge*, 249 U. S. 1, — L. ed. —.

⁷ *Hill v. Grigsby*, 35 Cal. 656; *Todd v. State Bank*, 182 Ia. 276, 165 N. W. 593.

⁸ *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822.

If one of the covenants is precedent, it is necessary that the party who is bound thereby should perform,¹ or should make formal tender of performance,² in order to enforce the subsequent covenants on the part of the adversary party against such adversary party.³

If the covenant in question is a subsequent covenant, it is not necessary that the party who is bound thereby should perform or should tender performance, or should be ready and willing to perform and call upon the adversary party to perform, in order to enforce the precedent covenant on the part of the adversary party against such adversary party.⁴

If the covenants are concurrent, formal tender may be made for greater safety, but it is not necessary to enable one of the parties to enforce such covenant against the other; but it is necessary that the party who wishes to enforce such covenant should be ready and willing to perform, and that he should notify the adversary party of such fact in such a way as to call upon him for performance of the covenant on his part to be performed.⁵

If the covenants in question are independent covenants, it is not necessary that the party who wishes to enforce such covenant should perform or tender performance, or be ready and willing to perform and call upon the adversary party to perform, in order to enforce such independent covenant against such adversary party.⁶

Accordingly, if one of the parties has performed or has made formal tender of performance, there is no practical difference between a precedent covenant and a concurrent covenant, as to the right of the party who has thus performed or tendered performance, to enforce the covenants on the part of the adversary party against such adversary party.⁷ As a result, in cases of this sort, the courts are likely to confuse the precedent covenants and the concurrent covenants, since the same practical consequences follow in covenants of each class.

If, on the other hand, the party who seeks to enforce a covenant is not even ready and willing to perform, and has not even offered performance and called upon the adversary party to perform, there is no practical difference between precedent covenants and concurrent covenants on the one hand, since such party can not enforce

¹ See chs. LXXX and LXXXI.

² See ch. LXXXIII.

³ See § 2960.

⁴ See § 2960.

⁵ See §§ 2969 and 2970.

⁶ See § 2976.

⁷ See §§ 2951 et seq. and 2961 et seq.

either kind of covenant; and on the other hand there is no difference in effect between subsequent covenants and independent covenants, since such party can enforce each of these classes of covenants in such cases. Accordingly, in cases of this sort, the courts frequently refer to a precedent covenant as an independent covenant,⁸ since the party who seeks to enforce such precedent covenant need not aver even a readiness and willingness to perform and an offer to perform on his part.

§ 2944. Construction of covenants—Original rule—Sealed contracts. The question of the relation of the covenants of a contract to one another was first presented at common law in the case of contracts under seal, and it was held that such covenants were *prima facie* independent covenants, and that they were to be so construed in the absence of language in the contract which showed clearly that they were intended to be dependent.¹ The rule is assumed in the earlier cases as a well-settled rule which needs no argument or discussion.

There are two reasons which possibly may have led the courts to reach this result. The contracts in question were under seal; and if each covenant had appeared in a separate contract, each would have been enforceable without regard to the performance of the covenant contained in the other contract. Accordingly, when the two covenants were in fact contained in the same instrument, it might have been felt that the incorporation of the two covenants on the part of the respective parties to the sealed instrument did not make them any more dependent on each other, in the absence of language showing such intention, than they would have been if they had appeared in separate instruments.

Another reason which may have led the courts to this result was the fact that, when this question was first presented, there were no definite rules on the subject of the measure of damages, and the courts had no check on the action of the jury in rendering a verdict for such amount as it saw fit. The courts at this time had no power to grant a new trial because of the amount of damages which

⁸ *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91; *Kane v. Hood*, 30 Mass. (13 Pick.) 281; *Glaser v. Dannelley*, 23 N. M. 503, 170 Pac. 63; *Dey v. Dox*, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; *Adrian v. Lane*, 13 S. Car. 183; *Kettle v. Harvey*, 21 Vt. 301.

¹ *Y. B. 15 Hen. VII*, 10b, pl. 17; *Ware v. Chappell*, Style 186; *Rolles v. Osborn*, 1 Brownl. & Gold. 90; *Pordage v. Cole*, 1 Wms. Saund. 319, also reported in 1 Lev. 274; *Cole v. Shallett*, 3 Lev. 41.

the jury had allowed. The jury were said to be "chancellors" when it came to awarding damages, which meant that the whole matter of damages was in the discretion of the jury and that the court had no check thereon.² With the law in this condition, the courts could be much surer of doing justice, even in accordance with the modern ideas, by treating the covenants as independent and by allowing each party to recover the value of the performance for which he had contracted, than they could by treating the contracts as dependent, since this would have resulted in many cases in discharging the party who was not in default and in leaving the jury to render such verdict as it might see fit. In many cases the result of allowing each party to recover on the theory that the covenants were independent would be the adoption of substantially the same measure of damages as that which the courts now use.³

Whatever the reason may have been, the rule that covenants were to be regarded as independent was thoroughly settled at common law with reference to sealed contracts. Under a covenant by which A agreed to furnish a certain number of soldiers at a certain port, and B agreed to furnish food and transportation of such soldiers to another port, it was held that A's failure to furnish such soldiers was not a defense in an action by A against B on such covenant for B's failure to provide transportation and food.⁴ Under a covenant by which A agreed to take his ship with the first fair wind from a given port to another and return, and B agreed to pay freight and a certain amount per day, it was held that A's failure to perform was no defense to an action by A against B upon B's covenant to make such payments.⁵ If a sealed contract was executed by A and B, by which each agreed to marry the other at a certain time, with a penalty for failure to perform, it was held that either could bring an action upon such bond, without performing or apparently without offering to perform.⁶ In some of the cases in which this rule is laid down, the question is not involved,

² See ch. LXXXVII.

³ See ch. LXXXVII.

⁴ Ware v. Chappell, Style 186.

⁵ Cole v. Shallett, 3 Lev. 41.

"* * * the covenants are mutual and reciprocal, whereupon each hath his action against the other, and can not plead the breach of one covenant in bar of the other; and perhaps the damage of the one side and the other

was not equal, and therefore the one not pleadable in bar of the other; but each party is by his action to recover against the other the certain damage he sustained, and so it was adjudged. Hill, 13 Car. 2 B. R., inter Thompson & Noel." Cole v. Shallett, 3 Lev. 41.

⁶ Rolles v. Osborn, 1 Brownl. & Gold. 90.

since there is such tender by one and such refusal by the other as would give right of action, even if the covenants were held to be concurrent.⁷

§ 2945. Original rule—Simple contracts. When the simple contract was recognized by the king's courts, the rules which applied to sealed contracts were, in many cases, carried over to simple contracts by way of analogy; and among them the rule that covenants were *prima facie* independent was applied to simple contracts,¹ even where the covenants formed each the consideration for the other.² A simple contract whereby A agreed to sell goods to B at a certain price, was held to be made up of independent covenants, so that the failure of either to perform would not be a defense to the other.³ This result was justified by holding that the consideration was the promise and not the performance, and that accordingly failure to perform did not affect the consideration.⁴ A simple contract, by which A agreed to deliver B's bill to B, and B agreed to furnish two sureties for the debt, was held to be made up of independent covenants, so that A could bring an action against B without delivering such bill.⁵ The fact that the contract recited that one promise was in consideration of the other, did not make the covenants dependent.⁶ It was not necessary for the plaintiff to allege that he was ready to perform.⁷ A simple promise by A to convey land to B and by B "in consideration thereof," to pay a certain amount, was held to be made up of independent covenants.⁸ Under a simple contract by A to surrender a copyhold to B, and by B to pay A, in consideration of which each assumed to perform, was held to be made up of independent covenants, so that A could

¹ Blackwell v. Nash, 1 Strange 535.

² Gower v. Capper, Cro. Eliz. 543; Bettisworth v. Campion, Yelv. 133; Thorpe's Case, March 75; Gibbons v. Prewd, Hardres 102; Beany v. Turner, 1 Lev. 293; Nichols v. Raynbred, Hobart 88b; Thorpe v. Thorpe, 12 Mod. 455; Rolles v. Osborn, 1 Brownl. & Gold. 90.

³ Nichols v. Raynbred, Hob. 88b; Gower v. Capper, Cro. Eliz. 543; Bettisworth v. Campion, Yelv. 133; Thorpe's Case, March 75; Gibbons v. Prewd, Hardres 102; Beany v. Turner, 1 Lev. 293.

⁴ Nichols v. Raynbred, Hob. 88b.

⁵ Gower v. Capper, Cro. Eliz. 543; Beany v. Turner, 1 Lev. 293.

"* * * being mutual promises, there needs no averment at all of the performance," and accordingly, "ill averment * * * shall not hurt." Beany v. Turner, 1 Lev. 293.

⁶ Gower v. Capper, Cro. Eliz. 543.

⁷ Bettisworth v. Campion, Yelv. 133; Gibbons v. Prewd, Hardres 102.

⁸ Thorpe's Case, March 75.

⁹ Gibbons v. Prewd, Hardres 102.

recover without performing.⁹ This rule was invoked in some cases in which the same result could have been reached on the theory that the covenants were dependent.¹⁰ Under a contract by which A agreed to deliver to B all the iron which A produced, at a certain price per ton, it was held that A could recover for all the iron which he had delivered without showing that he had delivered all the iron which he had produced.¹¹

§ 2946. Evasion of original rule—Modern rule. The actual operation of this rule, and possibly the fact that the courts were beginning to feel that justice could better be done by treating the covenants as dependent and by forcing the jury to conform to definite rules as to the measure of damages, led to a dislike of the rule that covenants were *prima facie* independent, and caused the courts to evade it in cases in which they once would either have felt that the rule was a just one, or that they were bound by it.¹ The fact that the contract showed that one promise was made "for" or "in consideration of" the other, was held to be sufficient to show that the covenants were dependent.² The fact that the instrument was a deed poll, and that one of the parties would be left without remedy if the covenants were independent, was fixed upon as ground for holding that the covenants were dependent.³

It was finally said that the rule was an absolute one which would not have been adopted if it had been a new question, but which was too thoroughly settled to be attacked.⁴

⁹ *Beany v. Turner*, 1 Lev. 203.

¹⁰ *Bettisworth v. Campion*, Yelv. 133.

¹¹ *Bettisworth v. Campion*, Yelv. 133.

¹ *Thorpe v. Thorpe*, 12 Mod. 455; *Peeters v. Opie*, 2 Wms. Saunders 350 [also reported in 1 Vent. 177, 214]; *Lock v. Wright*, 1 Strange 569.

² *Thorpe v. Thorpe*, 12 Mod. 455; *Peeters v. Opie*, 2 Wms. Saunders 350 [also reported in 1 Vent. 177, 214].

³ *Lock v. Wright*, 1 Strange 569.

⁴ *Thomas v. Cadwallader*, Willes 496.

"* * * I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, can not be pleaded in bar to an action brought for the breach of the other,

but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuitry of action and multiplying actions, both which the law so much abhors. If, therefore, this were a new point, I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his

Following this expression of opinion, the courts found little trouble in ignoring the original rule and in holding that covenants were *prima facie* dependent,⁵ even if they were found in a contract under seal.⁶ It was said that if one covenant was in consideration of the other, they were to be regarded as concurrent unless the contract fixed a time for the performance of each which prevented the courts from treating them as concurrent.⁷ Under a contract under seal, by which A agrees to convey realty to B on or before a certain day and B agrees to pay A on or before such day, such covenants were held to be concurrent.⁸ Indeed the courts almost immediately began to assume that covenants were *prima facie* concurrent, and to treat them accordingly.⁹ The case in which the modern rule that covenants are *prima facie* dependent was first laid down,¹⁰ has frequently been cited and quoted;¹¹ and it has

plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification." *Thomas v. Cadwallader*, Willes 496.

"The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense." *Goodisson v. Nunn*, 4 T. R. 761.

⁵ *Kingston v. Preston*, 2 Dougl. 689; *Callonel v. Briggs*, 1 Salk. 112.

⁶ *Kingston v. Preston*, 2 Dougl. 689.

⁷ *Callonel v. Briggs*, 1 Salk. 112.

⁸ *Glazebrook v. Woodrow*, 8 T. R. 366.

⁹ *Jones v. Barkley*, 2 Dougl. 684.

¹⁰ *Kingston v. Preston*, 2 Dougl. 680.

¹¹ *Kingston v. Preston* is quoted in full in *Jones v. Barkley*, 2 Dougl. 684.

By one style or the other it is frequently cited as the leading case on the classification of covenants. *Glazebrook v. Woodrow*, 8 T. R. 366; *Northrup v.*

Northrup, 6 Cow. (N. Y.) 296; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

"In *Kingston v. Preston*, cited at the bar in *Jones v. Barkley*, 2 Dougl. 684, Lord Mansfield expressed himself to the following effect: "There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of

become thoroughly established at modern law that covenants are to be regarded as dependent if possible, since such rule will give the most fair and just results.¹² The presumption that covenants are dependent seems to be quite strong, and not to be overcome by language which might suggest that the parties intended that the covenants should be independent.¹³

the other; though it is not certain that either is obliged to do the first act.' The complexities of modern industrial and commercial transactions have not rendered the classification inaccurate or inadequate." *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

¹² *United States. Bank v. Hagner*, 26 U. S. (1 Pet.) 455, 7 L. ed. 219; *Lowber v. Bangs*, 69 U. S. (2 Wall.) 728, 17 L. ed. 768.

Alabama. McCormick v. Badham, 191 Ala. 339, 67 So. 609; *Wise v. Sparks*, — Ala. —, 73 So. 394.

Arizona. World's Fair Mining Co. v. Powers, 12 Ariz. 285, 100 Pac. 957.

Illinois. Mecum v. Peoria & Oquawka Ry., 21 Ill. 533.

Louisiana. Stockstill v. Byrd, 132 La. 404, 61 So. 446.

Massachusetts. Smith v. Boston & Maine Ry., 88 Mass. (6 All.) 262; *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

Michigan. Mailhot v. Turner, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804; *Pearce v. Alward*, 163 Mich. 313, 128 N. W. 210.

Nebraska. Hamilton v. Thrall, 7 Neb. 210.

New York. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53.

North Carolina. Lutz v. Thompson, 87 N. Car. 334.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Oregon. Scheland v. Erpelding, 6 Or. 258.

South Dakota. Davis v. Jeffris, 5 S. D. 352, 58 N. W. 815; *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594.

"Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the inclination of the courts has strongly favored the latter construction as being obviously the most just." *Bank v. Hagner*, 26 U. S. (1 Pet.) 455, 464, 7 L. ed. 219.

To the same effect, *Telfener v. Russ*, 162 U. S. 170, 40 L. ed. 930.

"In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him and yet be disabled from procuring the property, for which he paid it." *President, etc., Bank of Columbia v. Hagner*, 1 Pet. 455. See also, *Page v. Sheinwald*, 160 N. Y. 246, 251, and *Taylor v. Blair*, 50 Hun. 347, 350. The agreement itself was not a transfer, but merely an implied promise to transfer upon performance by the other party. Where a contract requires contemporaneous performance neither party can sue at law until he has put the other in default. An offer to perform made in the pleadings or during the trial is not enough, and even that kind of an offer was not made in this case." *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

¹³ *Pead v. Trull*, 173 Mass. 450, 53 N. E. 901.

As between precedent covenants and concurrent covenants the tendency of modern law is to construe covenants as concurrent rather than precedent.¹⁴

§ 2947. Sergeant Williams' tests for determining nature of covenants. As the modern classification of contracts was first laid down by Lord Mansfield in *Kingston v. Preston*,¹ the modern doctrines for ascertaining the nature of any given covenant are based on a note by Sergeant Williams to *Pordage v. Cole*;² and as the general principles laid down in this note have been recognized, followed and applied in subsequent decisions, though not always with perfect consistency, the note will be given in full.³ This note has no judicial authority. The author criticises the reasoning of the

¹⁴ *Arizona*. *World's Fair Mining Co v. Powers*, 12 Ariz. 285, 100 Pac. 957.

California. *Deacon v. Blodgett*, 111 Cal. 416, 44 Pac. 159.

Louisiana. *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

Michigan. *Pearce v. Alward*, 163 Mich. 313, 128 N. W. 210.

New York. *Delaware Trust Co v. Calm*, 195 N. Y. 231, 88 N. E. 53.

South Dakota. *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594.

Washington. *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

¹ *Kingston v. Preston*, 2 Doug. 689.

² *Pordage v. Cole*, 1 Wms. Saund. 319l.

³ "Almost all the old cases and many of the modern ones on this subject are decided upon distinctions so nice and technical that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained what covenants are independent and what dependent; and, of course, when it is necessary to aver performance in the declaration and when not. Thus, if A covenant with B to serve him for a year, and B covenant with A to pay him £10, it is held that these are independent covenants, and A may maintain an action against B for the money before any service; but if B had covenanted to

pay him £10 for the service, these words make the service a condition precedent, and A can not enforce payment of the money until he has performed the service. So where A covenants with B to marry his daughter, and B covenants to convey an estate to A and the daughter in special tail, it is said that, though A marry another woman, or the daughter of another man, still A may have an action against B on the covenant; but if B had covenanted to convey the estate for the cause aforesaid, the marriage is a condition precedent, and no action will lie until it be solemnized. 15 H. 7, 10 pl. 17, Bro. Covenant, 22, 12 Mod. 460; *Thorpe v. Thorpe*, Hob 106; *Lampleigh v. Brathwait*. Also where A, in consideration of £10, promised to deliver to B all the books of the law, it has been said that B may bring an action against A for the books before any payment; but if A, in consideration that B will pay him £10, will deliver to him all the books of the law, B can not bring an action for the books before he has paid the money. 1 Rol. Rep. 125; *Everard v. Hopkins*, per Coke, C. J. So where B covenanted with C, his copyholder, to assure to him and his heirs the freehold and inheritance of his copyhold, and C, in consideration of the same performed, covenanted to pay such a sum, it was

earlier cases, and often seeks to rationalize them by justifying, on grounds that never occurred to the courts, the results which they

adjudged that this was a condition precedent, and B must make the assurance before he is entitled to the money; but if the words had been, in consideration of the said covenant to be performed, B might bring an action for the money before he made the assurance. 3 Leon. 219, Brocas's case. And, lastly, where articles of agreement were made between A and B and a covenant by A that, for the consideration thereafter expressed, he should convey certain lands to B in fee, and B, on his part, for the consideration aforesaid, covenanted to pay a sum of money to A, it was held that these were independent covenants, and A might bring an action for the money before any conveyance of the lands. 1 Rol. Abr. 415, pl. 8, S. C, cited 12 Mod. 463; Thorpe v. Thorpe, 1 Ld. Raym. 665, 666; 1 Lutw. 251, 252. There are many other authorities of a similar nature which I refer the reader to: 1 Rol. Rep. 336; Spanish Ambassador v. Gifford, Yelv. 133, 134; Bettisworth v. Campion, Hob 88; Nichols v. Raynbred, 1 Lev. 293; Beany v. Turner, Hard. 102, 103; Gibbons v. Prewd, 1 Str. 535; Blackwell v. Nash, Ibid. 712; Dawson v. Myer, 1 Wils. 88; Martindale v. Fisher. Hence it appears that the judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties. For the rule which is contained in them all seems clear and indisputable: that where there are several covenants, promises or agreements which are independent of each other, one party may bring an action against the other for a breach of his covenants, etc., without averring a performance of the covenants, etc., on his, the plaintiff's part; and it is no excuse for the de-

fendant to allege in his plea a breach of the covenants, etc., on the part of the plaintiff; according to Justinian's rule in the civil law, 'Qui actionem habet ad rem recuperandam, ipsam rem habere videtur' Justin de Regulis Juris, 361. But where the covenants, etc., are dependent, it is necessary for the plaintiff to aver and prove a performance of the covenants, etc., on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant; and so are also 7 Rep 10, a, b, Ughtred's case; Doug. 690, 3rd ed, Kingston v. Preston, cited in Jones v Barkley. The difficulty lies in the application of this rule to the particular case. It is justly observed that covenants, etc., are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. 1 T. R. 645, Hotham v. East India Company; 6 T. R. 668, Porter v. Shephard; Ibid. 571, Campbell v. Jones; 7 T. R. 130, Morton v. Lamb.

"In order, therefore, to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration and when not, it may not be improper to lay down a few rules which will perhaps be found useful for that purpose.

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the perform-

actually reached. At the same time the views set forth in this note are so much better suited to modern conditions, and conform so

ance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. *Dyer*, 76a, in *margin*. 1 *Salk*. 171, *Thorpe v. Thorpe*; *S. C.* 1 *Ld. Raym.* 665, 1 *Lutw.* 250, 12 *Mod* 461, 1 *Vent.* 177, *Peter v. Ople*, per *Hale*, *C. J.*; 2 *Saund.* 350, *S. C.* 1 *Salk.* 113, *Callonel v. Briggs*; 2 *H. Black.* 389, *Terry v. Duntze*; 6 *T. R.* 572, *Campbell v. Jones*. This seems to be the ground of the judgment in this case of *Pordage v. Cole*, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed. And upon the same ground is 48 *Edw.* 3, 2, 3 decided. Lord *Holt*, in *Thorpe v. Thorpe*, 12 *Mod.* 461, 1 *Lutw.* 250, 251, observes that the report of 48 *Edw.* 3, in 7 *Rep.* 10b, *Ughtred's case*, is incorrect. It is thus put in that book: Sir *Richard Pool* covenants with Sir *Ralph Tolcelser* to serve him with three esquires in the wars of France; Sir *Ralph Tolcelser* covenants, in consideration of those services, to pay him so much money, and it is said that an action will lie for the money before any service.

"But in the book at large the case will be found to have been adjudged upon the above-mentioned rule. The report is this: Sir *Richard Pool* covenants with Sir *Ralph Tolcelser* to serve him with three esquires in the wars of France, and Sir *Ralph* covenants with him to pay so much money for the service; and it was further agreed that half the money should be paid in England on a certain day before they went for France, and the rest by quarterly payments (which also might incur before the service); and it was held that an action might be brought for the money before the service.

"But (2) when a day is appointed for the payment of money, etc., and the

day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. 1 *Salk.* 171, *Thorpe v. Thorpe*, 2d *Resolution*; 12 *Mod.* 462, 1 *Ld. Raym.* 665, 1 *Lutw.* 251, *Dyer*, 76a, pl. 30.

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. As where A by deed conveyed to B the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B should quietly enjoy; and B covenanted that A, well and truly performing all and everything therein contained on his part to be performed, he would pay the annuity: in an action by A against B on this covenant, the breach assigned was the nonpayment of the annuity: plea, that A was not at the time legally possessed of the negroes on the plantation, and so had not a good title to convey. The court of K. B. on demurrer held the plea to be ill, and added that, if such plea were allowed, any one negro, not being the property of A, would bar the action. *E. T.* 17 *Geo.* 3 *K. B.*, *Boon v. Eyre*; 1 *H. Black.* 273, note; 2 *Black. Rep.* 1312, *S. C.* The whole consideration of the covenant on the part of B, the purchaser, to pay the money was the conveyance by A, the seller, to him of the equity of redemption of the plantation, and also the stock of negroes upon it. The excuse for nonpayment of the

much more closely to the actual intentions of the parties than did the original theories of the English courts, that modern law on this

money was that A had broken his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A had conveyed the equity of redemption to B, and so had in part executed his covenant, it would be unreasonable that B should keep the plantation, and yet refuse payment, because A had not a good title to the negroes. 6 T. R. 573, per Ashhurst, J. Besides, the damages sustained by the parties would be unequal, if A's covenant were held to be a condition precedent. 1 H. Black. 279, *Duke of St. Albans v. Shore*. For A on the one side would lose the consideration money of the sale, but B's damage on the other might consist perhaps in the loss only of a few negroes. So where it was agreed between C and D that, in consideration of £500, C should teach D the art of bleaching materials for making paper, and permit him, during the continuance of a patent which C had obtained for that purpose, to bleach such materials according to the specification, and C, in consideration of the sum of £250 paid, and of the further sum of £250 to be paid by D to him, covenanted that he would with all possible expedition teach D the method of bleaching such materials, and D covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C should before that time have taught him the bleaching of such materials, pay to C the further sum of £250; in covenant by C against D the breach assigned was the nonpayment of the £250. Demurrer, that it was not averred that C had taught D the method of bleaching such materials. But it was held by the court that the whole consideration of the agreement being that C should permit D to bleach materials as well as teach him the method of doing it, the covenant by C to teach formed but part of the con-

sideration, for a breach of which D might recover a recompense in damages. And C having in part executed his agreement by transferring to D a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by D's not having instructed him; and the demurrer was overruled. 6 T. R. 570, *Campbell v. Jones*.

"Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. And hence, too, it seems it must appear upon the record that the consideration was executed in part. As in *Boon v. Eyre*, above mentioned, the action was on a deed, whereby the plaintiff had conveyed to the defendant the equity of redemption of the plantation; for the defendant did not deny the plaintiff's title to convey it. So in *Campbell v. Jones*, the plaintiff had transferred to the defendant a right to exercise the patent. Therefore, if an action be brought on a covenant or agreement contained in articles of agreement or other executory contract where the whole is future, it seems necessary to aver performance in the declaration of the whole, or at least of part of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed part.

subject is, to a large extent, based on this note rather than on the earlier cases; and its application and development will be discussed in the following sections.⁴

§ 2948. Intention of parties paramount. While the courts now assume that covenants are dependent rather than independent, and concurrent on the one hand rather than precedent and subsequent on the other, this rule, like the other rules of modern law on this subject, is merely a guide to aid the court in ascertaining the intention of the parties; and it is not a rigid rule of substantive law. Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties.¹ While a

As where A, by articles of agreement, in consideration of a sum of money to be paid to him by B on a certain day, covenants to convey to B on the same day a house, together with the fixtures and furniture therein, and that he was lawfully seized of the house and possessed of the fixtures and furniture, in an action against B for the money, A must aver that he conveyed either the whole of the premises or at least the house to B, or it must be admitted by B in his plea that A did convey the house, but was not lawfully possessed of the furniture or fixtures.

"4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 1 Vent. 147, *Large v. Cheshire*; 1 H. Black 270, *Duke of St. Alban's v. Shore*.

"5. Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of

them is obliged to do the first act; and this particularly applies to all cases of sale. 1 Salk. 112, 113, *Callonel v. Briggs*; *Ibid* 171."

⁴See §§ 2948 et seq.

¹England. *Stavers v. Curling*, 3 Bing. N. C. 355; *Glazebrook v. Woodrow*, 8 T. R. 366; *Graves v. Legg*, 9 Exch. 709; *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537].

United States. *Pollack v. Brush Electric Association*, 128 U. S. 446, 32 L. ed. 474; *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849.

Alabama. *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

Arizona. *World's Fair Mining Co. v. Powers*, 12 Ariz. 285, 100 Pac. 957.

Florida. *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Louisiana. *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

Massachusetts. *Johnson v. Reed*, 9 Mass. 78, 6 Am. Dec. 36; *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

Missouri. *Con. P. Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812.

number of tests have been laid down,² and while they are of great help in ascertaining the intention of the parties, they are not, at modern law, arbitrary rules, but merely guides to aid the court in discovering the intention of the parties; and accordingly they are not conclusive in every case.³ The fact that a covenant is referred to as a condition precedent, or as a precedent covenant, is not of itself conclusive as to its character.⁴ It is the order in which the

New York. Delaware Trust Co. v. Calm, 105 N. Y. 231, 88 N. E. 53; Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766.

North Carolina. Statesville Flour Mills Co. v. Wayne Distributing Co., 171 N. Car. 708, 88 S. E. 771.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Ohio. Commissioners of Clermont County v. Robb, 5 Ohio 491.

South Dakota. Ink v. Rohrig, 23 S. D. 548, 122 N. W. 594.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

Washington. Toellner v. McGinnis, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641; Ihrke v. Continental Life Ins. & Investment Co., 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

"Conditions have no idiom. * * * Whether they be precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates." Bucksport & Bangor Railroad Co. v. Brewer, 67 Me. 295.

² See §§ 2947 and 2951 et seq.

³ **United States.** Stanley v. Colt, 72 U. S. (5 Wall.) 119, 18 L. ed. 502; Union Stockyards Co. v. Nashville Packing Co., 140 Fed. 701.

Connecticut. Scovill v. McMahon, 62

Conn. 378, 21 L. R. A. 58, 36 Am. St. Rep. 350, 26 Atl. 479.

Massachusetts. Sohler v. Trinity Church, 109 Mass. 1.

Rhode Island. Greene v. O'Connor, 18 R. I. 56, 19 L. R. A. 262, 25 Atl. 692.

Wisconsin. Hartung v. Witte, 59 Wis. 285, 18 N. W. 175.

"The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed upon the language employed by the parties to express their agreement. * * * If parties think proper they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to performance by the other. The question in each case is, Which intent is disclosed by the language employed in the contract?" Loud v. Pomona Land & Water Co., 153 U. S. 564, 576, 38 L. ed. 822.

⁴ **United States.** Stanley v. Colt, 72 U. S. (5 Wall.) 119, 18 L. ed. 502; Union Stockyards Co. v. Nashville Packing Co., 140 Fed. 701.

Connecticut. Scovill v. McMahon, 62 Conn. 378, 21 L. R. A. 58, 36 Am. St. Rep. 350, 26 Atl. 479.

Massachusetts. Sohler v. Trinity Church, 109 Mass. 1.

Rhode Island. Greene v. O'Connor, 18 R. I. 56, 19 L. R. A. 262, 25 Atl. 692.

parties intend the covenants to be performed, and not the name that the parties give to them, which determines whether they are precedent covenants or not.⁵ The intention of the parties must be ascertained from the contract as a whole, and specific provisions must be ignored if they are inconsistent with the general intent.⁶ While the fact that a covenant goes to a part only of the consideration,⁷ or that the covenants are to be performed at different times without any apparent relation between the performance of the one and the performance of the other,⁸ may tend to show that such covenants are independent, neither of these rules can be regarded as arbitrary and unbending; and if the contract as a whole shows that the covenants are dependent, effect will be given to such intention, although one of the covenants goes to a part of the consideration only,⁹ and although the contract provides that different covenants are to be performed at different times without any apparent relation between the performance of the two.¹⁰ On

Wisconsin. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

"The calling of a provision or stipulation a condition is not conclusive, and if, from the contract or other circumstances, it is seen that it was not the intention of the parties that its performance should be a condition precedent, it will not be held to be such." *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849.

⁵ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849; *McCormick v. Badham*, 191 Ala. 330, 67 So. 609.

"The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed." *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849.

⁶ *United States*, *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 18 L. ed. 502; *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701.

Connecticut. *Scovill v. McMahon*, 62 Conn. 378, 21 L. R. A. 58, 36 Am. St. Rep. 350, 26 Atl. 479.

Massachusetts. *Sohier v. Trinity Church*, 109 Mass. 1; *Griggs v. Moore*, 168 Mass. 354, 47 N. E. 128.

New York. *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

Rhode Island. *Green v. O'Connor*, 18 R. I. 56, 19 L. R. A. 262, 25 Atl. 692.

Virginia. *Allemong v. Augusta National Bank*, 103 Va. 243, 48 S. E. 897.

Wisconsin. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

⁷ See § 2974.

⁸ See §§ 2072 and 2073.

⁹ *Graves v. Legg*, 9 Exch. 709; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

¹⁰ "It is said 'where the acts stipulated to be done are to be done at different times the stipulations are to be construed as independent of each other.' This as a general rule is correct, but it is subject to the intention of the parties as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used." *Slater v. Emerson*, 60 U. S. (19 How.) 224, 238, 15 L. ed. 626.

the other hand, the injustice of the result that may follow in some cases from treating a covenant as independent, may induce the court to construe it as independent, although in outward form it may seem to be dependent.¹¹

While there is occasionally a lack of harmony in construing some provisions,¹² as is often the case when questions of construction are presented,¹³ the courts agree that arbitrary tests must be discarded.¹⁴ Special emphasis is placed upon good sense or common sense as the best guide in ascertaining the relation of the cove-

¹¹ *Hunt v. Tibbetts*, 70 Me. 221; *Todd v. Summers*, 43 Va. (2 Gratt.) 167.

¹² See §§ 2951 et seq.

¹³ See ch. LXIII.

¹⁴ "By a long series of decisions, the rule has been established that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication. *Stavers v. Curling*, 3 Bingham's N. C. 355; *Tipton v. Feitner*, 20 N. Y. 423; *Pollak v. Brush Electric Association*, 128 U. S. 446; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564; *Griggs v. Moors*, 168 Mass. 354; *Leonard v. Dyer*, 26 Conn. 172. The efforts put forth in judicial opinions and by text writers to define or formulate the distinctions of dependence and independence of promises or covenants have revealed their comparative futility and served, in the main, to strengthen the rule. Parties have the right to contract as they will for any lawful purpose, and the problem for the courts is to ascertain, in accordance with established rules of interpretation, the real contract or agreement. If they make their promises dependent or independent throughout, or dependent in part and independent in part, it is not for the courts to thwart them. Their expressed intention and meaning, ascer-

tained from the whole instrument, rather than from technical or conventional expressions, are the guides in determining the character and force of their respective covenants." *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

"This court has said: 'Perhaps there is no other branch of the law in which is to be found a larger number of decisions or a greater apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all parts of the instrument, rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings.' Per Daniel, J., in *Roach v. Dickinson*, 9 Gratt. 154.

"Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent when the necessity of the case and the ends of justice require it, notwithstanding the form.' *Todd v. Summers*, 2 Gratt. 167; *Brockenbrough v. Word*, 4 Rand. 352; *Bream v. Marsh*,

nants.¹⁵ The order in which the covenants appear in the contract is generally regarded as immaterial;¹⁶ while there is apparently some authority to the contrary.¹⁷ The fact that the contract provides that one party shall "first" do a certain act does not of itself show conclusively that such covenant is intended as a precedent covenant.¹⁸ A covenant may be precedent as to one or more covenants to be performed by the adversary party, and concurrent or subsequent as to others.¹⁹ Under a building contract requiring payment by instalments at certain specified dates and requiring the building to be completed at an intervening date, the completion of the building was a condition precedent to the payment of the instalments due after the date fixed for completion.²⁰

§ 2949. Relation of covenants as depending on nature of performance. The relation of the covenants depends in part on the question whether performance on the one side or the other requires only the doing of some continuous act, as for example the payment of money, or whether it requires the performance of a series of acts, such as a covenant for work and labor for a certain period of time. If performance on A's part must by its nature extend over a considerable period of time, while performance on B's part is instantaneous, such covenants can not be concurrent; and if they are dependent, one must be precedent either in whole or in part, and the other must be subsequent either in whole or in part.¹ If A agrees to teach for a certain period of time and B agrees to pay

4 Leigh 21; *Ayres v. Robins*, 30 Gratt. 105; see note to *Todd v. Summers* (title 'Dependent Covenants'), Va. R. Anno. 322." *Allemon v. Augusta National Bank*, 103 Va. 243, 48 S. E. 897.

¹⁵ *Rawson v. Johnson*, 1 East 203; *Ritchie v. Atkinson*, 10 East 295; *Morton v. Lamb*, 7 T. R. 125; *Measures Brothers, Ltd. v. Measures* [1910], 2 Ch. 248; *Leonard v. Dyer*, 26 Conn. 172; *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771; *Pacific Mill Co. v. Inman*, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

"Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case." *Measures*

Brothers, Ltd. v. Measures [1910], 2 Ch. 248.

"Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done." *Morton v. Lamb*, 7 T. R. 125.

¹⁶ *Gardiner v. Corson*, 15 Mass. 500; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

¹⁷ See §§ 2037 and 2051.

¹⁸ *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594.

¹⁹ *Dermott v. Jones*, 64 U. S. (23 How.) 220, 16 L. ed. 442.

²⁰ *Dermott v. Jones*, 64 U. S. (23 How.) 220, 16 L. ed. 442.

¹ *Campbell v. Jones*, 6 T. R. 570.

therefor, the covenants can not be concurrent; and in the absence of some provision to the contrary, A's covenant will be precedent to B's.² If A's covenant requires performance which extends over a period of time, and if B's covenant requires performance which extends over a period of time, the covenants may be dependent or independent, as the parties intend. If A's covenant is one which can be performed by doing an instantaneous act, and B's covenant is one which can be performed by doing an instantaneous act, the covenants may be independent or dependent, as the parties intend; and if dependent they may be precedent and subsequent on the one hand, or concurrent on the other, as the parties may intend.³

§ 2950. Effect of partial performance or delay on relation of covenants. A question upon some phases of which there is a marked conflict of authority is whether a covenant is to be construed as independent or dependent according to its relation to the remaining covenants when the contract is made, or according to its relation to the remaining covenants at the time that the contract is broken. It seems to be generally held that performance of a number of covenants, especially the vital covenants, on one side, leaving one or more minor covenants unperformed, may turn such minor covenants into independent covenants.¹ If the covenant is originally independent, the fact that the time has elapsed within which the covenants on the part of the adversary party are to be performed, or the fact that the event has happened on which the covenants of the adversary party are to be performed, has been held to change such covenant from an independent covenant to a

² Campbell v. Jones, 6 T. R. 570.

³ "And * * * the plaintiff who is to execute the conveyance, and who is also the person to pay for it, not having made it, or made a tender of it to the defendant, nevertheless calls upon him by this action to pay the consideration money. The very statement of such a claim is enough to refute it. If these be not dependent covenants, it is difficult to conceive what covenants are so. The very substance of the consideration to entitle the plaintiff to receive the money was the making of the conveyance required, and it is admitted that he has not

done it; that makes an end of the question. The case of Campbell v. Jones (6 T. R. 570), was very different from the present; for there the instruction to be given was not to be, and could not in the nature of the thing be, performed at the same time with the payment of the money by the defendant, for which a certain time was limited, whereas no time was limited for giving the instruction. But here the parties have stipulated for the conveyance and the payment to be performed at the same time." Glazebrook v. Woodrow, 8 T. R. 366.

¹ See §§ 2974 and 2982 et seq.

dependent covenant;² but, on the other hand, it has been held that such covenant remains independent, and that the fact that the party who is to perform such covenant may demand performance of an independent covenant on the part of the adversary party does not make the two covenants dependent, one on the other.³ If a covenant is a precedent covenant when the contract is made, but if performance thereof is not required until the party who is bound to perform such covenant may require the performance of certain covenants on the part of the adversary party, it is held in some jurisdictions that such lapse of time converts such covenants into concurrent covenants;⁴ while in other jurisdictions it is held that such covenants are to be construed as of the time at which the contract was made, and that the fact that each party may demand performance from the other does not convert the precedent covenant into a concurrent covenant.⁵

B. PRECEDENT AND SUBSEQUENT COVENANTS

§ 2951. Precedent and subsequent covenants—Definition and classification. The term "precedent covenant" implies, as a correlative, a "subsequent covenant." A "precedent covenant" is one which, by the terms of the contract, is to be performed before the corresponding covenant on the part of the adversary party is to be performed by such adversary party.¹ A corresponding covenant, which by the terms of the contract is not to be performed until the adversary party has performed the precedent covenant, is the "subsequent covenant."

²Russ Lumber Co. v. Muscupiabe Land Co., 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; Gillum v. Dennis, 4 Ind. 417.

³Tronson v. Colby University, 9 N. D. 559, 84 N. W. 474.

⁴California. Hill v. Grigsby, 35 Cal. 656; McCroskey v. Ladd, 96 Cal. 455, 31 Pac. 558.

Illinois. Runkle v. Johnson, 30 Ill. 328, 83 Am. Dec. 191.

Indiana. Irwin v. Lee, 34 Ind. 310.
Kansas. Soper v. Gabe, 55 Kan. 646, 41 Pac. 969.

New York. Beecher v. Conradt, 13 N. Y. 108; Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362.

South Dakota. First National Bank v. Spear, 12 S. D. 108, 80 N. W. 166.

⁵Sheeren v. Moses, 84 Ill. 448; Gray v. Meek, 109 Ill. 136, 64 N. E. 1020; Bowen v. Bailey, 42 Miss. 405.

¹England. Graves v. Legg, 9 Exch. 709.

United States. World's Fair Mining Co. v. Powers, 224 U. S. 173, 56 L. ed. 717.

California. McConnell v. Corona City Water Co., 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

Colorado. Empson Packing Co. v. Clawson, 43 Colo. 188, 95 Pac. 546; Burrell v. Masters, — Colo. —, 176 Pac. 316.

Precedent covenants are usually said to consist of two general classes. One class of precedent covenants consist of the covenant which is precedent to the corresponding subsequent covenant because the time for the performance of each is fixed by the contract, or the order of performance is fixed; and the time for the performance of the precedent covenant must occur before the time for the performance of the subsequent covenant has arrived.² If two acts are to be done at different times, each of which times is fixed, and there is a necessary priority of one over the other in point of time, performance of the prior covenant is precedent to the right of enforcing the later covenant.³ If A agrees to complete a railroad for B by December 1st, and B is then to give notes payable six months thereafter, A's performance is a condition precedent to B's liability.⁴ Even if the time for performance is not fixed in the ordinary sense of fixing time, the clear intent of the parties that one covenant shall be performed before performance can be required from the adversary party, makes the former covenant a

Florida. *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Kentucky. *Seventh St. Planing Mill Co. v. Schaefer* (Ky.), 99 S. W. 341.

Louisiana. *Louisiana & N. W. R. Co. v. Athens Lumber Co.*, 134 La. 788, L. R. A. 1915B, 856, 64 So. 714.

Maine. *Savage Manufacturing Co. v. Armstrong*, 19 Me. 147; *Hunt v. Tibbetts*, 70 Me. 221.

Massachusetts. *Parrot v. Mexican Central Ry. Co.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

Michigan. *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101; *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

New Hampshire. *Famous Players Film Co. v. Salomon*, — N. H. —, 106 Atl. 282.

New York. *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549.

North Carolina. *Hughes v. Crooker*, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429.

North Dakota. *Sunshine Cloak &*

Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

South Carolina. *Pearson v. Easterling*, — S. Car. —, 97 S. E. 238.

Tennessee. *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Utah. *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

Wisconsin. *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

² **Florida.** *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Massachusetts. *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

Michigan. *Hill v. Mathews*, 78 Mich. 377, 44 N. W. 286.

Oregon. *Holtz v. Olds*, 84 Or. 567, 164 Pac. 583.

Wisconsin. *Kellogg v. Nelson*, 5 Wis. 125.

³ *Slater v. Emerson*, 60 U. S. (19 How.) 224, 15 L. ed. 626.

⁴ *Slater v. Emerson*, 60 U. S. (19 How.) 224, 15 L. ed. 626.

precedent covenant and the latter a subsequent covenant.⁵ It has been said that a provision that A should transfer something to B on payment by B of a certain sum of money, makes B's payment precedent to A's duty to make such transfer.⁶ In many jurisdictions, however, language of this sort would not be sufficient to overcome the general presumption in favor of concurrent covenants.⁷ Under a provision that A should "first" make payment, and that B should convey certain property, it is held that such covenants are concurrent and that A's covenant to pay is not precedent to B's duty to convey.⁸

The second class of precedent covenants consists of covenants for the performance of which no set time is fixed, but which from their nature are such that they must be performed before performance on the part of the adversary party can be required.⁹

In many cases these two classes of precedent covenants merge into each other, since, although performance of each covenant is not required at a fixed time, the contract may show by its express

⁵ *Porter v. Shepard*, 6 T. R. 665; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822; *Northrup v. Northrup*, 6 Cow. (N. Y.) 296; *Hughes v. Crooker*, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429.

⁶ *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822; *Northrup v. Northrup*, 6 Cow. (N. Y.) 296.

⁷ See § 2952.

⁸ *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594.

⁹ *United States. King Iron Bridge & Manufacturing Co. v. St. Louis*, 43 Fed. 768, 10 L. R. A. 826 [appeal dismissed on motion of plaintiff in error, *St. Louis v. King Bridge & Manufacturing Co.*, 149 U. S. 769, 37 L. ed. 960].

Alabama. *Hardaway-Wright Co. v. Bradley Bros.*, 163 Ala. 596, 51 So. 21.

California. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

Colorado. *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546.

Illinois. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652.

Kentucky. *Williams v. Yates (Ky.)*, 113 S. W. 503; *Pittsburgh Filter Mfg. Co. v. Smith*, 176 Ky. 554, 196 S. W. 150.

Maine. *Savage Manufacturing Co. v. Armstrong*, 19 Me. 147.

Massachusetts. *Mill Dam Foundry v. Hovey*, 38 Mass. (21 Pick.) 417.

Michigan. *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

Montana. *Starr v. Gregory Consolidated Mining Co.*, 6 Mont. 485, 13 Pac. 195.

New Mexico. *Culp v. Sandoval*, 22 N. M. 71, L. R. A. 1917A, 1157, 159 Pac. 956.

New York. *Atlantic Avenue Ry. v. Johnson*, 134 N. Y. 375, 31 N. E. 903; *Gutmann v. Crouch*, 134 N. Y. 585, 31 N. E. 275.

Oregon. *Vanderhof v. Shell*, 42 Or. 578, 72 Pac. 126.

Tennessee. *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Utah. *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

terms, and not merely by the nature of the respective covenants alone, that performance is to be made on the part of one of the parties before performance can be required on the part of the adversary party.

A precedent covenant is frequently referred to as a condition.¹⁰ The intention of the parties that performance on the part of one shall be completed before performance can be required on the part of the other is said to show that the precedent covenant may also operate as a precedent condition.¹¹ It is in cases of this sort, in which the parties have indicated their intention that breach by one party shall operate as a discharge of the adversary party, that the confusion between conditions and covenants has arisen;¹² but this confusion has unfortunately not been confined to cases of this sort.¹³

The fact that a covenant is spoken of as a condition is not conclusive of the fact that it is a precedent covenant, if the contract taken as a whole shows that it is not to be performed until after the adversary party has performed one or more of the covenants on his part.¹⁴ If bonds of a county are issued to a railway, and if the contract provides that the railway shall use such money in constructing its road, the construction of such road is not precedent

Virginia. *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711; *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888; *Atlantic & Danville Ry. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13.

Wisconsin. *Olsen v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

"When in the order of events the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment, sufficiently distant to have the work done in the meantime. Suppose B agrees to build at his own shop a carriage for A, of A's materials; A stipulates seasonably to furnish materials and to pay B in four months, and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials

by A is a condition precedent. Without it B can not perform. He must build it of A's materials. Even building it of his own would not be a performance. B has his shop, his tools, and his workmen all ready, but A does not furnish the materials. If B sues A, averring readiness to perform, he may recover. But if A sues B for not building the carriage, it would be a good answer that A himself had not furnished the materials, because, whatever else the contract may contain, this is in its nature a condition precedent." *Cadwell v. Blake*, 72 Mass. (6 Gray) 402.

¹⁰ *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

¹¹ See § 2578.

¹² See §§ 2576 et seq.

¹³ See §§ 2576 et seq.

¹⁴ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849 [affirmed, *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335].

to the issuing of such bonds, although in the proposition which is submitted to popular vote the question is whether the bonds in payment of such subscription should be issued on condition that the railway should locate and construct the road in accordance with the terms of its contract.¹⁵

In the absence of a provision in a contract, tending to show that a given covenant is precedent, the court will not construe the contract so as to make such covenant precedent.¹⁶ An express provision in a contract may make a covenant independent, although without such express provision it would ordinarily be regarded as precedent.¹⁷ An express provision that failure to pay assessments by a member while he is sick shall not be ground for cancellation of his membership, prevents his failure to pay assessments from operating as a discharge of a contract to furnish medical and hospital services.¹⁸

§ 2952. Specific types of precedent covenants—Contracts for the sale of land. While, at modern law, the covenants in a contract for the sale of realty which provide on the one hand for the conveyance, and on the other for payment of the purchase price, are regarded as concurrent in the absence of any provision in the contract which shows a contrary intention,¹ such a contract frequently contains provisions which show that the parties intend that the performance of one or more covenants by one of the parties shall precede the duty of the adversary party to perform the covenants into which he has entered. Full effect is given to such provisions where the intention of the parties is clear.² Such a contract may by its express terms require the purchaser to pay a part or all of the purchase price to the vendor in advance; and under such a

¹⁵ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849 [affirmed, *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335].

¹⁶ *Lord v. Miller*, 86 Wash. 436, 150 Pac. 631.

¹⁷ *Coffey v. Northwestern Hospital Assn.*, — Or. —, 183 Pac. 762.

¹⁸ *Coffey v. Northwestern Hospital Assn.*, — Or. —, 183 Pac. 762.

¹ See §§ 2946 and 2964.

² *United States. Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822.

Indiana. Huff v. Lawlor, 45 Ind. 80.

Iowa. Granfield v. Rowlings, 53 Ia. 654, 6 N. W. 31.

Maine. Hill v. Fisher, 34 Me. 143.
Mississippi. Leftwich v. Coleman, 4 Miss. (3 How.) 167.

New Jersey. Huffman v. Hummer, 18 N. J. Eq. 83.

New York. Burwell v. Jackson, 9 N. Y. 535.

Pennsylvania. Parmentier v. Wheat, 33 Pa. St. 192.

Wisconsin. Gale v. Best, 20 Wis. 44.

contract such covenant on the part of the purchaser is precedent to the covenant on the part of the vendor to convey.³ Under a contract to sell certain land at a certain price if the vendee shall pay a pre-existing note to the vendor,⁴ or to convey certain realty and relinquish a tree-claim, such contract "not to be performed until" the grantee shall pay a debt owing by him to a third party and secured by a mortgage upon personalty, the transfer of which is the consideration for such contract,⁵ the payment of such debt is in each case a precedent covenant. Under a contract by which A agrees to lease a tract of land to B and to pay for the building which B is to erect thereon, reserving to A the right of re-entry in case of B's default in paying rent, and B agrees to pay rent in certain instalments at certain intervals, as well as to erect such building, B's covenants to pay rent are precedent to A's covenants to pay for such building;⁶ and if B makes default in paying such instalments, and A elects to re-enter under such condition, A is not bound to pay for such building.⁷ Under a bond for a deed which declares that improvements to be made on the realty conveyed are the chief condition, and are to be made by a certain date, the construction of such improvements is precedent to the delivery of such deed.⁸

By the terms of a contract for the sale of realty the vendor may agree to convey the realty before the purchaser is to pay part or all of the purchase price therefor; and under such a contract the covenants of the vendor to convey is precedent to the covenant of the purchaser to pay the purchase price or such part thereof.⁹ Under a contract by which the vendor covenants to convey the realty on the payment of a specified instalment of the purchase

³ **United States.** *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822.

Maine. *Hill v. Fisher*, 34 Me. 143.

Mississippi. *Leftwich v. Coleman*, 4 Miss. (3 How.) 167.

Pennsylvania. *Parmentier v. Wheat*, 33 Pa. St. 192.

Wisconsin. *Gale v. Best*, 20 Wis. 44.

⁴ *Schildes v. Horlach*, 30 Neb. 536, 46 N. W. 629.

⁵ *Wright v. Wilcox*, 52 Minn. 438, 54 N. W. 483.

⁶ *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641.

⁷ *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641.

⁸ *Haggerty v. Elyton Land Co.*, 89 Ala. 428, 7 So. 651.

⁹ **California.** *Danziger v. Benson*, 175 Cal. 565, 166 Pac. 313.

Indiana. *Huff v. Lawlor*, 45 Ind. 80.

Iowa. *Granfield v. Rowlings*, 53 Ia. 654, 6 N. W. 31.

New Jersey. *Huffman v. Hummer*, 18 N. J. Eq. 83.

New York. *Burwell v. Jackson*, 9 N. Y. 535.

price, leaving other instalments due and unpaid, such covenant to convey is precedent to the covenant on the part of the purchaser to pay the remaining instalments; and the vendor can not, on the one hand, recover such subsequent instalments if he has not performed his covenant to convey;¹⁰ and, on the other hand, the vendor is bound to make such conveyance, although it is possible that the purchaser may not perform his covenant to pay the remaining instalments of the purchase price.¹¹ If the vendor has agreed to remove the encumbrances upon certain realty before the purchaser is to pay therefor, such covenant on the part of the vendor is precedent to the covenant on the part of the purchaser to pay therefor.¹² Under a contract for the exchange of realty providing that the contract is to be void unless each can furnish an abstract showing title, the ability of each party to furnish such abstract is precedent to his right to enforce performance against the adversary party.¹³ A covenant on the part of the vendor to construct certain improvements,¹⁴ or to construct a railway or other means of access to the realty,¹⁵ which by its terms is to be performed before the

¹⁰ *Burwell v. Jackson*, 9 N. Y. 535.

¹¹ *Danziger v. Benson*, 175 Cal. 565, 166 Pac. 313.

¹² *Negley v. Jeffers*, 28 O. S. 90.

¹³ *McLaughlin v. McAllister*, 36 Fed. 745.

¹⁴ *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

"The second contention is that the clause in the contract relating to the planting of the fruit trees is an independent covenant, a breach of which is not ground for a rescission of the contract. In support of the contention the cases of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586; *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106, and *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884, are cited. While in each of these cases the covenants were held to be independent, it can be conceded that they were rightly decided without requiring the holding that the covenants in the present case are so. In the first case the covenant was in regard to building re-

strictions and the making of street improvements, and in the others it related to water rights. The reason given for the holdings was that there was no connection in the matter of the promises; that they were to be performed at different times, and went only to separate parts of the consideration. Here the covenants are mutual and dependent. The very contract is to convey a tract of land with a bearing orchard, which was to be planted and matured prior to the time the last of the payments were due. There was no separation in regard to the consideration. The land with the orchard was to be conveyed as a whole for the one price, and there is no means of determining what part of the consideration was to be paid for the land and what part for the orchard." *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

¹⁵ *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

last instalments of the purchase price are due, is precedent to such covenants on the part of the purchaser. If B, who has purchased certain land from A under an executory contract, agrees to work on such realty for a certain time and to surrender such contract to A, in consideration of which A agrees to pay to B a certain amount, B can not recover such amount from A unless he can show that he has surrendered such contract and the possession of the realty which he has obtained thereunder.¹⁶ If A has agreed to reimburse B for money which B has advanced for the purchase of certain property from X for the benefit of A and B, B can not recover from A unless he is able to show that he has made a valid contract with X and has advanced money thereunder.¹⁷ If A agrees to purchase land for B, and B is to have a certain length of time in which to examine and investigate such land, A's covenant to get such land for B is precedent to B's duty to pay therefor;¹⁸ and B is not required to show that he was ready and willing to buy such land or that he offered to pay therefor.¹⁹

§ 2953. Contracts for the sale of personalty. While, in the absence of any specific agreement to the contrary, covenants for the sale and transfer of the possession of goods, on the one hand, and covenants for the payment therefor on the other, are usually held to be concurrent,¹ the parties to the contract may make either of these covenants precedent to the other by the special terms of the contract.

If the purchaser has agreed to pay part or all of the purchase price in advance, payment on his part is a covenant precedent to the duty of the seller to deliver the goods which he has sold.² A provision requiring notice to be given by the vendee before the vendor was to ship the goods sold, is precedent to the vendee's

¹⁶ De Young v. Benepe, 55 Mont. 306, 176 Pac. 609.

¹⁷ Hinderliter v. McDonald, 84 Or. 251, 164 Pac. 378.

¹⁸ Winfield Lumber Co. v. Partridge, — Ala. —, 80 So. 821.

¹⁹ Winfield Lumber Co. v. Partridge, — Ala. —, 80 So. 821.

¹ See §§ 2946 and 2965.

² England. Sanders v. Maclean, 11 Q. B. D. 327.

United States. Straus v. Russell Co.,

85 Fed. 589; Weinstein v. Studebaker Corporation, 238 Fed. 963.

California. Langley v. Rodriguez, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406.

Massachusetts. Massachusetts Biographical Society v. Russell, 220 Mass. 524, 118 N. E. 662.

Michigan. W. & A. McArthur Co. v. Bay City Old Second National Bank, 122 Mich. 223, 81 N. W. 92.

Mississippi. Stokes-Evans Co. v. Oil Co. (Miss.), 33 So. 283.

liability.³ A covenant as to the time of shipment is ordinarily regarded as precedent and material, so that the breach thereof operates as a discharge of the remaining provisions of the contract to be performed by the purchaser.⁴ If there is a substantial breach of the covenant as to the time at which shipment is made, such breach discharges the buyer.⁵ A stipulation in a contract to sell, that the goods sold were to be shipped by "sailer or sailers" within a specified time, is a condition precedent, and the vendor can not hold the vendee liable for the goods so shipped by steamer, and not within such time.⁶ A provision that the seller shall declare the name of the vessel on which the goods are shipped is a precedent covenant.⁷ A covenant by the seller to sell the goods f. o. b. cars, imposes upon the seller the duty of obtaining the cars at such place, and to load the goods thereon; and his failure so to do is a breach of a precedent covenant.⁸ The formation of a corporation is a condition precedent to enforcing a contract of subscription for corporate stock.⁹ Under a contract to deliver certain shares of stock when certain syndicates have completed the subscription to the securities of a given corporation, performance by the syndicate is a condition precedent to the delivery of such stock.¹⁰ Under a contract to give certain rebates to a vendee if he buys for a certain period of time from the vendor exclusively, such exclusive patronage is a condition precedent to the recovery of such rebates.¹¹ If payment is to be according to the measurement of the property contracted for, such measurement is a condition precedent to payment.¹² A contract to pay a certain sum for a receipt for dyeing hosiery a certain shade of black, payment to be made on a certain

³ *Maddox v. Wagner*, 111 Ga. 146, 36 S. E. 609.

⁴ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359; *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

⁵ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

⁶ *Ashmore v. Cox* [1899], 1 Q. B. 436.

⁷ *Graves v. Legg*, 9 Exch. 709.

⁸ *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 6 L. R. A. (N.S.) 928, 85 Pac. 551; *Culp v. Sandoval*, 22 N. M. 71, L. R. A. 1917A, 1157, 159 Pac. 956; *R. J. Menz*

Lumber Co. v. McNeeley, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

⁹ *McCoy v. Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 238, 7 N. E. 1043; *Brooksville Ry. Co. v. Byron* (Ky.), 50 S. W. 530.

¹⁰ *Becker's Estate*, 166 Pa. St. 313, 31 Atl. 95.

¹¹ *Dennehy v. McNulta*, 86 Fed. 825, 41 L. R. A. 609, 30 C. C. A. 422.

¹² *Street paving. New Telephone Co. v. Foley*, 28 Ind. App. 418, 63 N. E. 56. *Logs. Jeamer v. Rines*, 37 Minn. 477, 35 N. W. 180.

Sale of marble. Lowry v. Barelli, 21 O. S. 324.

day if the color is right, makes the production of such color by means of such receipt, if used in good faith, a condition precedent to payment.¹³ Under a contract whereby A agrees to cancel certain notes and a mortgage when B surrenders certain property to A, A's refusal to cancel them when B has surrendered part but not all of such property, is not a breach.¹⁴ If the purchaser is to furnish the receptacles in which the goods are to be delivered, such covenant is precedent on his part,¹⁵ and his failure to furnish such receptacles operates as a discharge of the covenants on his part to be performed.¹⁶ No recovery can be had for such failure, however, if the party who is to make delivery is not himself ready to perform until after the party who is to furnish such receptacles has in fact furnished them.¹⁷

If the contract provides for sale on credit, delivery of the goods by the seller is precedent to his right to enforce against the purchaser his covenant to pay therefor.¹⁸ If goods are to be furnished in instalments for an entire price, and no provision is made as to the payment therefor, delivery of all the instalments but the last is precedent to the right of the seller to recover.¹⁹ If A agrees to manufacture an article for B, according to models or specifications to be furnished by B, B's covenant to furnish such model or specification is precedent to A's duty to manufacture such article.²⁰ Under a contract by which A is to furnish seed to B, and B is to plant such seed and from it he is to grow other seed for planting which he is to deliver to A, A's failure to furnish the proper seed

¹³ *Hecht v. Taubel*, 55 N. J. L. 419, 26 Atl. 902.

¹⁴ *Ward v. Sherman*, 192 U. S. 168, 48 L. ed. 301 [reversing, 7 Ariz. 277, 64 Pac. 434].

¹⁵ *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

¹⁶ *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

¹⁷ *Lee v. Upton*, — N. Car. —, 100 S. E. 268.

¹⁸ *Maryland. Hazel Hill Canning Co. v. Roberts Bros.*, 129 Md. 306, 99 Atl. 424.

Michigan. J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657, 113 N. W. 300.

New Jersey. Kelly Construction Co. v. Hackensack Brick Co., 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

Ohio. Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 100 N. E. 33.

Vermont. James Smith Woolen Machine Co. v. Holden, 73 Vt. 396, 51 Atl. 2.

¹⁹ *In re Hellams*, 223 Fed. 460; *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

²⁰ *Savage Manufacturing Co. v. Armstrong*, 19 Me. 147; *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

to B is a breach of a precedent covenant which excuses B for failure to deliver to A the kind and quality of seed specified in the contract.²¹ Under a contract for the sale of a patent right or trade secret, which provides that the vendor shall teach the vendee the means of using such right or process of selling the product, the latter covenant is precedent to the duty of the purchaser to pay, if it appears from the terms of the contract taken as a whole that payment is not due until the vendor has performed all of the covenants on his part to be performed.²²

§ 2954. Covenants for giving security. If extension of credit is not intended, a provision for giving bond or other security is precedent to the right of the party who is to give such bond or security, to enforce the contract against the adversary party.¹ If a building contract provides that the owner is to give security for the payment of the contract price, his giving of such security is precedent to his right to demand performance on the part of the contractor.² Under a contract for the sale of a business, which provides that the buyer is to give security, his giving such security is a precedent covenant which he must perform before he can enforce performance against the seller.³ If each party agrees to give security for performance on his part, each of such covenants is precedent to his right to demand performance on the part of the other, but the two covenants for giving security are not concurrent, each with the other.⁴ If A has agreed to lend money or furnish

²¹ *Burrell v. Masters*, — Colo. —, 176 Pac. 316.

²² *Cadwell v. Blake*, 72 Mass. (6 Gray) 402; *Hughes v. Crooker*, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429.

¹ *Kingston v. Preston*, 2 Dougl. 689; *Roberts v. Brett*, 11 H. L. Cas. 337; *Harriman National Bank v. Seldomridge*, 249 U. S. 1, — L. ed. —; *Flynn v. Dougherty* (Cal.), 26 Pac. 831; *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

"It's of the very essence of the agreement, that the defendant will not trust the personal security of the plaintiff. A court of justice is [asked] to say, that by operation of law he shall, against his teeth. He is to let him into his house to squander everything there,

without anything to rely on but what he has absolutely refused to trust." *Lofft* 194 (same case as *Kingston v. Preston*, 2 Dougl. 689).

² *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

³ *Kingston v. Preston*, 2 Dougl. 689.

⁴ "It was also contended by the appellant that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent, being in like default, could not defend himself by pleading the default of the appellant.

credit to B in consideration of B's furnishing certain collateral, B's failure to furnish the collateral agreed upon discharges A from his duty to lend money or to furnish credit.⁵ If a contract of guaranty contains a covenant on the part of the creditor not to extend credit to the debtor in excess of a certain amount, the creditor's performance of such covenant is precedent to his right to enforce the covenant on the part of the guarantor; and the creditor's breach of such covenant operates as a discharge of the guarantor.⁶ Under a contract to indemnify against loss, the party to whom such indemnity is given must show that he has sustained such loss, in order to enable him to enforce such covenant for indemnity.⁷

§ 2955. Railway aid contracts. Railway aid contracts, which were far more common in the past than they are today, afforded a number of illustrations of precedent covenants, although from the wording of many of these contracts the precedent act is rather in the nature of an acceptance of the offer,¹ or in the nature of a condition,² than like a covenant. Under a contract to give a railroad company a right of way if a certain route were selected, the selection of such route is precedent to obtaining such right of way.³ Under a contract to pay a certain sum of money in aid of a railroad if it is ready for operation by a certain time, getting it ready for operation by such time is precedent to enforcing payment. Under a contract by which the owner of land agrees to pay to the promoter of a railroad five thousand dollars when he shall extend his railroad southerly to a certain section of land, and ten thousand dollars if the land sells at a specified price per acre, the extension

"But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other; but the fulfillment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agree-

ment, unless he has performed this precedent obligation." *Roberts v. Brett*, 11 H. L. Cas. 337.

⁵ *Harriman National Bank v. Seldomridge*, 249 U. S. 1, — L. ed. —.

⁶ *Koppitz-Melchers Brewing Co. v. Schultz*, 68 O. S. 407, 67 N. E. 719.

⁷ *Louisiana & N. W. R. Co. v. Athens Lumber Co.*, 134 La. 788, L. R. A. 1915B, 856, 64 So. 714.

¹ See §§ 180 et seq.

² See §§ 2574 et seq.

³ *New Orleans v. Texas & Pacific Ry.*, 171 U. S. 312, 43 L. ed. 178; *Crane v. Indiana Ry.*, 50 Ind. 165; *Davenport Ry. v. O'Connor*, 40 Ia. 477.

of such railroad is precedent to the right of the promoter to recover under the contract, and without such extension the promoter of the railroad can not recover, even if the land sells for the stipulated amount.⁴ A contract to pay when a certain railroad "is constructed and the cars are running thereon between" certain specified points, does not make the construction of the entire road precedent to recovering such subscription, but only the construction and operation of the road between the points named.⁵ A provision to the effect that the road shall be so far completed that trains are run over its track between certain points, is not performed if trains can be run between such points only by using a substantial portion of the track of another railway.⁶ A provision to the effect that the cars shall run over a given portion of the track by a certain time, is performed if the track is so far completed that construction trains can run over it and do run regularly, although it is not yet ready for passenger traffic.⁷ A provision requiring the railway to be completed in a certain time is performed, although stations and other terminal facilities have not yet been constructed.⁸ A provision for locating a station within a certain distance of a town is performed if the station is located within such distance from the limits of the town, although the track and side-track are not located within such distance.⁹

If the contract of subscription shows that the money which is to be paid in is to be expended by the railway company in constructing its road, the construction of the road is not a precedent covenant on the part of the railway company to its right to enforce such contract of subscription for furnishing aid, although the contract refers to the construction of the road as a condition.¹⁰

§ 2956. Contracts with carriers. Under a contract by which a carrier agrees to transport passengers, the duty of the passenger to pay his fare is frequently precedent to the duty of the carrier

⁴ *Stevens v. Ambler*, 39 Fla. 575, 23 So. 10; *Persinger v. Beville*, 31 Fla. 364, 12 So. 366.

See also, *Sickels v. Anderson*, 63 Mich. 421, 30 N. W. 78.

⁵ *Gardner v. Walsh*, 95 Mich. 505, 55 N. W. 355.

⁶ *Indianapolis Ry. v. Holmes*, 101 Ind. 348.

⁷ *Pontiac, O. & P. A. Ry. v. King*, 68 Mich. 111, 35 N. W. 705.

⁸ *Ogden v. Kirby*, 79 Ill. 555.

⁹ *Courtright v. Strickler*, 37 Ia. 382.

¹⁰ *Quinlan v. Green County*, 157 Fed. 33, 19 L. R. A. (N.S.) 849 [affirmed, *Green County v. Quinlan*, 211 U. S. 582, 53 L. ed. 335].

to begin performance of his duty to transport such passenger.¹ In some cases, in the case of street railways, or of other means of transportation where there is no means of preventing a passenger from entering without paying his fare in advance, the fare is payable on demand; and such duty on the part of the passenger is precedent to the duty on the part of the carrier to continue to perform the contract of transportation. A clause in a railway ticket to the effect that it must be stamped by the agent of the company at the terminal point to be good for the round trip, imposes a provision which must be complied with before such ticket can be used.²

In the absence of a specific agreement by which the carrier extends credit to the consignor, the duty of the consignor to pay freight in advance is precedent to the duty of the carrier to accept the goods or to transport them.³ If the carrier does not waive his right to demand payment of freight in advance, he is not bound to accept goods without a prepayment of freight, either from the consignor,⁴ or from a connecting carrier.⁵ It has been said that if the carrier receives such goods, his common-law liability does not attach until freight is paid in advance, unless he has waived his right to such payment and has agreed to extend credit to the consignor.⁶

¹ *Hurt v. Southern Ry.*, 40 Miss. 391; *Martin v. Rhode Island Co.*, 32 R. I. 162, 32 L. R. A. (N.S.) 695, 78 Atl. 548; *Curtis v. Louisville City Ry.*, 94 Ky. 573, 21 L. R. A. 649, 23 S. W. 363.

² *United States. Boylan v. Hot Springs Ry.*, 132 U. S. 146, 33 L. ed. 200.

California. *Marlow v. Southern Pacific Ry.*, 151 Cal. 383, 128 Am. St. Rep. 127, 90 Pac. 928.

Kansas. *Dangerfield v. Atchison Ry.*, 62 Kan. 85, 61 Pac. 405.

Michigan. *Edwards v. Lake Shore & Michigan Southern Ry.*, 81 Mich. 364, 21 Am. St. Rep. 527, 45 N. W. 827.

Pennsylvania. *Bowers v. Pittsburgh, Ft. Wayne & Chicago Ry.*, 158 Pa. St. 302, 27 Atl. 893.

South Carolina. *Bethea v. Northeastern Ry.*, 26 S. Car. 91, 1 S. E. 372.

Tennessee. *Watson v. Louisville Ry.*, 104 Tenn. 194, 49 L. R. A. 454, 56 S. W. 1024.

Texas. *Russell v. Missouri, Kansas & Texas Ry.*, 12 Tex. Civ. App. 627, 35 S. W. 724.

³ *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 59 L. ed. 405; *Dixon v. Central of Georgia Ry.*, 110 Ga. 173, 35 S. E. 369; *Illinois Central Ry. v. Frankenberger*, 54 Ill. 88, 5 Am. Rep. 92 (obiter); *Lehigh Valley Transportation Co. v. Post Sugar Co.*, 228 Ill. 121, 81 N. E. 819; *Bird v. Southern Ry.*, 99 Tenn. 719, 63 Am. St. Rep. 856, 42 S. W. 451.

⁴ *Illinois Central Ry. v. Frankenberger*, 54 Ill. 88, 5 Am. Rep. 92 (obiter).

⁵ *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 59 L. ed. 405; *Lehigh Valley Transportation Co. v. Post Sugar Co.*, 228 Ill. 121, 81 N. E. 819; *Bird v. Southern Ry.*, 99 Tenn. 719, 63 Am. St. Rep. 856, 42 S. W. 451.

⁶ *Dixon v. Central of Georgia Ry.*, 110 Ga. 173, 35 S. E. 369.

Under a contract by which A is to cut timber sufficient to keep B's teams employed in transporting it, A's failure to keep such amount of timber cut is a breach of a precedent covenant;⁷ and B may treat the covenant on his part as discharged.⁸

§ 2957. Contracts for work, labor, services, etc. In the absence of a provision in a contract of employment which, in express terms, or by fair implication, requires the employer to pay before the employe has performed the contract on his part, performance on the part of the party who is to perform work and labor or to render services is precedent to his right to enforce the covenant of the adversary party to pay therefor.¹ Under a contract by which A is to sell certain realty for B, and B is to pay to A a commission therefor, A's performance is precedent to his right to recover commissions.² Accordingly, if A has secured performance on terms other than those which B has authorized, and B has not waived such departure from the terms of A's authority, A can not recover compensation.³ If A brings an action against B for B's failure to do certain work, or to render certain services in accordance with the terms of a contract which contains no provision for payment in advance, it is not necessary that A should allege or prove such payment.⁴ Under a contract for paying for work in instalments, and retaining part of the amount due each month as a security for the faithful performance, complete performance is precedent to the recovery of any part of such reserve.⁵ Under a contract to dig a well, to reach a suitable supply of water, reaching such suitable supply is precedent to the recovery.⁶ Under a contract by which

⁷ *Fletcher v. Verser*, 79 Ark. 271, 116 Am. St. Rep. 75, 96 S. W. 384.

⁸ *Fletcher v. Verser*, 79 Ark. 271, 116 Am. St. Rep. 75, 96 S. W. 384.

¹ *Arkansas. Friedman v. Schleuter*, 105 Ark. 580, 151 S. W. 606.

Connecticut. Cunningham Lumber Co. v. New York, New Haven & Hartford Ry. Co., 77 Conn. 628, 60 Atl. 107.

New York. Stewart v. Newbury, 220 N. Y. 379, 2 A. L. R. 519, 115 N. E. 984; *Cream of Wheat Co. v. Arthur H. Crist Co.*, 222 N. Y. 487, 1 A. L. R. 150, 119 N. E. 74 (a question of construction).

Ohio. Laws v. Schmidt, 80 O. S. 108, 88 N. E. 319.

Oklahoma. Meek v. Daugherty, 21 Okla. 850, 97 Pac. 557.

Oregon. Hoskins v. Scott, 52 Or. 271, 96 Pac. 1112.

² *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652; *Laws v. Schmidt*, 80 O. S. 108, 88 N. E. 319; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959.

³ *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652.

⁴ *Hoskins v. Scott*, 52 Or. 271, 96 Pac. 1112.

⁵ *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949.

⁶ *Jackson v. Creswell*, 94 Ia. 713, 61 N. W. 383; *Sherzer v. Buckholz*, 108 Ia. 749, 78 N. W. 818.

A agrees to pay to B a certain compensation for his services, and also agrees to reimburse him for his necessary expenses, B's expenditure of money for such necessary expenses is precedent to his right to recover on A's covenant to reimburse him; and B can not recover from A because of A's refusal to advance the money for such expenses before B has expended it.⁷ If, on the other hand, A has agreed to advance money for the payment of the expenses of an employe, A's failure or refusal to advance such payments is a breach of a precedent covenant on his part;⁸ and B may treat such breach as a discharge of his covenant to continue to render such services.⁹ In contracts of employment in which the opportunity to work, so as to acquire either skill or reputation, is not an essential feature of the contract, an employer is not guilty of breach by refusing to allow his employe to continue to work, if he offers payment in accordance with the terms of the contract.¹⁰

Since performance on the part of the employe is precedent to the duty of the employer to make compensation, the act of the employe in quitting his employment without sufficient excuse is a breach of his contract of employment.¹¹

The precedent duty of the employe is not merely to put in the amount of time at the place provided for by the contract, but also to act with the requisite amount of skill, care and fidelity. His inability or omission to perform his duties in this way is a breach of a covenant which may be regarded as precedent to his right to recover under the contract, but which may also be regarded as subsequent to the validity of the contract of employment. In either case, his inability or omission to make use of the requisite amount of skill, care and fidelity justifies his employer in treating the contract of employment as ended and in discharging the employe.¹²

⁷ *Sherk v. Holmes*, 125 Mich. 118, 83 N. W. 1016.

⁸ *Parrot v. Mexican Central Ry. Co.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590.

⁹ *Parrot v. Mexican Central Ry.*, 207 Mass. 184; 34 L. R. A. (N.S.) 261, 93 N. E. 590.

¹⁰ *Turner v. Sawdon* [1901], 2 K. B. 653; *Konski v. Peet* [1915], 1 Ch. 530.

¹¹ *Nash v. H. R. Gladding Co.*, 118 Mich. 529, 77 N. W. 7.

¹² *United States. Lyon v. Pollard*, 87 U. S. (20 Wall.) 403, 22 L. ed. 361.

Georgia. Mackenzie v. Minis, 132 Ga.

323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900; *Hattaway v. Sanderlin*, 145 Ga. 219, 88 S. E. 941.

Kansas. Manross v. Uncle Sam Oil Co., 88 Kan. 237, 128 Pac. 385.

Kentucky. Thomas v. Houston, Stanwood & Gamble Co., 146 Ky. 156, 37 L. R. A. (N.S.) 950, 142 S. W. 214.

Maryland. Keedy v. Long, 71 Md. 385, 5 L. R. A. 759, 18 Atl. 704.

Massachusetts. Casavant v. Sherman, 213 Mass. 23, 99 N. E. 475.

Minnesota. Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

The employer may terminate the contract for any wilful disobedience on the part of the employe,¹³ as by refusal to obey reasonable orders,¹⁴ or at least for misconduct on his part which affects the performance of his contract of employment.¹⁵ The misconduct of an employe in making use of property belonging to an employer, for his own personal use;¹⁶ or in remaining absent from his employment without a sufficient excuse,¹⁷ such as illness;¹⁸ or in engaging, during his term of employment, in a business which competes with that of his employer,¹⁹ is in each case a breach of his duty, for which the employer may terminate the contract. The fact that the employe has made arrangements for engaging in business in competition with his employer after his term of employment is ended, is not regarded as a breach of his duty which justifies the employer in terminating the contract of employment,²⁰ at least if the employe has not agreed to abstain from competing with his employer after the expiration of the term of employment.²¹ An architect who is employed to draw plans for a building of a certain maximum cost, can not recover for plans which exceed such maximum cost.²² An architect is also liable for failure to use due care

¹³ England. *Turner v. Mason*, 14 Mees. & W. 112.

United States. *Development Co. v. King*, 161 Fed. 91, 24 L. R. A. (N.S.) 812.

Kentucky. *Thomas v. Houston, Stanwood & Gamble Co.*, 146 Ky. 156, 37 L. R. A. (N.S.) 950, 142 S. W. 214.

Minnesota. *Von Heyne v. Tompkins*, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

North Dakota. *McGregor v. Harm*, 19 N. D. 599, 30 L. R. A. (N.S.) 649, 125 N. W. 885.

Pennsylvania. *Matthews v. Park*, 146 Pa. St. 384, 23 Atl. 208.

Wisconsin. *Green v. Somers*, 163 Wis. 96, 157 N. W. 529.

¹⁴ *Development Co. v. King*, 161 Fed. 91, 24 L. R. A. (N.S.) 812; *McGregor v. Harm*, 19 N. D. 599, 30 L. R. A. (N.S.) 649, 125 N. W. 885.

¹⁵ England. *Baillie v. Kell*, 4 Bng. N. Cas. 638.

Illinois. *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896.

Iowa. *Miller v. Jones*, 178 Ia. 168, 159 N. W. 671.

Ohio. *Beckman v. Garrett*, 66 O. S. 136, 64 N. E. 62.

Oklahoma. *Board of Education v. Gossett*, 56 Okla. 95, 155 Pac. 856.

Oregon. *Foreman v. School District No. 25*, 81 Or. 587, 159 Pac. 1155.

¹⁶ *Mackenzie v. Minis*, 132 Ga. 323, 23 L. R. A. (N.S.) 1003, 63 S. E. 900.

¹⁷ *Farmer v. First Trust Co.*, In re Milwaukee Motor Co., 246 Fed. 671, L. R. A. 1918C, 1027; *Beckman v. Garrett*, 66 O. S. 136, 64 N. E. 62.

¹⁸ See § 2683.

¹⁹ *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

²⁰ *Myers v. Roger J. Sullivan Co.*, 166 Mich. 193, 34 L. R. A. (N.S.) 1217, 131 N. W. 521.

²¹ See § 780.

²² *Hight v. Klingensmith*, 75 Ark. 218, 87 S. W. 138; *Williar v. Nagle*, 109 Md. 79, 71 Atl. 427.

and skill in preparing plans,²³ or for directing the contractor to depart from the plans which the owner had adopted.²⁴ Violation by the employer of the terms of his contract in some substantial respect, operates as a discharge of the contract of employment,²⁵ whether such covenant on his part is regarded as precedent to the duty of the employe to continue performance, or whether it is regarded as subsequent to the contract of employment as an entire contract. Under a contract for the sale of goods on commission, the conduct of the employer in furnishing defective goods to be sold is a breach which the agent may treat as a discharge of the contract.²⁶ A contract for the employment of one at a certain rank is broken by the act of the employer in demanding that he perform the duties of an employe of substantially lower rank, although the employer offers to pay the salary provided for in the original contract.²⁷ A contract for professional employment,²⁸ such as a contract for the employment of an attorney,²⁹ is broken by the conduct of the employer in charging bad faith, improper conduct, and the like.

§ 2958. Building and construction contracts. In a contract for the construction of a building, covenants on the part of the owner which, either by their express terms, or from the nature of the respective covenants, must be performed before the contractor can perform the covenants on his part, are precedent covenants.¹ A covenant on the part of the owner to deliver possession of the

²³ Bayshore Development Co. v. Bonfoey, — Fla. —, L. R. A. 1918D, 889, 78 So. 507.

²⁴ Foeller v. Heintz, 137 Wis. 169, 24 L. R. A. (N.S.) 327, 118 N. W. 543.

²⁵ Genrow v. Flynn, 166 Mich. 564, 35 L. R. A. (N.S.) 960, 131 N. W. 1115; Cooper v. Stronge & Warner Co., 111 Minn. 177, 27 L. R. A. (N.S.) 1011, 126 N. W. 541; Kennedy v. Meilicke Calculator Co., 90 Wash. 238, 155 Pac. 1043.

²⁶ Kennedy v. Meilicke Calculator Co., 90 Wash. 238, 155 Pac. 1043.

²⁷ Cooper v. Stronge & Warner Co., 111 Minn. 177, 27 L. R. A. (N.S.) 1011, 126 N. W. 541.

²⁸ Genrow v. Flynn, 166 Mich. 564, 35 L. R. A. (N.S.) 960, 131 N. W. 1115.

²⁹ Genrow v. Flynn, 166 Mich. 564, 35 L. R. A. (N.S.) 960, 131 N. W. 1115.

¹ United States. King Iron Bridge & Manufacturing Co. v. St. Louis, 43 Fed. 768, 10 L. R. A. 826 [appeal dismissed on motion of plaintiff in error, St. Louis v. Iron Bridge & Manufacturing Co., 149 U. S. 769, 37 L. ed. 960].

Alabama. Hardaway-Wright Co. v. Bradley, 163 Ala. 596, 51 So. 21.

California. McConnell v. Corona City Water Co., 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

Illinois. Vermont St. M. E. Church v. Brose, 104 Ill. 206.

Kentucky. Williams v. Yates (Ky.), 113 S. W. 503; Pittsburgh Filter Mfg. Co. v. Smith, 176 Ky. 554, 196 S. W. 150.

premises to the contractor;² or his covenant to do certain preliminary work;³ or his covenant to furnish plans;⁴ or his covenant to furnish material which the contractor is to use in the performance of the contract,⁵ are all precedent covenants, the breach of which will discharge the contractor from performance of covenants on his part to be performed. A covenant to furnish pipe for use in putting in a well is precedent to a covenant to use such pipe in the construction of the well.⁶ A covenant on the part of the property owner to give bond for payment of the purchase price is precedent to his right to demand performance on the part of the contractor.⁷ Failure on the part of the owner to pay the contract price or the instalments thereof when due by the terms of the contract, is breach on his part;⁸ and if, by the terms of the contract, such

Massachusetts. *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

Montana. *Starr v. Gregory Consolidated Mining Co.*, 6 Mont. 485, 13 Pac. 195.

New York. *Gutmann v. Crouch*, 134 N. Y. 585, 31 N. E. 275.

Oregon. *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126.

Virginia. *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711; *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888; *Atlantic & Danville Ry. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13.

² *Atlantic & Danville Ry. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13.

³ **United States.** *King Iron Bridge & Manufacturing Co. v. St. Louis*, 43 Fed. 768, 10 L. R. A. 826 [appeal dismissed on motion of plaintiff in error, *St. Louis v. Iron Bridge & Manufacturing Co.*, 149 U. S. 769, 37 L. ed. 960].

Alabama. *Hardaway-Wright Co. v. Bradley*, 163 Ala. 596, 51 So. 21.

Kentucky. *Pittsburgh Filter Mfg. Co. v. Smith*, 176 Ky. 554, 196 S. W. 150.

New York. *Gutmann v. Crouch*, 134 N. Y. 585, 31 N. E. 275.

Oregon. *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126.

See also, *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L.

ed. 636, and *Miller v. United States*, 49 Ct. Cl. 276.

⁴ *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711.

⁵ **California.** *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

Illinois. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206.

Indiana. *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503.

Indian Territory. *Degnan v. Nowlin*, 5 Ind. T. 312, 82 S. W. 758.

Kentucky. *Seventh St. Planing Mill Co. v. Schaefer* (Ky.), 99 S. W. 341; *Williams v. Yates* (Ky.), 113 S. W. 503.

Montana. *Starr v. Gregory Consolidated Mining Co.*, 6 Mont. 485, 13 Pac. 195.

Virginia. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

Wisconsin. *Olson v. Viroqua*, 121 Wis. 571, 105 Am. St. Rep. 1039, 99 N. W. 326.

⁶ *Olson v. Viroqua*, 121 Wis. 571, 99 N. W. 326.

⁷ *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

⁸ *Shulte v. Hennessey*, 40 Ia. 352; *Harris's Assignee v. Gardner* (Ky.), 68 S. W. 8; *Camp v. Treanor*, 142 N. Y. 478, 37 N. E. 463.

payment is to be made before the contract is performed in whole by the contractor, such default is treated, in many jurisdictions,⁹ as a breach of a precedent covenant which will operate as a discharge of the contractor from the duty on his part to perform further.

In the absence of an express provision for payment by the owner before the contractor has performed on his part, performance by the contractor of a substantial character at least,¹⁰ is precedent to the right of the contractor to enforce the covenant on the part of the owner for the payment of the contract price.¹¹ Under a contract which provides for issuing a warrant and an assessment attached thereto when a contract for grading a street is completed, completion of such contract is precedent to the issuing of such warrant.¹² Even if provision for payment in instalments is made, substantial performance of that part of the work on the completion of which payment of a given instalment is due, is a covenant precedent to the right of the contractor to recover such instalment.¹³ If a contract for installing an hydraulic elevator provides that the elevator shall be so constructed that the water pressure will not vary more than a certain amount per square inch when the elevator stops, and if it also contains a provision to the effect that the owner of the building shall obtain the consent of the city for the use of city water for the proper operation of such elevator, the installation of an elevator which will not cause a variance in the water pressure in excess of the amount agreed upon, is precedent to the right of the contractor to recover payment from the property owner; and a provision of such covenant discharges the property owner from his duty to furnish water, especially if the consent of the city to the use of city water is conditioned upon the installation of an elevator which will not cause a variance in water pressure in excess of the amount agreed upon between the property owner and the contractor.¹⁴ If the contractor has covenanted to give a

⁹ See §§ 3011 et seq.

¹⁰ See § 2784.

¹¹ *United States v. Dermott*, 64 U. S. (23 How.) 220, 16 L. ed. 442.

Arkansas v. Friedman v. Schleuter, 105 Ark. 580, 151 S. W. 696.

Iowa v. Schillinger v. Bosch-Ryan Grain Co., 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

New York v. Stewart v. Newbury, 220 N. Y. 379, 2 A. L. R. 519, 115 N. E. 984.

Wisconsin v. Pormann v. Walsh, 97 Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881 (express agreement to this effect).

¹² *Connolly v. San Francisco (Cal.)*, 33 Pac. 1109.

¹³ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹⁴ *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

bond for the performance of the contract on his part, such covenant is precedent to his right to continue performance and to recover the contract price;¹⁵ and his offer to begin work without giving bond can not put the adversary party in default.¹⁶

A provision in a building contract, that final payment shall be made upon satisfactory proof that all liens against the building have been discharged, makes payment of such liens a condition precedent to the recovery of final payment.¹⁷ A contract for payment of liens as a precedent covenant is substantially performed, however, if the time within which liens upon the property can be filed has elapsed and no liens have been filed.¹⁸ It has been held that if the lien is liquidated the contractor may enforce payment of the difference between the amount due him and the amount of such lien, leaving the owner to pay such lien.¹⁹

§ 2959. Other classes of contracts. A covenant by A to support B, and B's covenant to give his notes in consideration thereof, form dependent covenants; and B's covenant to give his notes is precedent to A's covenant to furnish such support, so that B can not recover damages for A's failure to furnish support, if B has not delivered such notes to A.¹ Under a contract by which A rents moving picture films from B and agrees to pay for such films as are destroyed while in his possession, B's duty to furnish films in proper condition is precedent to A's covenant;² and if such films are destroyed by reason of the defective condition in which B fur-

¹⁵ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹⁶ *Flynn v. Dougherty* (Cal.), 26 Pac. 831.

¹⁷ *Massachusetts. Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138.

Minnesota. Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62.

Montana. Franklin v. Schultz, 23 Mont. 165, 57 Pac. 1037.

Pennsylvania. Huckstein v. Kelly & Jones Co., 152 Pa. St. 631, 25 Atl. 747.

Washington. John v. Mortgage Trust & Savings Bank, 97 Wash. 504, 166 Pac. 1137.

¹⁸ *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am.

St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140; *Mills v. Norfolk & Western Ry.*, 90 Va. 523, 19 S. E. 171; and see s. c., 91 Va. 613, 22 S. E. 556.

¹⁹ *Huckstein v. Kelly & Jones Co.*, 152 Pa. St. 631, 25 Atl. 747. But in *Negley v. Jeffers*, 28 O. S. 90, a contract by a vendor to remove liens on realty before the last payment from the vendee should be due is a condition precedent and a waiver of such condition and agreement that the amount of such liens should be deducted from the purchase price and the balance paid was held to be a valuable consideration.

¹ *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

² *Famous Players Film Co. v. Salomon*, — N. H. —, 106 Atl. 282.

nished them to A, A is not liable for such loss.³ If payment for a charter of a vessel is to be made in advance, failure to make such payment discharges the contract and no recovery can be had thereon.⁴ If A gives his note to B under a contract by which B is to pay a certain sum to A on payment of such note, A's payment of such note is precedent to B's duty to pay such sum to A.⁵ A contract to pay a certain amount when a certain tract is sold, makes the sale of such tract a covenant precedent to such payment.⁶ Under a contract by which A, who owns an undivided interest in property which has been sold at a foreclosure sale, agrees with X, through A's agent, B, that A, A's husband, C, and B, who owns the other undivided interest in such property, shall convey such property to X, who is to retain such property, sell it, and divide the proceeds with A and B, the covenant of A and B to convey to X is precedent to X's duty to retain, resell and divide the profits.⁷ An agreement that a contract should take effect only on approval by the attorney of one of the parties thereto is precedent.⁸ Under a contract to pay a certain sum to a university, if within thirty days the university should permanently locate the university buildings, to cost not less than one hundred thousand dollars, upon a given tract of land, the location of such buildings, and not their erection, constitutes the condition precedent. The covenant as to the cost of the buildings is merely a stipulation.⁹

§ 2960. Performance of precedent and subsequent covenants.

No recovery can be had upon a contract by a party who has not performed or tendered performance of precedent covenants on his part to be performed against the adversary party who is in default for performance of a subsequent covenant.¹ While language has

³ *Famous Players Film Co. v. Salomon*, — N. H. —, 106 Atl. 232.

⁴ *Goff v. Pacific Coast Steamship Co.*, 9 Wash. 386, 37 Pac. 418.

⁵ *Leeper Bros. Lumber Co. v. Gunter*, — Okla. —, 160 Pac. 606.

⁶ *Morris v. Davis*, 83 Va. 297, 8 S. E. 247.

⁷ *Temple v. Pennell*, 123 Ia. 729, 99 N. W. 567.

⁸ *Bank v. Sturdee*, 32 N. B. 398; *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563.

⁹ *Judson University v. Kinkaid*, 50 Kan. 369, 31 Pac. 1074.

¹ *England. Bank v. Trading Co.* [1894], A. C. 266; *Abrahams v. Campbell* [1911], 1 Scots Law Times 2, 4.

United States. Loud v. Water Co., 153 U. S. 564, 38 L. ed. 822; *Hull, etc., Co. v. Coke Co.*, 113 Fed. 256.

Alabama. Whitley v. Murray, 34 Ala. 155; *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816.

Arkansas. Fletcher v. Verser, 79 Ark. 271, 116 Am. St. Rep. 75, 96 S. W. 384.

been used which seems to indicate that the party who is bound to perform the precedent covenant need only show that he is ready and willing to perform,² this language is used of a situation in which he was actually attempting to perform although he was in default as to time.³ The party who is in default for performance of a precedent covenant can not recover damages from the adversary party for his default in performance of subsequent covenants.⁴ He can not treat such breach of a subsequent covenant as a ground

California. *Hill v. Grigsby*, 35 Cal. 656; *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929.

Florida. *Thomson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12.

Illinois. *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161; *Lake Shore, etc., Ry. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652; *Van Sicklen v. Ballard*, 97 Ill. App. 640.

Indiana. *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447.

Iowa. *White v. Day*, 56 Ia. 248, 9 N. W. 210; *Temple v. Pennell*, 123 Ia. 729, 99 N. W. 567.

Kansas. *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 6 L. R. A. (N.S.) 928, 85 Pac. 551.

Louisiana. *Louisiana & N. W. R. Co. v. Athens Lumber Co.*, 134 La. 788, L. R. A. 1915B, 856, 64 So. 714.

Massachusetts. *Olmstead v. Beale*, 36 Mass. (19 Pick.) 528; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Wiley v. Athol*, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311; *National Contracting Co. v. Commonwealth*, 183 Mass. 89, 66 N. E. 639; *Cook v. Sawyer*, 188 Mass. 163, 74 N. E. 356; *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334; *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

Michigan. *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

Missouri. *Aaron v. Moore*, 34 Mo. 79.

Montana. *Franklin v. Shultz*, 23 Mont. 165, 57 Pac. 1037.

Nevada. *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

New York. *Cunningham v. Jones*, 20 N. Y. 486; *Bonesteel v. New York*, 22 N. Y. 162; *Cornell v. Cornell*, 96 N. Y. 108; *Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 89 N. E. 476; *Cream of Wheat Co. v. Arthur H. Crist Co.*, 222 N. Y. 487, 1 A. L. R. 150, 119 N. E. 74.

North Dakota. *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Ohio. *Lowry v. Barrelli*, 21 O. S. 324; *Gilbert v. Port*, 28 O. S. 276; *Thomas v. Matthews*, 94 O. S. 32, L. R. A. 1917A, 1068, 113 N. E. 669.

Oklahoma. *Meek v. Daugherty*, 21 Okla. 859, 97 Pac. 557.

Oregon. *Hinderliter v. McDonald*, 84 Or. 251, 164 Pac. 378.

Utah. *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

Vermont. *Lyndon Granite Co. v. Farrar*, 53 Vt. 585.

Washington. *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

Wisconsin. *Williams v. Thrall*, 101 Wis. 337, 76 N. W. 599.

² *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

³ This is the rule in concurrent covenants, except that notice and request for performance by the adversary party are necessary. See § 2970.

⁴ *Alabama.* *Griffin v. Machine Co.*, 135 Ala. 490, 33 So. 177.

for discharge.⁵ A building contractor who has failed of substantial performance can not treat the subsequent refusal of the owner to pay an instalment thereafter due as discharging him from liability on the contract.⁶

Performance of a precedent covenant is necessary to the enforcement of covenants subsequent thereto.⁷ The party who is bound to perform the subsequent covenant may maintain an action against the adversary party for default in performance of his precedent covenant, although the time for the performance of the subsequent covenant has not yet arrived.⁸ It is not necessary that he should allege or prove that he was ready and willing to perform.⁹

Missouri. Tufts v. Sams, 47 Mo. App. 487.

Nebraska. Hale v. Sheehan, 52 Neb. 184, 71 N. W. 1019.

New York. Lake v. McElpatrick, 139 N. Y. 349, 34 N. E. 922.

Washington. Ingram v. Mining Co., 25 Wash. 318, 65 Pac. 549.

⁵ **Georgia.** Barrett v. Verdery, 93 Ga. 526, 21 S. E. 64.

Illinois. Myers v. Gross, 59 Ill. 436.

Iowa. Coldren v. Clark, 93 Ia. 352, 61 N. W. 1045.

Minnesota. Mason v. Edw. Thompson Co., 94 Minn. 472, 103 N. W. 507.

New York. Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551; Wright v. Reusens, 133 N. Y. 298, 31 N. E. 215.

Pennsylvania. Hatton v. Johnson, 83 Pa. St. 219.

Washington. Reddish v. Smith, 10 Wash. 178, 45 Am. St. Rep. 781, 38 Pac. 1003.

⁶ **Golden Gate Lumber Co. v. Sahrbacher**, 105 Cal. 114, 38 Pac. 635.

⁷ **England.** Measures Brothers, Ltd. v. Measures [1910], 2 Ch. 248.

United States. Harriman National Bank v. Seldomridge, 249 U. S. 1, — L. ed. —; National Surety Co. v. Long, 125 Fed. 887; Development Co. v. King, 161 Fed. 91, 24 L. R. A. (N.S.) 812.

Florida. Marshall v. Bumby, 25 Fla. 619, 6 So. 480; Southern Colonization Co. v. Derflier, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Kentucky. Thomas v. Houston, Stanwood & Gamble Co., 146 Ky. 156, 37 L. R. A. (N.S.) 950, 142 S. W. 214.

Louisiana. Louisiana & N. W. R. Co. v. Athens Lumber Co., 134 La. 788, L. R. A. 1915B, 856, 64 So. 714.

Massachusetts. Clark v. Gulesian, 197 Mass. 492, 84 N. E. 94; Bryne v. Dorey, 221 Mass. 399, 109 N. E. 146.

Minnesota. Wasser v. Western Land Securities Co., 97 Minn. 460, 107 N. W. 160.

Nevada. Bradley v. Nevada-California-Oregon Ry., 42 Nev. 411, 178 Pac. 906.

North Dakota. McGregor v. Harm, 19 N. D. 599, 30 L. R. A. (N.S.) 649, 125 N. W. 885.

Ohio. Lowry v. Barelli, 21 O. S. 324; Koppitz-Melchers Brewing Co. v. Schultz, 68 O. S. 407, 67 N. E. 719; Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33; Thomas v. Matthews, 94 O. S. 32, L. R. A. 1917A, 1068, 113 N. E. 669.

Utah. William B. Hughes Produce Co. v. Pulley, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337.

Washington. Toellner v. McGinnis, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641.

⁸ **Hunt v. Tibbetts**, 70 Me. 221; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247, 8 Am. Rep. 549.

⁹ **Winfield Lumber Co. v. Partridge**, — Ala. —, 80 So. 821.

C. CONCURRENT COVENANTS

§ 2961. Concurrent covenants—Definition and nature. Concurrent covenants are those which, by the terms of the contract, are each to be performed at the same time by each of the parties who are respectively bound to perform each.¹ The practical effect of treating a covenant as concurrent with another, is manifest chiefly in the necessity of making tender or informal offer of performance by the one party in order to put the other in default; or, in other words, in the right of either party to enforce one of such covenants against the adversary party without himself tendering performance or offering it informally. These questions are considered subsequently.²

§ 2962. Intention of parties. As in the case of other covenants,¹ whatever may have been the original common-law rule,² the intention of the parties must be considered primarily in determining whether a covenant is concurrent or not.³ If two or more covenants each form the consideration for the other, there is a strong presumption that they are concurrent.⁴ Accordingly, wherever one covenant is a consideration for the other, and there is no provision in the contract for credit on the part of either party, such covenants are regarded as concurrent.⁵ Since the intention of the parties determines whether covenants are precedent or concurrent, slight differences in phraseology may be decisive of different intentions. If the contract specifically provides that the deed is to be delivered after performance by the vendee, performance by the vendee is a condition precedent to and not concurrent with delivery

¹ *United States. World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717.

Alabama. McCormick v. Badham, 191 Ala. 339, 67 So. 609.

Arizona. World's Fair Mining Co. v. Powers, 12 Ariz. 285, 100 Pac. 957.

Nebraska. Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719.

New York. Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766.

Ohio. Webb v. Stevenson, 6 Ohio 282; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

Rhode Island. Marsh v. Babcock (R. I.), 68 Atl. 475.

² See §§ 2967 et seq.

³ See § 2948.

⁴ See §§ 2944 et seq.

⁵ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609.

⁶ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *World's Fair Mining Co. v. Powers*, 12 Ariz. 285, 100 Pac. 957.

See § 2948.

⁷ *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *Schmidt v. Mitchell*, 117 Ga. 6, 43 S. E. 371; *Hall v. International Liberty Union of the World*, 161 Ky. 299, 170 S. W. 631.

of the deed by the vendor.⁶ The use of the word "after" is not conclusive that payment is a condition precedent, since the context may show that it is a concurrent covenant.⁷ A contract for a deed "after" certain payments are made, the vendee at the same time to deliver a bond and mortgage to secure a balance due, makes delivery of the deed concurrent with the last payment to be made apart from that secured by mortgage.⁸ A contract to convey "upon payment,"⁹ or "as soon as" the purchase money is paid,¹⁰ provides for concurrent covenants. The fact that a contract for the sale of realty provides that the purchaser shall "first" make payment therefor, does not prevent the covenants for conveyance and for payment from being concurrent if there is nothing else in the contract to show that the parties do not intend performance at the same time.¹¹

§ 2963. Nature of performance as affecting relation of covenants. If, from its nature, performance is or may be instantaneous on each side, as in the case of a sale of realty which is to be conveyed by one deed, and for which the purchaser is to make a single payment,¹ or in the case of the sale of goods which are to be delivered at the same time and for which the purchaser is to make a single payment,² the covenants on each side are presumed to be concurrent³ if they go to the entire consideration on each side⁴ and if there is nothing in the contract which shows an intention that either party shall give credit to the other.⁵ A different question arises in cases in which performance on the one side is not an instantaneous act, either by reason of the agreement of the parties or from the nature of the performance. In cases of this sort performance on one side must be precedent to performance by the other, either in whole or in part;⁶ but in such cases the performance of the last instalment, or of the whole of the continuous act, is generally regarded as concurrent with the duty of the adver-

⁶ *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822; *Hill v. Fisher*, 34 Me. 143; *Kirtz v. Peck*, 113 N. Y. 222; 21 N. E. 130; *Gale v. Best*, 20 Wis. 44.

⁷ *Hill v. Grigsby*, 35 Cal. 656.

⁸ *Glenn v. Rochester*, 156 N. Y. 161, 50 N. E. 785.

⁹ *Bohall v. Diller*, 41 Cal. 532.

¹⁰ *Hill v. Grigsby*, 35 Cal. 656.

¹¹ *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594.

¹ See § 2964.

² See § 2965.

³ See § 2962.

⁴ See §§ 2962 and 2974.

⁵ See §§ 2951 et seq.

⁶ See §§ 2951 et seq.

sary party to perform on his side.⁷ In such case the party who is to perform in instalments can not require the adversary party to divide performance on his part into corresponding instalments, if the contract has not made such provision.⁸ Under a contract for the sale of goods, which makes no provision for payment in instalments, the seller can not require the buyer to pay for the instalments as they are delivered.⁹ Whether delay in performing the instalments, which are precedent covenants, until performance of the last instalment, which is concurrent with performance by the adversary party, converts the precedent covenants into concurrent covenants, is a question upon which there is a conflict of authority—some jurisdictions taking the position that under such circumstances all the covenants on one side, whether precedent or concurrent, become concurrent with the covenant on the other side, which originally was concurrent with the covenant for performance of the last instalment;¹⁰ while in other jurisdictions it is held that such delay in performance does not affect the relation of the covenants, and that the covenants which were originally precedent remain precedent.¹¹ This question frequently arises in contracts by which the purchaser is to pay for land in instalments and the vendor is to convey upon payment of the last instalment, or at least upon payment of some instalment after the first, and the purchaser has delayed his payments until the time which is fixed by the contract for paying the instalment which is concurrent with the duty of the vendor to convey the realty. In some jurisdictions it is held that under the circumstances the duty of the purchaser to pay all the instalments is concurrent with the duty of the vendor to convey the realty, and that the vendor can not recover any of

⁷ United States. *In re Hellams*, 223 Fed. 460.

California. *Hill v. Grigsby*, 35 Cal. 656.

Indiana. *Irwin v. Lee*, 34 Ind. 319.

Kansas. *Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969.

Michigan. *Pearce v. Alward*, 163 Mich. 313, 128 N. W. 210.

New Jersey. *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

New York. *Beecher v. Conradt*, 13 N. Y. 108; *Eddy v. Davis*, 116 N. Y. 247.

⁸ *In re Hellams*, 223 Fed. 460; *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

⁹ *In re Hellams*, 223 Fed. 460; *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

¹⁰ *Hill v. Grigsby*, 35 Cal. 656; *Irwin v. Lee*, 34 Ind. 319; *Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969; *Beecher v. Conradt*, 13 N. Y. 108; *Eddy v. Davis*, 116 N. Y. 247.

¹¹ *Sheeren v. Moses*, 84 Ill. 448; *Bowen v. Bailey*, 42 Miss. 405.

the instalments unless he is ready and willing to convey and calls upon the purchaser to perform;¹² while in other jurisdictions it is held that the covenants which originally were precedent remain precedent.¹³

If performance is to be continuous on both sides, it may be so far concurrent that breach by either party may operate as a discharge of the adversary party.¹⁴ Under a contract for the sale of land, which requires the vendor to replace trees or vines within a certain period of time, such covenant is concurrent with the duty of the adversary party to perform; and a breach of such covenant on the part of the vendor may be treated by the purchaser as a discharge of the contract.¹⁵ Under a contract by which A is to take possession of B's mine and operate it and deposit the proceeds in a given bank to B's credit, A's duty to perform is concurrent with B's duty to allow A to remain in possession of B's mine; and A's act in depositing such proceeds in another bank to his own credit operates as a discharge of B's covenant.¹⁶ Under a marriage separation contract, the wrongful act of the wife in committing adultery discharges the husband from his duty to make further payments.¹⁷

§ 2964. Specific illustrations of concurrent covenants—Contracts for the sale of realty. Under a contract for the sale of realty in which no specific provision is made as to the order of time at which the deed is to be delivered and payment made, these acts are concurrent.¹ If the vendor under a contract for the sale of realty

¹² Hill v. Grigsby, 35 Cal. 656; Soper v. Gabe, 55 Kan. 646, 41 Pac. 969; Beecher v. Conratt, 13 N. Y. 108; Eddy v. Davis, 116 N. Y. 247.

¹³ Sheeren v. Moses, 84 Ill. 448; Bowen v. Bailey, 42 Miss. 405.

¹⁴ World's Fair Mining Co. v. Powers, 224 U. S. 173, 56 L. ed. 717; Pearce v. Alward, 163 Mich. 313, 128 N. W. 210; Devine v. Devine, 89 N. J. Eq. 51, 104 Atl. 370.

¹⁵ Pearce v. Alward, 163 Mich. 313, 128 N. W. 210.

¹⁶ World's Fair Mining Co. v. Powers, 224 U. S. 173, 56 L. ed. 717.

¹⁷ Devine v. Devine, 89 N. J. Eq. 51, 104 Atl. 370.

¹ England. Jacobs v. Revell [1900], 2 Ch. 858; Weston v. Savage, 10 Ch. Div. 736.

United States. Ankeny v. Clark, 148 U. S. 345, 37 L. ed. 475; Telfener v. Russ, 162 U. S. 170, 40 L. ed. 930.

California. Hill v. Grigsby, 35 Cal. 656; Englander v. Rogers, 41 Cal. 420; Crim v. Umbsen, 155 Cal. 697, 132 Am. St. Rep. 137, 103 Pac. 178.

District of Columbia. Newman v. Baker, 10 D. C. App. 187.

Idaho. Boyd v. Boley, 25 Ida. 584, 139 Pac. 139.

Iowa. Stonerook v. Wisner, 171 Ia. 109, L. R. A. 1915E, 834, 153 N. W. 351; Todd v. State Bank, 182 Ia. 276, 166 N. W. 593.

is unable to make any title, or if his title is not a marketable title,² or if the title fails as to a material part of the realty while the contract is still executory,³ as where he attempts to sell land with-

Kansas. *Williams v. Bricker*, 83 Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 908.

Minnesota. *Howe v. Coates*, 97 Minn. 385, 4 L. R. A. (N.S.) 1170, 107 N. W. 397; *Williams v. Gilbert*, 120 Minn. 299, 139 N. W. 502.

Mississippi. *Johnson v. Jackson*, 27 Miss. 498, 61 Am. Dec. 522.

Nebraska. *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (N.S.) 1, 131 N. W. 736.

New Jersey. *Reutler v. Ramsin*, 91 N. J. L. 262, 102 Atl. 351.

New York. *Acme Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

Ohio. *Webb v. Stevenson*, 6 Ohio 282; *McCoy v. Bixbee*, 6 Ohio 310; *Rummington v. Kelley*, 7 Ohio (second part) 97; *Lewis v. White*, 16 O. S. 444; *Hayes v. Skidmore*, 27 O. S. 331; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

Oklahoma. *Martin v. Spaulding*, 40 Okla. 191, 137 Pac. 882; *Groves v. Stouder*, 58 Okla. 744, 161 Pac. 239.

Oregon. *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.

Pennsylvania. *Rugg v. Midland Realty Co.*, 261 Pa. St. 453, 104 Atl. 685.

Texas. *Gregg v. English*, 38 Tex. 139.

Vermont. *Brown v. Aitken*, 88 Vt. 148, 92 Atl. 22.

West Virginia. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255.

Wisconsin. *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

² **England.** *Weston v. Savage*, 10 Ch. Div. 736.

California. *Crim v. Umbsen*, 155 Cal. 697, 132 Am. St. Rep. 137, 103 Pac. 178.

Idaho. *Boyd v. Boley*, 25 Ida. 584, 139 Pac. 139.

Kansas. *Williams v. Bricker*, 83 Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 908.

Minnesota. *Howe v. Coates*, 97 Minn. 385, 4 L. R. A. (N.S.) 1170, 107 N. W. 397; *Williams v. Gilbert*, 120 Minn. 299, 139 N. W. 502.

Nebraska. *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (N.S.) 1, 131 N. W. 736.

Ohio. *Lewis v. White*, 16 O. S. 444.

Oklahoma. *Martin v. Spaulding*, 40 Okla. 191, 137 Pac. 882.

Pennsylvania. *Rugg v. Midland Realty Co.*, 261 Pa. St. 453, 104 Atl. 685.

Wisconsin. *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

³ **England.** *Jacobs v. Revell* [1900], 2 Ch. 858.

United States. *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475.

Iowa. *Stonerook v. Wisner*, 171 Ia. 109, L. R. A. 1915E, 834, 153 N. W. 351.

New Jersey. *Reutler v. Ramsin*, 91 N. J. L. 262, 102 Atl. 351.

New York. *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

Ohio. *Hayes v. Skidmore*, 27 O. S. 331.

Oklahoma. *Groves v. Stouder*, 58 Okla. 744, 161 Pac. 239.

Vermont. *Brown v. Aitken*, 88 Vt. 148, 92 Atl. 22.

Wisconsin. *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

out having the title to the growing timber thereon,⁴ or where he attempts to sell a building which encroaches on a public street,⁵ or where he undertakes to sell an entire city lot, a part of which is included in the limits of a public right of way,⁶ he has failed to perform his covenant, which is concurrent with the covenant of the purchaser to perform; and the purchaser is thereby discharged from such covenant on his part. Accordingly, in some jurisdictions, one who has bought a note which is given for the purchase of realty and has also bought the land contract, takes such note subject to the defense that title to such realty can not be made.⁷

In like manner, the inability or omission of the vendor to convey free from encumbrances, if by the terms of the contract he is bound so to do,⁸ or his omission to convey at all,⁹ is in each case a breach of his covenant, which is concurrent with the covenant of the vendee to perform; and the vendee may treat such breach as a discharge.

On the other hand, the failure of the purchaser to pay the purchase price at the time fixed by the contract, if time is of the essence of such contract,¹⁰ or the failure of the purchaser to pay in a reasonable time upon notice to perform,¹¹ is a breach of his con-

⁴ *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 99 N. W. 790.

⁵ *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577.

⁶ *Stoncrook v. Wisner*, 171 Ia. 109, L. R. A. 1915E, 834, 153 N. W. 351.

⁷ *Todd v. State Bank*, 182 Ia. 276, 3 A. L. R. 971, 165 N. W. 593.

⁸ *England. In re Haedicke* [1901], 2 Ch. 666.

California. Tandy v. Waesch, 154 Cal. 108, 97 Pac. 69.

Iowa. Tague v. McColm, 145 Ia. 179, 123 N. W. 960.

Minnesota. Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356.

Missouri. Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480.

⁹ *Alabama. Clark v. Bird*, 158 Ala. 278, 132 Am. St. Rep. 25, 48 So. 359.

Michigan. Droppers v. Marshall, 203 Mich. 173, 4 A. L. R. 1266, 168 N. W. 1001.

Minnesota. Schmidt v. Scandinavian Canadian Land Co., 136 Minn. 14, 161 N. W. 218.

New Jersey. Zimmerman v. Brannan, 62 N. J. L. 478, 41 Atl. 639.

Wisconsin. Isaacs v. Bardou, 114 Wis. 142, 89 N. W. 913.

¹⁰ *United States. Coughran v. Bigelow*, 164 U. S. 301, 41 L. ed. 442 [affirming, *Coughran v. Bigelow*, 9 Utah 260, 34 Pac. 51].

Arkansas. Smith v. Berkau, 123 Ark. 90, 184 S. W. 429 (obiter).

California. Smith v. Post, 167 Cal. 69, 138 Pac. 705.

Pennsylvania. Korman v. Trainer, 258 Pa. St. 362, 101 Atl. 1051.

Washington. Benham v. Columbia Canal Co., 74 Wash. 110, 132 Pac. 884; *Converse v. La Barge*, 92 Wash. 282, 158 Pac. 958.

¹¹ *Fuller v. Hovey*, 84 Mass. (2 All.) 324, 79 Am. Dec. 782; *Kirby v. Harrison*, 2 O. S. 326, 59 Am. Dec. 677.

current covenant, for which the vendor may treat the contract as discharged.

§ 2965. Contracts for the sale of personalty. Under a contract for the sale of personalty, in which no specific provision is made as to the order in time of payment and delivery, these acts are concurrent.¹ If the seller fails to deliver the goods at the time specified by the contract, if such time is of the essence, or within a reasonable time, if time is not of the essence, such failure is a breach of a concurrent covenant on the part of the seller for which the buyer may treat the contract as discharged.² No action can be brought on an underwriting certificate by one who is unable to

¹ **England.** *Read v. Hutchinson*, 3 Campb. 352.

United States. *Delaware, Lackawanna & Western Ry. v. United States*, 231 U. S. 363, 58 L. ed. 269.

Alabama. *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

Arkansas. *Isbell-Brown Co. v. Stevens Grocer Co.*, 119 Ark. 17, 175 S. W. 1158.

California. *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Eames v. Haver*, 111 Cal. 401, 43 Pac. 1120.

Connecticut. *United Machinery Co. v. Etzel*, 89 Conn. 336, 94 Atl. 356.

Iowa. *Kuhlman v. Wood*, 81 Ia. 128, 46 N. W. 738; *Rice v. Appel*, 111 Ia. 154, 82 N. W. 1001; *Roper v. Wells*, 182 Ia. 237, 165 N. W. 385.

Kansas. *Fairbanks v. Walker*, 76 Kan. 903, 17 L. R. A. (N.S.) 558, 92 Pac. 1129.

Kentucky. *United States Fidelity & Guaranty Co. v. Travelers' Ins. Machine Co.*, 167 Ky. 382, 180 S. W. 815.

Maryland. *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

Massachusetts. *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409.

Michigan. *Lamont v. La Fevre*, 96 Mich. 175, 55 N. W. 687; *W. A. McArthur Co. v. Bank*, 122 Mich. 223, 81 N. W. 92.

Minnesota. *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *J. I. Case Threshing Machine Co. v. Bargabos*, — Minn. —, 172 N. W. 882.

Nebraska. *Behrends v. Beyschlag*, 50 Neb. 304, 69 N. W. 835.

New Jersey. *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

New York. *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

Pennsylvania. *White v. Wolf*, 185 Pa. St. 369, 30 Atl. 1011; *Frech v. Lewis*, 218 Pa. St. 141, 120 Am. St. Rep. 864, 11 L. R. A. (N.S.) 948, 67 Atl. 45 (payment waived by vendor).

Rhode Island. *Marsh v. Babcock (R. I.)*, 68 Atl. 475.

Wisconsin. *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N. W. 451; *Pratt v. Mfg. Co.*, 115 Wis. 648, 92 N. W. 368; *Fox v. Wilkinson*, 133 Wis. 337, 14 L. R. A. (N.S.) 1107, 113 N. W. 669; *Stein v. Jasculca*, 165 Wis. 317, 162 N. W. 182.

² *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439; *Isbell-Brown Co. v. Stevens Grocer Co.*, 118 Ark. 17, 175 S. W. 1158; *White v. Wolf*, 185 Pa. St. 369, 30 Atl. 1011; *Marsh v. Babcock (R. I.)*, 68 Atl. 475.

deliver the stock for which the promisor has agreed to pay, at the time specified in the contract or at least within a reasonable time thereafter.³

If the seller attempts to perform by delivering goods which are materially deficient in quantity,⁴ or in quality,⁵ or if he attempts to perform by delivering goods the title to which is materially defective in whole or in part,⁶ the seller has broken a concurrent covenant on his part; and the buyer may treat the contract as discharged by reason of such breach. On the other hand, the duty of the buyer to pay is concurrent with the duty of the seller to deliver in the absence of any agreement for credit; and the failure of the buyer to pay at the time fixed by the contract for performance and on offer by the seller to perform, is breach for which the seller may treat the contract as discharged, and refuse further performance.⁷ In the absence of a specific provision for payment in instalments upon delivery in instalments, the seller who delivers in instalments can not require the buyer to pay until the entire quantity of goods is delivered.⁸ This general principle is changed by the provision of the Sale of Goods Act,⁹ to the effect that delivery of the goods and payment of the purchase price are concurrent, in the absence of some specific agreement, since this must be construed as meaning that payment is concurrent with complete delivery.¹⁰

³ *Marsh v. Babcock* (R. I.), 68 Atl. 475.

⁴ *Kuhlman v. Wood*, 81 Ia. 128, 46 N. W. 738.

⁵ *United States. Delaware, Lackawanna & Western Ry. v. United States*, 231 U. S. 363, 58 L. ed. 269.

Iowa. Roper v. Wells, 182 Ia. 237, 165 N. W. 385.

Kansas. Fairbanks v. Walker, 76 Kan. 903, 17 L. R. A. (N.S.) 558, 92 Pac. 1129.

Kentucky. United States Fidelity & Guaranty Co. v. Travelers' Ins. Machine Co., 167 Ky. 382, 180 S. W. 815.

Wisconsin. Fox v. Wilkinson, 133 Wis. 337, 14 L. R. A. (N.S.) 1107, 113 N. W. 669; *Stein v. Jasculca*, 165 Wis. 317, 162 N. W. 182.

⁶ *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N. W. 451.

⁷ *Read v. Hutchinson*, 3 Campb. 352; *United Machinery Co. v. Etzel*, 89 Conn. 336, 94 Atl. 356; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *J. I. Case Threshing Machine Co. v. Bargabos*, — Minn. —, 172 N. W. 882 (payment by check which is not honored).

⁸ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

⁹ See § 42, Sale of Goods Act.

¹⁰ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

§ 2966. Other contracts. While a carrier may require prepayment of freight before he transports the goods,¹ he may transport the goods without requiring a payment of freight; and in such a case his duty to deliver the goods is concurrent with the duty of the consignee to pay therefor.² A contract between two persons to intermarry is a contract which is made up of concurrent covenants which from their nature must be performed at the same time.³

§ 2967. Concurrent covenants—Method of putting adversary party in default—Duty to perform in advance. If the covenants are concurrent, one party can not be required to perform while the other party has not yet performed and is not able and willing to perform.¹ The purchaser can not be compelled to pay before the seller has delivered substantially all of the goods which he has agreed to deliver.² If a building contract provides for payment at a certain date upon completion, the owner can not be compelled to pay on such date if the contractor has not yet completed the performance of his covenants.³ If the covenants are concurrent, the fact that one of the parties is unable to perform before the adversary party is able and willing to perform, and offers performance on his part, does not of itself discharge the contract.⁴

§ 2968. Concurrent covenants—Necessity of formal tender. Language is occasionally used which seems to imply that a formal

¹ See § 2956.

² New York, *N. H. & H. R. Ry. v. Porter*, 220 Mass. 547, 108 N. E. 409; *McEachran v. Grand Trunk Ry. Co.*, 115 Mich. 318, 73 N. W. 231; *Atchison T. & S. F. Ry. v. Foster Lumber Co.*, 31 Okla. 661, 122 Pac. 139; *Atchison T. & S. F. Ry. v. Ehret*, 52 Okla. 368, 152 Pac. 1107; *Gates v. Bekins*, 44 Wash. 422, 87 Pac. 505.

³ England. *Gough v. Farr*, 2 Car. & P. 631.

Indiana. *Shellenbarger v. Blake*, 67 Ind. 75.

Iowa. *Lemke v. Franzenburg*, 150 Ia. 466, 141 N. W. 332.

Kentucky. *Burks v. Shain*, 5 Ky. (2 Bibb.) 341, 5 Am. Dec. 616; *Burn-*

ham v. Cornwell, 55 Ky. (16 B. Mon.) 284.

New Hampshire. *Crossett v. Brackett*, — N. H. —, 105 Atl. 5.

New Jersey. *Coil v. Wallace*, 24 N. J. L. 291.

Rhode Island. *Clark v. Corey*, 24 R. I. 137, 52 Atl. 811.

¹ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417; *Clermont Co. v. Robb*, 5 Ohio 490.

² *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

³ *Clermont Co. v. Robb*, 5 Ohio 490.

⁴ *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

tender is necessary.¹ A formal tender, however, while frequently the most satisfactory method of putting the adversary party in default, is not absolutely necessary. It is sufficient if one of the parties to a contract in which the covenants are concurrent is ready and willing to perform and notifies the adversary party of such readiness and willingness and calls upon him to perform, without making a formal tender.² While it is sometimes said that the consignee must tender the freight, in order to recover the goods,³ this ordinarily means that the consignee can not demand delivery of the goods without paying the freight, and does not require a formal tender on his part.

§ 2969. Concurrent covenants—Sufficiency of readiness and willingness to perform and demand for performance. If one of the parties is able, ready and willing to perform, gives notice to the other of that fact and demands performance, this is sufficient to put the other in default if performance is refused.¹ Mere readiness and willingness to perform without present ability is not sufficient.² A and B entered into a contract whereby each was to furnish a machine for making shingles and B was to furnish the power; A was to operate the machines and B was to pay him for all shingles manufactured. A furnished a machine which was levied upon by his vendor for the unpaid purchase price and removed. A's willingness and readiness to perform were held not sufficient if he was unable to furnish the machine.³ An offer to convey the thing

¹ Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53; Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766; Ink v. Rohrig, 23 S. D. 548, 122 N. W. 594.

² England. Jones v. Barkley, 2 Dougl. 684.

Alabama. Saunders v. McDonough, 191 Ala. 119, 67 So. 501.

Connecticut. Nothe v. Nomer, 54 Conn. 326, 8 Atl. 134.

Delaware. Houston v. Spruance, 4 Har. (Del.) 117.

Massachusetts. Scanlan v. Geddes, 112 Mass. 15.

Michigan. Miller v. Smith, 140 Mich. 524, 103 N. W. 872.

Missouri. Curtis v. Sexton, 201 Mo. 217, 100 S. W. 17.

Ohio. Raudabaugh v. Hart, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214; George Wiedemann Brewing Co. v. Maxwell, 78 O. S. 54, 84 N. E. 595.

Vermont. Cobb v. Hall, 33 Vt. 233.

³ McEachran v. Grand Trunk Ry., 115 Mich. 318, 73 N. W. 231; Atchison T. & S. F. Ry. v. Foster Lumber Co., 31 Okla. 661, 122 Pac. 139.

¹ Adams v. Turner, 73 Conn. 38, 46 Atl. 247; Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719.

² Leek Milling Co. v. Langford, 81 Miss. 728, 33 So. 492.

³ Leek Milling Co. v. Langford, 81 Miss. 728, 33 So. 492.

agreed upon, such as a patent right,⁴ is, if refused, enough to put the adversary party in default. So if A, who has agreed to furnish to B all the tin cans used in B's factory for a year, is unable on B's demand to furnish cans needed, B does not violate the contract by buying cans elsewhere.⁵ Under a contract whereby a railroad company agrees to furnish a certain amount of grain annually for storage at a certain elevator, the elevator company must be ready and willing to store such grain in order to put the railroad in default; and if it is not able to store the grain tendered, the railroad is discharged from tendering the amount agreed upon.⁶ Under a contract to construct a creamery and cold-storage building to be built under a certain patent, and to furnish a patent deed from the owner of the patent conveying all rights thereunder, delivery or tender of such patent deed must be made before the contract price can be recovered.⁷

§ 2970. Concurrent covenants—Necessity of readiness and willingness to perform and demand for performance. Either party must be ready and willing to perform and must give notice thereof to the adversary party, to put such adversary party in default.¹ To put the one party in default the other must either tender performance,² or without formal tender of performance, must be ready and willing to perform, must offer to perform and demand performance of the adversary party.³ Without such offer and demand the adversary party is not in default, either for the purpose of consider-

⁴ *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247.

⁵ *E. C. Dailey Co. v. Can Co.*, 128 Mich. 501, 87 N. W. 761.

⁶ *Chicago, Milwaukee & St. Paul Ry. v. Hoyt*, 140 U. S. 1, 37 L. ed. 625; *Dunlap v. Chicago, Milwaukee & St. Paul Ry.*, 151 Ill. 409, 428, 38 N. E. 89, 95.

⁷ *Davis v. Jeffris*, 5 S. D. 352, 363, 58 N. W. 815, 928.

¹ *Colorado. Webb v. Smith*, 6 Colo. 365.

Louisiana. J. G. Wagner Co. v. Munroe, 52 La. Ann. 2132, 28 So. 229.

Maine. Howe v. Huntington, 15 Me. 350.

Nebraska. Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719.

New Hampshire. Crossett v. Brackett (N. H.), 105 Atl. 5.

Ohio. Webb v. Stevenson, 6 Ohio 282; *McCoy v. Bixbee*, 6 Ohio 310; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

Oregon. Longfellow v. Huffman, 49 Or. 486, 90 Pac. 907.

Rhode Island. Marsh v. Babcock (R. I.), 68 Atl. 475.

Virginia. Camp v. Wilson, 97 Va. 265, 33 S. E. 591.

² *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

³ *Eames v. Haver*, 111 Cal. 401, 43 Pac. 1120; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

ing the contract as discharged, or for the purpose of recovering damages.⁴ Neither party can treat the other as being in default either for the purpose of considering the contract as discharged,⁵ or for bringing an action for damages,⁶ or for the purpose of enabling the vendor to forfeit such part of the purchase money as has been paid in,⁷ without either tendering performance or notifying the adversary party of his willingness to perform and demanding performance by him.

Readiness and willingness to perform are not sufficient without tender or notice to the adversary party of such readiness and willingness, together with a demand for performance.⁸

Since a contract between two parties to intermarry is made up of concurrent covenants, neither party can put the other in default without offering performance and calling on the other to perform,⁹ unless the adversary party has renounced such contract, or has done some other act to excuse such offer. While it has been said that the woman need not offer to perform,¹⁰ apparently on the theory

⁴ *Campbell v. Moran Bros. Co.*, 97 Fed. 477, 38 C. C. A. 293; *Vandegrift v. Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

⁵ *Ludlow v. Cooper*, 4 O. S. 1; *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.

The vendor can not avoid:

California. Avila v. Pereira, 120 Cal. 589, 52 Pac. 840.

Iowa. Gaughen v. Kerr, 99 Ia. 214, 68 N. W. 694.

Michigan. Corning v. Loomis, 111 Mich. 23, 69 N. W. 85.

Minnesota. Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14.

South Dakota. McPherson v. Fargo, 10 S. D. 611, 65 Am. St. Rep. 723, 74 N. W. 1057.

Vendee can not avoid. *Mahan v. Close*, 63 Minn. 21, 65 N. W. 95.

⁶ *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

⁷ *Gaughen v. Kerr*, 99 Ia. 214, 68 N. W. 694; *Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14; *Frink v.*

Thomas, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.

⁸ *Campbell v. Moran Bros. Co.*, 97 Fed. 477, 38 C. C. A. 293; *Eames v. Haver*, 111 Cal. 401, 43 Pac. 1120; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941; *Raudabaugh v. Hart*, 61 O. S. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

⁹ *England. Gough v. Farr*, 2 Car. & P. 631 (obiter).

Iowa. Lemke v. Franzenburg, 159 Ia. 466, 141 N. W. 332.

Kentucky. Burks v. Shain, 5 Ky. (2 Bibb.) 341, 5 Am. Dec. 616; *Burnham v. Cornwell*, 55 Ky. (16 B. Mon.) 284.

New Hampshire. Crossett v. Brackett, — N. H. —, 105 Atl. 5.

New Jersey. Coil v. Wallace, 24 N. J. L. 291.

Rhode Island. Clark v. Corey, 24 R. I. 137, 52 Atl. 811.

¹⁰ *Seymour v. Gartside*, 2 Dowl. & R. 55; *Kelley v. Brennan*, 18 R. I. 41, 25 Atl. 346; *Clark v. Corey*, 24 R. I. 137, 52 Atl. 811 (dissenting opinion); *Parkinson v. Murphy*, — R. I. —, 107 Atl. 235.

that her modesty would forbid her making such offer before she institutes a suit for breach of promise, this statement has ordinarily been made in cases in which the declaration showed a request for performance on her part,¹¹ or in which the adversary party had refused to perform,¹² or in which the adversary party had so delayed performance as to indicate a refusal on his part by his acts.¹³

As in the case of other contracts,¹⁴ a refusal on the part of one of the parties to perform gives a cause of action without further request on the part of the adversary party for performance.¹⁵ While renunciation of a contract in advance may excuse offer to perform by one who wishes to maintain an action for breach of such contract, it is said, however, that it does not excuse the performance of concurrent covenants.¹⁶ If A has agreed to sell certain property and to credit the price thereof upon his note which is held by B, and on A's renunciation B sells such note to X, B can not recover from A, since if B was not ready to perform, he could not have received such credit.¹⁷ This result is reached for the reason that discharge from the duty to perform a covenant does not have the same consequences as the performance of the covenant.

D. INDEPENDENT COVENANTS

§ 2971. Independent covenants—Definition and nature. A covenant is said to be independent if the performance of such covenant by the party who is bound thereby is not related in any way to the duty of the adversary party to perform the covenants which, by the terms of the contract, are to be performed on his part.¹ While, in the earlier cases, there was a strong presumption

¹¹ *Seymour v. Gartside*, 2 Dowl. & R. 55.

¹² *Kelley v. Brennan*, 18 R. I. 41, 25 Atl. 346; *Parkinson v. Murphy*, — R. I. —, 107 Atl. 235.

¹³ *Seymour v. Gartside*, 2 Dowl. & R. 55.

¹⁴ See §§ 2881 et seq.

¹⁵ *Gough v. Farr*, 2 Car. & P. 631.

¹⁶ *Longfellow v. Huffman*, 49 Or. 486, 90 Pac. 907.

¹⁷ *Longfellow v. Huffman*, 49 Or. 486, 90 Pac. 907.

¹ *England. Ware v. Chappell*, Style

186; *Boone v. Eyre*, 1 H. Bl. 273, note; *Bettini v. Gye*, 1 Q. B. D. 183; *Campbell v. Jones*, 6 T. R. 570.

United States. Emigrant Company v. Adams County, 100 U. S. 61, 25 L. ed. 563; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. ed. 811 [affirming, *Mercantile Trust Co. v. Hensey*, 27 D. C. App. 210]; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278.

California. Fresno Canal & Irrigation Co. v. Perrin, 170 Cal. 411, 149 Pac. 805.

their relation to one another seems to be determined by their relation when the contract is made and not to be affected by the stage of performance which has been reached when the question of the relation of such covenants arises;³ and, accordingly, the fact that in the actual course of performance each party becomes bound to perform before either seeks to enforce performance of such covenant, does not prevent the covenant from being treated as independent.⁴

§ 2973. Covenants to be performed at different and unrelated times—Specific illustrations. Covenants by which an irrigation company agrees to furnish water continuously for a given period, and a land owner agrees to pay therefor in annual payments, have been held to be independent on the theory that performance is to take place at different times, so that failure of the land owner to make a payment does not discharge the irrigation company from its duty to furnish water.¹ Under a contract by which A agrees to sell land to B and to furnish water in the future at a given amount per annum for a period which exceeds the time at which B is to pay for the land, the covenant to furnish water is held to be independent of A's covenant to sell the land, so that if B fails to pay for the land in accordance with the terms of the contract, A may

³ *Goldsborough v. Orr*, 21 U. S. (8 Wheat.) 217, 5 L. ed. 600.

⁴ *Goldsborough v. Orr*, 21 U. S. (8 Wheat.) 217, 5 L. ed. 600.

¹ *Fresno Canal & Irrigation Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805.

"But the covenants are not dependent or concurrent. The water was to be furnished, when wanted, continuously from February 19, 1897, to February 16, 1921, while the payments were to be made annually as aforesaid. The furnishing of the water for the first six months could not be dependent upon or concurrent with the payment to be made in the following September. The same would be true of each succeeding year, upon the plaintiff's election not to terminate the agreements by reason of the failure of the defendant to pay. Where the covenants of the respective parties are to be performed at different times they

are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof. *S. P. R. R. Co. v. Allen*, 112 Cal. 461, 44 Pac. 796; *Front St. M. & O. R. R. Co. v. Butler*, 50 Cal. 577; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Deacon v. Blodget*, 111 Cal. 418, 44 Pac. 159. Upon these facts, the most that the plaintiff can claim on account of the failure of the defendant to make the payments is the right to recover the same and to have the amount thereof set off pro tanto against such damage as the defendant has shown from the failure of the plaintiff to deliver water." *Fresno Canal & Irrigation Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805.

avoid without showing that he has furnished the water.² Many of the cases in which covenants are held to be independent for this reason, are also illustrations of the general principle that covenants, at least of a minor character, which do not form the entire consideration for the covenants of the adversary party, are to be regarded as independent.³ If the purchaser of realty gives a note to fall due in one day after date, no time for performance is fixed, and the covenants are said to be independent.⁴ If a contract for the sale of goods provides that the purchase price is to be paid in a certain time, and that defective parts are to be replaced during a longer period, the covenants are said to be independent.⁵ Under a contract whereby A agrees to guarantee the payment of X's debt to B in consideration of an extension of time on prior debts, and also in consideration of B's extending credit to X on X's demand therefor, the covenant for future credit is said to be independent.⁶ Under a contract by which A agrees to subscribe for a certain amount of stock in the X Company, and the X Company agrees to increase its stock to secure a lumber yard and dock facilities and bona fide subscriptions of a certain amount to be paid in a certain time, the covenant fixing the time for the payment of such subscriptions is independent of A's covenant to pay for the stock which he has subscribed.⁷ If A sells stock to B under a contract by which A agrees to pay a certain amount annually to B if the corporation does not declare a dividend equal to such amount, and by which A also agrees to repurchase such stock from B if the corporation fails to pay such dividend, such covenants are so far independent that B may require A to repurchase such stock upon the failure of the corporation to pay such dividend, although A offers to pay the amount which he has agreed to pay.⁸ If A agrees to furnish instruction to B, and B agrees to pay therefor in instalments, the covenants are independent if the instruction is not to be completed until after the last payment is due.⁹ If A agrees to furnish

² *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106.

See also, *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884, in which case, however, the purchaser was in default first.

³ See § 2974.

⁴ *McRaven v. Crisler*, 53 Miss. 542.

⁵ *Kinney v. Federal Laundry Co.*, 75 N. J. L. 497, 68 Atl. 111.

⁶ *United & Globe Rubber Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203.

⁷ *Pacific Mill Co. v. Inman*, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

⁸ *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303.

⁹ *International Text-book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469.

The same result has been reached where the instruction might or might

machinery to B and to furnish a man to install such machinery, and B agrees to pay within a certain time after he has received the shipping documents, the covenant to furnish a man to install the machinery is independent of the covenant to pay for such goods.¹⁰ A covenant to construct a railroad is not a condition precedent to the payment of royalties, under a lease, which are to be paid beginning two months after possession is taken under the lease, while no part of the road is to be built till twelve months after possession is taken, part eighteen months after possession is taken, and another part six months after demand by the lessee.¹¹ Where A gave to B his non-negotiable note, secured by mortgage, and B agreed in consideration thereof to satisfy certain debts due from A which were liens on the mortgaged realty, no time being fixed for such payment, B's covenant is independent and if broken is not the basis for a suit to cancel the note for failure of consideration.¹² If covenants by a land company to build a side-track "promptly" to a certain factory, and when such factory was completed and in successful operation to buy certain stock, the first covenant is independent and the completion of the factory is not a condition precedent thereto.¹³ A agreed to pay to B a certain note on February 15, 1819, under a contract, a consideration for which was B's promise to deliver to A a certain amount of lumber, one-half in the year 1818 and the other half during the year 1819 as A should require it. It was held that inasmuch as A might require the lumber, deliverable in 1819, either all before the date on which the note came due, or all after that date, or part before and part after, his promise to pay the note was a covenant independent of B's covenant to deliver.¹⁴

§ 2974. Covenant which forms part of consideration. A covenant by one party which does not form the entire consideration for

not be completed before the time fixed for the payment of the last instalment. *Campbell v. Jones*, 6 T. R. 570.

¹⁰ *Lombard Water-wheel Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 6 L. R. A. (N.S.) 180, 63 Atl. 555.

¹¹ *Central Appalachian Co. v. Buchanan*, 73 Fed. 1006.

¹² *Tronson v. Colby University*, 9 N. D. 559, 84 N. W. 474.

For a similar case, except that the decision rests on the principle that B's covenant goes to part of the consideration only, see *Emigrant Company v. Adams County*, 100 U. S. 61, 25 L. ed. 563.

¹³ *Southern Pine Fibre Co. v. Land Co.*, 53 Fed. 318.

¹⁴ *Goldsborough v. Orr*, 21 U. S. (8 Wheat.) 217, 5 L. ed. 600.

the covenants to be performed by the adversary party, but which forms only a part of such consideration, is held to be an independent covenant,¹ at least if such covenant is not the vital or material

¹ England. *Boone v. Eyre*, 1 H. Bl. 273, note; *Bach v. Owen*, 5 T. R. 409.

United States. *Emigrant Company v. Adams County*, 100 U. S. 61, 25 L. ed. 563; *Mercantile Trust Co. v. Henssey*, 205 U. S. 298, 51 L. ed. 811 [affirming *Mercantile Trust Co. v. Henssey*, 27 D. C. App. 210]; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278.

Arkansas. *Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187.

Illinois. *Palmer v. Britannia Co.*, 188 Ill. 508, 59 N. E. 247.

Iowa. *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760.

Kansas. *Loveland v. Kibbey*, 103 Kan. 292, 173 Pac. 976.

Kentucky. *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 590, 174 S. W. 25.

Louisiana. *Hart v. Tremont Lumbar Co.*, 131 La. 847, 60 So. 368.

Maryland. *Havre De Grace Real Estate & Power Co. v. Havre De Grace*, 102 Md. 33, 61 Atl. 662.

Massachusetts. *Wiley v. Athol*, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311.

Michigan. *Gates v. Detroit & M. Ry. Co.*, 147 Mich. 523, 111 N. W. 101.

Missouri. *Turner v. Mellier*, 59 Mo. 526.

North Carolina. *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771.

Ohio. *Gould v. Brown*, 6 O. S. 538.

Oregon. *Pacific Mill Co. v. Inman*, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

Vermont. *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

Washington. *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586.

Wisconsin. *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

"The defense is predicated upon the doctrine, frequently approved by this court, that a breach that goes to the essence of the contract operates as a discharge of it. This rule will not avail the defendant. It is not every breach that goes to the essence. It gives rise to an action for damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance. In such cases, the broken promise is an independent undertaking and not a condition precedent. *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Lowber v. Bangs*, 2 Wall. 728, 17 L. ed. 768. See *Rioux v. Ryegate Brick Co.*, 72 Vt. at p. 155, 47 Atl. 406. In order to operate as a discharge or give rise to a right of rescission, the partial failure to perform must go the very root of the contract. *Chamberlin v. Booth*, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. (N.S.) 1223. *Keenan v. Brown*, 21 Vt. 86, is a case of partial failure of performance, and it was held that the defendant therein was not absolved thereby, and was only entitled to recover his damages.

"Moreover, when a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter can not refuse to comply with its terms simply because the former fails of complete performance. * * * 'Where a person has received a part of the consideration for which he entered into the agreement,' says Mr. Sergt. Williams, 'it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy

feature of such contract, but forms only a minor part of the consideration,² if the contract has been performed in part, at least as to the vital covenants thereof, and if the covenant in question is in part a consideration for such performance. Like other rules of construction,³ including the rules for determining the relation of two covenants to each other, this is not an arbitrary rule, but merely a guide to enable the courts to ascertain the intention of the parties; and if the contract, when taken as a whole, shows that the parties intend that the performance of one covenant shall depend upon the performance of the other, such other is a dependent covenant even if it forms only a part of the consideration.⁴

Refusal to sign a written contract does not discharge the prior oral contract which has been performed in part.⁵ In the case which is usually regarded as the leading case on this question,⁶ under a contract in which A agreed to convey to B an equity of redemption in a plantation, and also the negro slaves thereon, in consideration of which B agreed to pay a certain sum of money to A and also agreed to pay an annuity to A for A's life, it was held that A could recover such annuity although A did not have title to all the slaves on the plantation. A sold land to B in consideration of which B (1) made a money payment, (2) agreed to introduce settlers, (3) reclaim lands, and (4) pay A's debt to X. Covenants (2), (3) and

that part without either paying or doing anything for it.' 1 Saund. 320d. *Hammond v. Buckmaster*, 22 Vt. 375, is a case of this class, and it was therein held that, inasmuch as each party had received a partial benefit from the contract, and could not be placed in statu quo, the defendant would have to perform the contract, seeking his damages for the plaintiff's breach by cross-action. These holdings are decisive of the case in hand. The stipulation in question was only a part of the consideration of the defendant's undertaking; was subordinate and incidental to its main purpose; its breach is compensable in damages, and the defendant obtained and now holds a substantial benefit under the contract. Other questions argued need not be considered." *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

"The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." *Boone v. Eyre*, 1 H. Bl. 273, note.

² See § 2981.

³ See §§ 2021 et seq.

⁴ *Graves v. Legg*, 9 Exch. 709; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

⁵ *Hart v. Tremont Lumber Co.*, 131 La. 847, 60 So. 308.

⁶ *Boone v. Eyre*, 1 H. Bl. 273, note.

(4) were held to be independent.⁷ A city agreed (1) to convey certain land to A, (2) to pay a sum of money to A, (3) to exempt such property from taxation, and (4) to construct a sewer, in consideration of which A agreed to operate a factory on such land for a period of ten years, and to secure performance of such covenant by mortgage. It was held that if the city had performed its first three covenants, the fourth covenant was independent and that a breach thereof did not discharge A's covenant.⁸ Under a contract by which A agreed to convey certain realty to B and to furnish water therefor, and B agreed to pay taxes and interest and to make improvements, it is held that A's covenant to furnish water is independent and that his failure to perform such covenant does not excuse B for his failure to make such payments.⁹ Under a contract by which A agrees to sell certain land to B and to furnish water at a certain price per annum, and B agrees to pay a certain amount for such land and to pay for such water, A's covenant to furnish water is independent, so that if B fails to pay for such land A may avoid the contract without showing that he has performed his covenant to furnish water.¹⁰ Under a contract by which A agrees to convey land to B and to lay water mains,¹¹ or A agrees to convey land to B and to lay sidewalks and put in water mains and sewers,¹² or A conveys land and agrees to raise the level of an irrigation ditch,¹³ the covenants other than that for the conveyance of the realty are generally held to become independent covenants after A has performed, and B can not avoid such contract because of A's failure to perform such other covenants. If A agrees to exchange land with B, and B agrees to construct a building on the land which he is to convey to A, B's covenant to construct such building is independent.¹⁴ Under a contract by which A agreed to convey certain property to B and to give up all claims against the estate of X, in consideration of which B agreed that A should have a

⁷ *Emigrant Company v. Adams County*, 100 U. S. 61, 25 L. ed. 563.

⁸ *Havre De Grace Real Estate & Power Co. v. Havre De Grace*, 102 Md. 33, 61 Atl. 662.

⁹ *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884 (B was in default before A's performance was due).

¹⁰ *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106 (covenants to be performed at different times).

¹¹ *McMillan v. American Suburban Corporation*, 136 Tenn. 53, L. R. A. 1917B, 401, 188 S. W. 615.

¹² *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586.

¹³ *Cheney v. Bierkamp*, 58 Colo. 319, 145 Pac. 691.

¹⁴ *Braddy v. Elliott*, 146 N. Car. 578, 125 Am. St. Rep. 52, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

certain interest in X's estate and that B would give up his interest in certain personalty to A, it was held that after A had performed by conveying such realty his covenant not to press claims against X's estate was an independent covenant the breach of which would not enable B to avoid the entire contract.¹⁵ A leased to B, in consideration of which B was (1) to erect a building which cost twenty thousand dollars, (2) pay rents which aggregated a hundred thousand dollars, (3) perform certain other covenants. The group of covenants numbered (3) were independent, and by reason of B's breach thereof A could not treat a covenant whereby he agreed to pay five thousand dollars for the building at the end of the term as discharged.¹⁶ A had leased a building to B. B wished to assign to X, who was organizing a corporation. A and X agreed that A should release B from liability for rent; X would pay the rent at the end of the year; A would waive his right to eject for non-payment of rent; and X would assign to A a certain amount of stock in the new corporation which at a certain time A would reassign to X. The covenant to reassign is an independent covenant and a breach thereof does not discharge the contract.¹⁷ Under a contract by which A agrees to lease certain property to B and to grant a renewal thereof, and B agrees to pay rent therefor, the covenants are so far independent that B's default in paying rent does not discharge the covenant to renew.¹⁸ Under a contract by which A agrees to sell goods to B as B may order them, and B agrees to pay a certain amount to compensate A in case B fails to order a certain quantity of goods within a certain time, B's covenant to pay such compensation for his failure to send in such orders is independent, and a breach thereof does not discharge A from his contract to fill B's orders.¹⁹ Under a contract by which A agrees to buy articles to be used as premiums in a voting contest, and gives notes in payment therefor, and B agrees to furnish such articles and guarantees a certain increase in A's business as a result of such voting contest, A's notes are independent covenants and his failure to pay them does not discharge B from liability upon such contract of guaranty.²⁰ If A agrees to sell certain goods

¹⁵ *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760.

¹⁶ *Palmer v. Britannia Co.*, 188 Ill. 508, 59 N. E. 247.

¹⁷ *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278.

¹⁸ *Tracy v. Albany Exchange Co.*, 7 N. Y. 472.

¹⁹ *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771.

²⁰ *Loveland v. Kibbey*, 103 Kan. 292, 173 Pac. 976.

to B and not to sell such goods to any one else in town, and B agrees to pay therefor, A's covenant not to sell to any one else is independent, and a breach thereof does not discharge B from his liability to pay for such goods.²¹ If A and B agree to exchange property, and A pays earnest money to bind the bargain, A's covenant to convey becomes independent and A may maintain an action against B without offering to perform on his part.²² Under a contract by which A guarantees X's debts to B in consideration of B's giving an extension of time on X's prior indebtedness, and also in consideration of B's agreeing to grant credit to X when X requests it, the latter covenant is independent and a breach thereof does not discharge A from his liability on such guarantee.²³ Under a contract of indemnity insurance by which the premium is due in advance, the failure of the insurance company to reimburse the insured for certain surgical expenses is a breach of an independent covenant and does not discharge the insured from his duty to pay such premium.²⁴ Under an ante-nuptial contract by which the wife agrees to accept a certain amount of money in lieu of her interest in her husband's estate, his covenant to pay such money is an independent covenant after the parties have intermarried; and his failure to make such payment does not operate as a discharge of the contract.²⁵ Under a contract by which A agreed to sing in opera and in concerts during a period of four months, and A agreed to report for rehearsal six days before the engagement began, in consideration of which B agreed to pay a certain sum, the covenant to appear at such time for rehearsal was independent, so that a breach thereof did not operate as a discharge of the entire contract.²⁶ A hired B to work for him in consideration of a carriage which A delivered to B and a certain sum per month. The covenant to pay wages was an independent covenant, breach of which did not discharge the contract as to B.²⁷ A agreed to deliver a certain number of logs to B to be sawed and to pay a certain price therefor. B agreed to saw them at that price and to saw for no other person during that season. B's sawing for others is a breach

²¹ *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

²² *Bach v. Owen*, 5 T. R. 409.

²³ *United & Globe Rubber Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203. (Performance due at different times. See §§ 2072 et seq.)

²⁴ *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W.

25. (Insured did not treat such breach as discharge.)

²⁵ *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

²⁶ *Bettini v. Gye*, 1 Q. B. D. 183.

²⁷ *Gould v. Brown*, 6 O. S. 538.

of an independent covenant, and if he saws all the logs furnished by A, A is not justified in treating the entire contract as ended and refusing to deliver more logs.²⁸ Under a contract by a lighting company to furnish electricity to the city and to reduce its commercial rate, the latter covenant was held to be independent, so that a breach thereof did not operate as a discharge of the entire contract.²⁹ Under a contract by which A sold his business to B and agreed to refrain from trading with former customers, in consideration of which B agreed to pay to A a certain amount per annum for his life, it was held that A's covenant to refrain from trading with such customers was independent, since A's covenant was negative and could not be performed in full until his death.³⁰

A different rule has been applied where full compensation has been made for performance by the adversary party. In cases of this sort the party in default, having received full compensation, can not contend that the covenant in question is a part of the entire consideration, so that the party who is bound to perform such covenant will be unjustly enriched if the entire contract is to be treated as discharged.³¹ If A has agreed to employ B for a certain

²⁸ *Reindl v. Heath*, 115 Wis. 219, 91 N. W. 734.

²⁹ *Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187. (Delay due to referendum election on franchise ordinance.)

³⁰ *Hunlocke v. Blacklowe*, 2 Saund. 156.

³¹ *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

"The rule pressed upon us by Mr. Russell from the notes to *Pordage v. Cole* (1 Wms. Saund. 319), 'can not be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if in the case of *Boone v. Eyre* (1 H. Bl. 273, n.) two or three negroes had been accepted and the equity of redemption not conveyed we do not apprehend that the plaintiff could have recovered the whole stipulated price and left the defendant to recover damage for the

non-conveyance.' See per Pollock, C. B., delivering the judgment of the court in *Ellen v. Topp* ([1851] 6 Ex. 424, at p. 442). Further, in *White v. Beeton* (7 H. & N. at p. 49) Bramwell B. quotes with approval the remark of Lord Kenyon, C. J., in *Campbell v. Jones* ([1796] 6 T. R. 570). 'Whether these kinds of covenants be or be not independent of each other must certainly depend on the good sense of the case.' The reason for the rule itself is said by Sergeant Williams to be that 'where a person has received a part of the consideration for which he entered into the agreement it would be unjust, that because he has not had the whole, he should be permitted to enjoy that part without either paying or doing anything for it.' But in this case, as pointed out by Mr. Manisty, the respondent has given an equivalent in service for the remuneration he has received in salary. He stands, therefore, outside the reason of the rule." *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537].

period of time at a fixed salary, and B agrees to perform certain duties, and not to engage in such business within a certain period after his employment ends, and B performs the services for which he is paid under the contract, A's act in terminating such contract before the time fixed by such contract operates to discharge B from his covenant not to compete with A.³²

§ 2975. Absolute promises. A covenant may be independent because it is intended by the parties as an absolute promise; that is, each party may accept the promise of the adversary party rather than the performance thereof, not merely as the consideration for his promise, but also with reference to the promisor's duty to perform.¹ The use of the term "absolute" in this connection shows that dependent covenants are regarded as analogous to conditions in that the breach of such covenant may affect the liability of the adversary party to perform. A covenant may be made independent by an express provision to the effect that breach of a given covenant shall not affect the duty of the adversary party to perform.² Under a contract by which A agrees to pay certain assessments in consideration of which he is to receive medical and hospital services when necessary, which contains an express provision to the effect that his failure to pay assessments while sick shall not operate as a cancellation of such contract, his duty to pay such assessments while sick is an independent covenant the breach of which does not discharge the adversary party.³ In some of the cases in which covenants are held to be

³² *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 330].

¹ *Alabama*. *Logan v. Hodges*, 6 Ala. 699; *Equitable Life Assurance Society v. Golson*, 159 Ala. 508, 48 So. 1034.

Kentucky. *Hutchings v. Moore*, 61 Ky. (4 Met.) 110.

Nebraska. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 26 L. R. A. (N.S.) 747, 121 N. W. 996.

New Hampshire. *Clough v. Baker*, 48 N. H. 254.

North Carolina. *Woodfin v. Asheville Mutual Ins. Co.*, 51 N. Car. 558.

Ohio. *Mutual Life Insurance Co. v. French*, 30 O. S. 240.

Oklahoma. *Friend v. Southern States Life Ins. Co.*, 58 Okla. 448, 160 Pac. 457.

Oregon. *Hawley v. Bingham*, 6 Or. 76; *Coffey v. Northwestern Hospital Association*, — Or. —, 183 Pac. 762.

Virginia. *Allemong v. Augusta National Bank*, 103 Va. 243, 48 S. E. 897.

Wisconsin. *Alexander v. Continental Insurance Co.*, 67 Wis. 422, 30 N. W. 727.

² *Coffey v. Northwestern Hospital Association*, — Or. —, 183 Pac. 762.

³ *Coffey v. Northwestern Hospital Association*, — Or. —, 183 Pac. 762.

independent because of the intention of the parties to accept the promise of the adversary party rather than performance, performance on one side is due only on the happening of an event which either may not happen at all, or may not happen during the period for which the contract is in effect.⁴ Under a contract of insurance in which credit is given for payment of the premiums and no provision is made for forfeiting the rights of the insured because of his failure to pay such premiums, his duty to pay the premiums and the liability of the insurer are independent covenants; and failure to pay premiums does not operate as a discharge of the contract of insurance.⁵ Under a contract by which A and B agree mutually to guarantee debts due to each from third persons, such covenants are regarded as independent, since the liability of each is continued and performance may never be required.⁶ Under a contract by which A gave A's note to B, and B agreed to pay A's note to X, it was held that such covenants were independent and that B might recover on such note without paying A's note to X,⁷ even if such notes were of the same amount.⁸ Under a contract by which A sold his business to B and agreed not to compete for a certain time and gave bond to secure performance of such contract, and B gave his notes in consideration of A's promises, it was held that such covenants were independent on the theory that the bond was the sole consideration for the notes.⁹ Under a contract by which A

⁴ England. *Christie v. Borelly*, 29 L. J. Rep. C. P. 153.

Alabama. *Equitable Life Assurance Society v. Golson*, 159 Ala. 508, 48 So. 1034.

Nebraska. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 26 L. R. A. (N.S.) 747, 121 N. W. 996.

North Carolina. *Woodfin v. Asheville Mutual Ins. Co.*, 51 N. Car. 558.

Oklahoma. *Friend v. Southern States Life Ins. Co.*, 58 Okla. 448, 160 Pac. 457.

Ohio. *Mutual Life Ins. Co. v. French*, 30 O. S. 240.

Wisconsin. *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727.

⁵ Alabama. *Equitable Life Assurance Society v. Golson*, 159 Ala. 508, 48 So. 1034 (obiter as forfeiture clause was part of contract).

Nebraska. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 26 L. R. A. (N.S.) 747, 121 N. W. 996.

North Carolina. *Woodfin v. Asheville Mutual Ins. Co.*, 51 N. Car. 558.

Ohio. *Mutual Life Ins. Co. v. French*, 30 O. S. 240.

Oklahoma. *Friend v. Southern States Life Ins. Co.*, 58 Okla. 448, 160 Pac. 457.

Wisconsin. *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727 (waiver of clause of forfeiture).

⁶ *Christie v. Borelly*, 29 L. J. Rep. C. P. 153.

⁷ *Logan v. Hodges*, 6 Ala. 699.

⁸ *Logan v. Hodges*, 6 Ala. 699.

(In this case B paid A's note to X after he had brought the action, but before the trial.)

⁹ *Clough v. Baker*, 48 N. H. 254.

gave his note to B, and B agreed to transfer certain property to A upon payment of such note at maturity, time being of the essence of the contract, it was held that such covenants were independent and that B might recover upon such note without showing that he had performed, or that he had offered to perform.¹⁰ Under a contract by which A sold property to B, and A agreed to convey when the first payment was made, and B agreed to pay in three instalments, it was held that such covenants were independent and that A might recover the last instalment, although he had not made such conveyance when the first instalment was made.¹¹ Some of these cases seem to be cases of explanation only on the ground that the court still follows the original theory that covenants are *prima facie* independent in the absence of any provisions in the contract tending to show that the performance of one covenant depends upon the performance of the covenant of the adversary party, even though such covenants form the consideration, each for the other.¹²

§ 2976. Effect of failure to perform independent covenant.

From the nature of the independent covenant,¹ the essential characteristic of which is that the parties intend that the performance thereof shall not depend upon the performance of the covenant of the adversary party,² it follows that the breach or non-performance of such covenant does not operate as a discharge of the covenants which, by the terms of the contract, are to be performed by the adversary party.³ If such independent covenant is broken, the

¹⁰ *Hawley v. Bingham*, 6 Or. 76.

¹¹ *Hutchings v. Moore*, 61 Ky. (4 Met.) 110.

¹² *Hutchings v. Moore*, 61 Ky. (4 Met.) 110.

¹ See § 2971.

² See § 2971.

³ *England*. *Ware v. Chappell*, *Style* 186; *Boon v. Eyre*, 1 H. Bl. 273, note; *Bettini v. Gye*, 1 Q. B. D. 183; *Bach v. Owen*, 5 T. R. 409; *Campbell v. Jones*, 6 T. R. 570.

United States. *Emigrant Company v. Adams County*, 100 U. S. 61, 25 L. ed. 563; *Mercantile Trust Co. v. Hensey*, 205 U. S. 208, 51 L. ed. 811 [affirming, *Mercantile Trust Co. v. Hensey*, 27 D. C. App. 210]; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278.

California. *Fresno Canal & Irrigation Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805.

Iowa. *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760.

Kansas. *Loveland v. Kibbey*, 103 Kan. 292, 173 Pac. 976.

Kentucky. *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W. 25.

Maine. *Lombard Water-wheel Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 6 L. R. A. (N.S.) 180, 63 Atl. 555.

Maryland. *Havre De Grace Real Estate & Power Co. v. Havre De Grace*, 102 Md. 33, 61 Atl. 662.

Massachusetts. *International Text-book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469.

adversary party has a right of action for damages thereon, but he can not treat such breach as a discharge.⁴ If the time for the performance of such covenant has not yet arrived, the independent covenant on the part of the adversary party may be enforced notwithstanding such non-performance.⁵ It is accordingly not necessary that the party who seeks to enforce such independent covenant should allege either performance or tender, or even readiness and willingness to perform, together with an offer to perform and a request for performance by the adversary party.⁶ These are the

Missouri. *Con P. Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812.

Nebraska. *Barr v. Little*, 54 Neb. 556, 74 N. W. 850.

New Jersey. *Kinney v. Federal Laundry Co.*, 75 N. J. L. 497, 68 Atl. 111.

New Mexico. *Glaser v. Dannelley*, 23 N. M. 593, 170 Pac. 63.

New York. *Tracy v. Albany Exchange Co.*, 7 N. Y. 472; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

North Carolina. *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771.

Oregon. *Pacific Mill Co. v. Inman*, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

Vermont. *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

Washington. *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586; *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106; *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884.

Wisconsin. *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

⁴**England.** *Ware v. Chappell*, Style 186; *Campbell v. Jones*, 6 T. R. 570; *Boon v. Eyre*, 1 H. Bl. 273, note; *Bettini v. Gye*, 1 Q. B. D. 183.

Kansas. *Loveland v. Kibbey*, 103 Kan. 292, 173 Pac. 976.

Massachusetts. *International Text-*

book Co. v. Martin, 221 Mass. 1, 108 N. E. 469.

Missouri. *Con P. Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812.

New Jersey. *Kinney v. Federal Laundry Co.*, 75 N. J. L. 497, 68 Atl. 111.

New Mexico. *Glaser v. Dannelley*, 23 N. M. 593, 170 Pac. 63.

New York. *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

North Carolina. *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771.

Vermont. *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

Washington. *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586; *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106; *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884.

⁵**International Text-book Co. v. Martin, 221 Mass. 1, 108 N. E. 469; *Statesville Flour Mills Co. v. Wayne Distributing Co.*, 171 N. Car. 708, 88 S. E. 771.**

⁶**England.** *Bach v. Owen*, 5 T. R. 400; *Campbell v. Jones*, 6 T. R. 570.

California. *Fresno Canal & Irrigation Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805.

Iowa. *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760.

necessary consequences that follow from the intention of the parties that either shall perform without reference to the duty of the adversary party to perform.

IV

RELATION OF COVENANTS AS TO PURPOSE OF CONTRACT

A. FAILURE OF CONSIDERATION

§ 2977. Failure of consideration—General nature. If A, a party to a contract which is executory on his side, does not receive what he was promised by B in consideration for his promise, the question is frequently presented whether A can use such facts as discharging him from liability upon his executory contract or whether he is still liable to B upon his covenants and his only remedy is an action against B for damages. This is a question of the effect of breach, and it has been discussed, from this standpoint, in the preceding sections.¹ It is also discussed in many cases as failure of consideration.² The term "failure of consideration" is perhaps not a good one to use in this connection, since it is likely to be confused with "want of consideration"; and the two ideas have nothing in common except a superficial resemblance. Consideration is an essential element of a simple contract;³ and if consideration is wanting, there never was any contract, and accordingly no legal obligation of a contractual nature rested upon either party by reason of such transaction. The term "failure of consideration," on the other hand, imports the original existence or supposed existence of a consideration which has failed to material-

Kansas. *Loveland v. Kibbey*, 103 Kan. 292, 173 Pac. 976.

Kentucky. *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W. 25.

Maine. *Lombard Water-wheel Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 6 L. R. A. (N.S.) 180, 63 Atl. 555.

Maryland. *Havre De Grace Real Estate & Power Co. v. Havre De Grace*, 102 Md. 33, 61 Atl. 662.

Massachusetts. *International Text-book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469.

New Jersey. *Kinney v. Federal*

Laundry Co., 75 N. J. L. 497, 68 Atl. 111.

New Mexico. *Glaser v. Dannelley*, 23 N. M. 593, 170 Pac. 63.

New York. *Tracy v. Albany Exchange Co.*, 7 N. Y. 472.

Vermont. *Tichnor v. Evans*, 92 Vt. 278, L. R. A. 1918C, 1025, 102 Atl. 1031.

Washington. *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 21 L. R. A. (N.S.) 823, 99 Pac. 586.

Wisconsin. *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

¹ See §§ 2926 et seq.

² See §§ 2978 et seq.

³ See §§ 512 et seq.

ize in accordance with the terms of the contract, remaining a broken promise instead of turning into an actual performance. In cases of this sort, the contract was originally valid, as is shown by the fact that in case of failure of consideration the party who is not in default may, in many cases, treat such failure of consideration as discharging him from the covenants on his part to be performed,⁴ or as giving him a right to recover damages for the breach of such contract, which may greatly exceed the amount which he has actually expended in performance,⁵ or as giving him the right to recover the value of his performance.⁶ If no contract had ever existed, he might have had the right to recover the value of his performance on the theory of payment by mistake or payment through fraud,⁷ but he could not have recovered damages, and it would not have been necessary for him to invoke such failure of consideration as the ground for discharging him from further performance under the contract, since the contract would have had no legal effect from the outset. The existence of failure of consideration has been denied on the theory that if the party gets what he bargained for, the consideration can not be said to fail;⁸ while, if he does not receive what he bargained for, there is no consideration.⁹ As a criticism of the use of "failure of consideration" to indicate breach, this is correct enough, although it is not in accordance with the actual usage of terms, either by the courts or by text writers; and it probably does not mean to exclude the cases, of which there are many, in which the consideration consists of a promise which the promisor eventually fails to perform. Failure of consideration may assume either of two forms: (1) A may make his promise in consideration of an executory promise made to him by B, and B's failure to perform such executory promise may then constitute the failure of consideration; (2) A may make his promise in consideration of the transfer to him by B of certain property or other legal rights, which B agrees to be in existence and to possess certain qualities, and which prove not to exist or not to possess such qualities.

The doctrine of failure of consideration involves, in some cases, questions of fraud, misrepresentation or mistake.¹⁰ In other cases the question presented is primarily one of the power of equity to rescind contracts and conveyances.¹¹

⁴ See §§ 2980 et seq.

⁵ See ch. LXXXVII.

⁶ See ch. LXXXVIII.

⁷ See §§ 1548 et seq.

⁸ See § 2978.

⁹ *Hurlburt v. Kephart*, 50 Colo. 353, 115 Pac. 521.

¹⁰ See §§ 216 et seq.

¹¹ See ch. XC.

§ 2978. Failure of consideration imports breach. The term "failure of consideration" imports that the party to whom the consideration moved has not received under the contract what it was agreed that he should receive.¹ If he receives exactly what he has contracted for, and if he stipulated originally for a thing of value, he can not avoid the contract because it does not prove as advantageous to himself as he had anticipated,² or because the thing for which he bargained and which he has received proves to be substantially worthless in fact.³ If A subscribes to certain books in the belief that the publication thereof will be continued for a certain time, or until the happening of a certain event, but no agreement is made on the part of the publishers to publish them for such time or until such event, A can not treat the discontinuation of the publication of such books as such a failure of consideration that he can avoid payment for the volumes which were actually delivered.⁴ If a mining lease does not in legal effect require the lessee to drill

¹ **United States.** *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496.

Iowa. *Simmons v. Sefrit*, (Ia.), 125 N. W. 93; *Sharp v. Betts*, 165 Ia. 373, 145 N. W. 938.

Louisiana. *New Orleans Polo Club v. Jockey Club*, 128 La. 1044, 55 So. 668.

Minnesota. *Mineral Land Investment Co. v. Bishop Iron Co.*, 134 Minn. 412, L. R. A. 1917D, 900, 159 N. W. 966.

Rhode Island. *Kendall v. Rossi*, 35 R. I. 451, 45 L. R. A. (N.S.) 985, 87 Atl. 186.

West Virginia. *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

² **United States.** *Taylor v. Riggs*, 26 U. S. (1 Pet.) 591, 7 L. ed. 275; *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496.

Alabama. *Mertins v. Hubbell Publishing Co.*, 190 Ala. 311, 67 So. 275.

Colorado. *Hurlburt v. Kephart*, 50 Colo. 353, 115 Pac. 521.

Florida. *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Indiana. *Scott v. Scott*, 105 Ind. 584, 5 N. E. 397.

Iowa. *Simmons v. Sefrit*, (Ia.), 125 N. W. 93; *Sharp v. Betts*, 165 Ia. 373, 145 N. W. 938.

Louisiana. *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527.

Massachusetts. *Palmer v. Guillo*, 224 Mass. 1, 112 N. E. 493.

Minnesota. *Bigelow v. Barnes*, 121 Minn. 148, 45 L. R. A. (N.S.) 203, 140 N. W. 1032; *Mineral Land Investment Co. v. Bishop Iron Co.*, 134 Minn. 412, L. R. A. 1917D, 900, 159 N. W. 966.

Missouri. *Priest v. Captain (Mo.)*, 197 S. W. 83.

North Carolina. *Johnston v. Smith*, 86 N. Car. 498.

Pennsylvania. *Oakford v. Nixon*, 177 Pa. St. 76, 34 L. R. A. 575, 35 Atl. 588.

West Virginia. *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

³ *Hurlburt v. Kephart*, 50 Colo. 353, 115 Pac. 521; *Varney v. Bradford*, 86 Me. 510, 30 Atl. 115; *Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.*, 208 Pa. St. 37, 57 Atl. 77.

⁴ *Bigelow v. Barnes*, 121 Minn. 148, 45 L. R. A. (N.S.) 203, 140 N. W. 1032.

wells, his failure so to do is not failure of consideration, although the lessor may have expected that the lessee would drill such wells and that the lease would be profitable for both parties.⁵ If an oil and gas lease requires the lessee to drill a well within a certain time, the lessor can not treat the failure of the lessee to drill an additional number of wells, as failure of consideration, although such additional drilling would make the lease more profitable to both parties.⁶ If specific bonds are sold and there is no implied warranty of their validity, the fact that it is held that the city which issued them had no power to do so, does not amount to failure of consideration.⁷ If A knows that an appeal is pending which involves B's title to an undivided interest in certain realty in which A has an interest, and with knowledge of such facts A and B enter into a contract by which A is to purchase such realty at a partition sale, for the benefit of both in certain proportions, the fact that on appeal it is held that B had conveyed his undivided interest to X does not amount to failure of consideration.⁸ If the title to realty is in dispute and the vendee purchases the interests of both claimants, such vendee can not treat the lack of title in one of the claimants as a failure of consideration.⁹ If the original contract is modified by a mutual agreement of the parties and is then performed, neither of the parties to the original contract can claim a failure of consideration.¹⁰ Since the compromise of a claim, concerning which there is a bona fide dispute, is supported by sufficient consideration,¹¹ neither party can claim that there is failure of consideration because of the fact that the adversary party was not entitled to the legal right which he had claimed;¹² and accordingly a party who has given his note in compromise of such disputed claim can not set up a failure of consideration as a defense to an action on such note.¹³ One who has destroyed or defeated the legal rights which he was to receive under the original contract, can not set up failure of consideration.¹⁴ If A returns a

⁵ *Mineral Land Investment Co. v. Bishop Iron Co.*, 134 Minn. 412, L. R. A. 1917D, 900, 159 N. W. 966; *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

⁶ *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527.

⁷ *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496.

⁸ *Sharp v. Betts*, 165 Ia. 373, 145 N. W. 938.

⁹ *Priest v. Captain (Mo.)*, 197 S. W. 83.

¹⁰ *American Mfg. Co. v. Helena Hardware Co.*, 119 Ark 292, 176 S. W. 306.

¹¹ See §§ 612 et seq.

¹² *Kendall v. Rossi*, 35 R. I. 451, 45 L. R. A. (N.S.) 985, 87 Atl. 186.

¹³ *Kendall v. Rossi*, 35 R. I. 451, 45 L. R. A. (N.S.) 985, 87 Atl. 186.

¹⁴ *Simmons v. Sefrit (Ia.)*, 125 N. W. 93.

deed for a patent right in certain territory to B, and B sells it to another, A can not set up such transaction as failure of consideration in an action on the notes which he had given for such deed.¹⁵ A leased to B the privilege of displaying stereopticon advertisements on the roof and side wall of A's building, at an agreed rent. Subsequently X, the owner of the building adjoining A's, leased his roof to another advertiser who put up a high screen which shut off the view of A's wall and roof. Such facts were not held to excuse B from paying rent.¹⁶

Conversely, failure of consideration exists if the party to the contract does not receive substantially what he bargained for, although the advantage which he has gained by the transaction may exceed his expectations in other respects, so that on the whole he has gained as much as he could have expected.¹⁷ Under a contract between two clubs, by which it was agreed that the members of one club should join the other, the failure of a considerable number of the members of such club to join such other club amounts to a failure of consideration although the social standing of the club whose members were to join the other was such that the transaction proved of great benefit to such other club.¹⁸

§ 2979. Failure of consideration—Speculative bargains. If A makes a speculative bargain by which he intends to take the risk of gain or loss, the fact that such speculation results unfavorably to A and that he does not gain the advantages which he had hoped when he entered into the speculation, does not amount to a failure of consideration.¹ If A advances money to B, to enable B to per-

¹⁵ *Simmons v. Sefrit* (Ia.), 125 N. W. 93.

¹⁶ *Oakford v. Nixon*, 177 Pa. St. 76, 34 L. R. A. 575, 35 Atl. 588.

¹⁷ *New Orleans Polo Club v. Jockey Club*, 128 La. 1044, 55 So. 668.

See §§ 2774 et seq.

¹⁸ *New Orleans Polo Club v. Jockey Club*, 128 La. 1044, 55 So. 668.

¹ *United States. Tayloe v. Riggs*, 26 U. S. (1 Pet.) 591, 7 L. ed. 275; *Wilson v. Simpson*, 50 U. S. (9 How.) 109, 13 L. ed. 66; *United States v. Harvey Steel Co.*, 196 U. S. 310, 49 L. ed. 492; *Eclinse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. ed. 317.

Alabama. Mertins v. Hubbell Publishing Co., 190 Ala. 311, 67 So. 275.

Connecticut. Johnson v. Willimantic Linen Co., 33 Conn. 436.

Illinois. Myers v. Turner, 17 Ill. 179; *Hildreth v. Turner*, 17 Ill. 184.

Indiana. Detrick v. McGlone, 46 Ind. 291.

Maryland. Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676.

Massachusetts. Foss v. Richardson, 81 Mass. (15 Gray) 303; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435; *Palmer v. Guillo*, 224 Mass. 1, 112 N. E. 493.

Minnesota. Wilson v. Hentges, 26 Minn. 288, 3 N. W. 338; *Van Norman v. Barbeau*, 54 Minn. 388, 55 N. W. 1112.

fect an invention under an agreement by which B is to form a corporation if such invention is successful and to issue a certain amount of stock to A in return for such advance, the fact that such invention does not prove to be successful and that accordingly no corporation is organized, does not amount to a failure of consideration.² If stock is bought at a price which is based on the assumption that a dividend will be declared thereon in a short time, the fact that such dividend is not declared or is less than the amount which was anticipated, does not amount to a failure of consideration.³

A contract of sale of a patent previously issued, or of a right thereunder, can not be avoided where the vendee knows exactly what he is getting, though it proves of no value to him.⁴ Under a contract to pay royalties for permission to use a patent right, it is said that such royalties can be recovered as long as the patent is not annulled or set aside judicially,⁵ at least if the licensee has not given notice that he is not acting under the contract.⁶ After the patent is annulled, such royalties can not be recovered.⁷ If the parties know that the validity of the patent is in dispute, and agree

New York. *Marston v. Swett*, 82 N. Y. 526; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285; *McGill v. Holmes*, 168 N. Y. 647, 61 N. E. 1131.

North Carolina. *Fair v. Shelton*, 128 N. Car. 105, 38 S. E. 290.

Ohio. *Tod v. Wick*, 36 O. S. 370.

2 *Palmer v. Guillow*, 224 Mass. 1, 112 N. E. 493.

3 *Taylor v. Riggs*, 26 U. S. (1 Pet.) 501, 7 L. ed. 275.

4 *United States v. Wilson v. Simpson*, 50 U. S. (9 How.) 109, 13 L. ed. 66; *United States v. Harvey Steel Co.*, 190 U. S. 310, 49 L. ed. 492; *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. ed. 317.

Connecticut. *Johnson v. Willimantic Linen Co.*, 33 Conn. 436.

Illinois. *Myers v. Turner*, 17 Ill. 179; *Hildreth v. Turner*, 17 Ill. 184.

Indiana. *Detrick v. McGlone*, 46 Ind. 291.

Maryland. *Schwarzenbach v. Odorless Excavating Apparatus Co.*, 65 Md. 34, 67 Am. Rep. 301, 3 Atl. 676.

Massachusetts. *Foss v. Richardson*, 81 Mass. (15 Gray) 303; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435.

Minnesota. *Wilson v. Hentges*, 26 Minn. 289, 3 N. W. 339; *Van Norman v. Barbeau*, 54 Minn. 388, 55 N. W. 1112.

New York. *Marston v. Swett*, 82 N. Y. 526; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285.

North Carolina. *Fair v. Shelton*, 128 N. Car. 105, 38 S. E. 290.

Ohio. *Tod v. Wick*, 36 O. S. 370.

See § 2993.

5 *Marston v. Swett*, 82 N. Y. 526; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285.

6 *Marston v. Swett*, 82 N. Y. 526; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285.

7 *Marston v. Swett*, 82 N. Y. 526.

to pay royalties until it is judicially decided that such patent is invalid, such royalties can be recovered until such judicial decision, adverse to the patent, is rendered.⁸

Some cases, however, hold that if the patent proves to be worthless, failure of consideration exists.⁹ Some of the cases cited on this point are really decided on the ground of fraud.¹⁰ A contract for the sale of a patent protecting certain specified improvements, is broken if letters patent are thereafter issued for only a small portion of the improvements specified and the application as to the rest of such improvements is rejected.¹¹ In other cases it has been held that if the patented article is so useless as to avoid the patent, the consideration fails.¹² In such cases the tender of the letters patent by the vendee to the vendor places the latter in statu quo.¹³ If the patent is void, it is said to be a failure of consideration,¹⁴ even if the vendor of such right has warranted his right to sell and convey the same.¹⁵

§ 2980. Total failure. In other cases of failure of consideration, the question which is primarily presented is one of the effect of non-performance of precedent, concurrent, or subsequent covenants. From the standpoint of the effect of such breach, this topic must be divided into total and partial failure of consideration. Total failure of consideration, that is, complete failure to perform an executory promise, discharges the adversary party from performing the promise which he has made in consideration thereof.¹

⁸ *United States v. Harvey Steel Co.*, 196 U. S. 310, 49 L. ed. 492.

⁹ *Bierce v. Stocking*, 93 Mass. (11 Gray) 174; *Nettograph Machine Co. v. Brown*, 28 Okla. 436, 34 L. R. A. (N. S.) 737, 114 Pac. 1102; *Clough v. Patrick*, 37 Vt. 421.

¹⁰ *Comings v. Ledy*, 114 Mo. 454, 21 S. W. 804.

¹¹ *Hargraves v. A. B. Pitkin Machinery Co.*, 19 R. I. 426, 34 Atl. 738.

¹² *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217, 25 Am. Dec. 390; *Lester v. Palmer*, 86 Mass. (4 All.) 145; *Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783.

¹³ *Sandage v. Studabaker Brothers Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165, 34 L. R. A. 363, 41 N. E. 380.

¹⁴ *Morrow v. Brown*, 31 Ind. 378; *Chemical Electric Light & Power Co. v. Howard*, 150 Mass. 405, 2 L. R. A. 168; 148 Mass. 352, 23 N. E. 317, 20 N. E. 92; *Earl v. Page*, 6 N. H. 477, 26 Am. Dec. 711; *Cowan v. Dodd*, 40 Tenn. (3 Cold.) 278.

¹⁵ *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217, 25 Am. Dec. 390.

¹ *England. Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

United States. World's Fair Mining Co. v. Powers, 224 U. S. 173, 56 L. ed. 717.

Arkansas. Missouri Pacific Ry. v. Yarnell, 65 Ark. 320, 46 S. W. 943.

California. Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co., 120

Failure of consideration avoids a promissory note if it is not in the hands of a bona fide holder.² A note given for services to be performed thereafter, is discharged if not in the hands of a bona fide holder, if such services are not rendered.³ If A agrees to support B, and A fails to do so, A's non-performance amounts to a total failure of consideration which discharges B from his obligation to perform the covenants on his part to be performed,⁴ such as his covenant to make A the beneficiary of a policy of insurance on B's life.⁵ On the other hand, if A agrees to support B, and B in consideration of such covenant agrees to make and deliver certain notes to A, B's failure to deliver such notes discharges A from his duty to perform.⁶ Notes given in consideration of water to be furnished for irrigation are discharged if such water is not furnished when demanded. It is not necessary that the maker of such note should offer to release the payee from his agreement to furnish such water.⁷ If a note has been transferred before maturity to one who knows that the consideration therefor was an agreement by the payee to deliver coal, but who does not know that the payee

Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929.

Illinois. *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

Indian Territory. *Sellers v. Catron*, 5 Ind. Terr. 263, 82 S. W. 742.

Massachusetts. *Jewett v. Brooks*, 134 Mass. 505; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837; *Cook v. Sawyer*, 188 Mass. 163, 74 N. E. 356; *Parrot v. Mexican Central Railway*, 207 Mass. 184, 93 N. E. 590; *Neal v. Jefferson*, 212 Mass. 517, 90 N. E. 334; *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146; *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830.

Michigan. *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375.

North Carolina. *Farrington v. McNeill*, 174 N. Car. 420, 93 S. E. 957.

South Carolina. *Wait v. Williams*, 107 S. Car. 32, 91 S. E. 969.

West Virginia. *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N. S.) 807, 61 S. E. 235.

² **California.** *Flood v. Petry*, 165 Cal. 309, 46 L. R. A. (N.S.) 861, 132 Pac. 256.

Iowa. *Sigworth v. Holcomb* (Ia.), 79 N. W. 364; *Todd v. State Bank*, 182 Ia. 276, 3 A. L. R. 971, 165 N. W. 593.

Michigan. *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375.

North Carolina. *Farrington v. McNeill*, 174 N. Car. 420, 93 S. E. 957.

West Virginia. *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N. S.) 807, 61 S. E. 235.

³ *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; *Ray v. Moore*, 24 Ind. App. 480, 56 N. E. 937.

⁴ *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

⁵ *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

⁶ *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

⁷ *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

will not perform such agreement, the indorsee may recover from the maker upon such note.⁸ Under a contract to exchange real estate, A agreeing to accept a lease back of the property conveyed by him, A's agreement to accept the lease is discharged by B's refusal to perform the contract where B falsely claims that the title to A's realty is defective.⁹ A agreed to release certain claims in consideration that his debtor, B, would not change a devise in a will previously executed by B. This contract is discharged by A's subsequently presenting such claims to the commissioners of B's estate, although B does not offer to refund the money received in part consideration therefor.¹⁰ A contract to pay the debt of another, in consideration of forbearance of suit, is discharged if the original debtor is subsequently sued.¹¹ An executory agreement for credit is discharged where the notes¹² given in consideration of such promise proved worthless. A contract for the sale of mining land, conditioned that the vendee shall, at a certain time, induce a corporation thereafter to be organized, to execute certain notes for the remainder of the purchase price, and a mortgage of such property to secure such notes, may be rescinded by the vendor if the notes and mortgage are not furnished.¹³ If A has delivered possession of a mine to B under a contract by which B is to deposit the proceeds of such mine in a certain bank to A's account, as a credit upon the purchase price, B's act in depositing such proceeds in another bank in his own name discharges A from his duty under the contract to allow B to keep possession of such mine.¹⁴ If a number of persons agree to subscribe to a fund for the purpose of securing a lease and developing a mine, the failure of one of such parties to pay such subscription into such fund discharges the adversary parties from their duty to pay to him a proportionate amount of the proceeds of such mine.¹⁵ If A agrees to secure leases from X to B which B is to have sixty days' opportunity to investigate before accepting, A's failure to secure such leases and

⁸ *Tradesmen National Bank v. Curtis*, 167 N. Y. 194, 52 L. R. A. 430, 60 N. E. 429.

⁹ *Scannell v. Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889.

¹⁰ *White v. White*, 68 Vt. 161, 34 Atl. 425.

¹¹ *Clark v. Russell*, 3 Watts (Pa.) 213, 27 Am. Dec. 348.

¹² *Sheldon Axle Co. v. Scofield*, 85 Mich. 177, 48 N. W. 511.

¹³ *Tyler v. Cote*, 29 Or. 515, 45 Pac. 800.

¹⁴ *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717.

¹⁵ *Cameron v. Burnham*, 146 Cal. 580, 80 Pac. 929.

to offer them to B discharges B from his liability under the contract.¹⁶

The doctrine of failure of consideration has been applied to discharge a party who has refused to accept performance from notes which he has given in advance,¹⁷ so that in such case he will be liable for damages for breach, but he will not be liable upon such notes if they are not in the hands of a bona fide holder.¹⁸

§ 2981. Breach of covenant not a vital term of contract. It is not the breach of every covenant of a contract that may operate as a discharge of the adversary party. To have this effect the covenant broken must be a vital term of the contract, breach of which makes performance impracticable, and the accomplishment of the purpose of the contract impossible. Breach of a minor and subsidiary covenant may give rise to an action for damages but it can not operate as a discharge.¹ If A has agreed to sell land to B, in

¹⁶ Winfield Lumber Co. v. Partridge, — Ala. —, 80 So. 821.

¹⁷ Acme Food Co. v. Older, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235.

¹⁸ Acme Food Co. v. Older, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235.

¹ United States. Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 50 L. ed. 317; Robertson v. Gordon, 226 U. S. 311, 57 L. ed. 236; Hansen v. Storage Co., 86 Fed. 832.

California. Lassing v. James, 107 Cal. 348, 40 Pac. 534; Withers v. Moore (Cal.), 71 Pac. 697.

Idaho. Daniels v. Englehart, 18 Ida. 548, 39 L. R. A. (N.S.) 938, 111 Pac. 3.

Illinois. Lake Shore, etc., Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821; Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 N. E. 714.

Iowa. Graves v. Gas Co., 83 Ia. 714, 50 N. W. 283; Galt v. Provan, 131 Ia. 277, 108 N. W. 760.

Kansas. Missouri, K. & T. Ry. v. Ft. Scott, 15 Kan. 435.

Kentucky. Smith v. Howard (Ky.), 105 S. W. 411, 32 Ky. L. Rep. 211.

Maryland. Nes v. Union Trust Co., 104 Md. 15, 64 Atl. 310; Schnepfe v. Schnepfe, 124 Md. 330, 92 Atl. 891; Ady v. Jenkins, 133 Md. 36, 104 Atl. 178.

Massachusetts. Leavitt v. Fletcher, 92 Mass. (10 All.) 119; Lund v. Smith, 191 Mass. 473, 77 N. E. 893.

Michigan. Alderton v. Williams, 139 Mich. 296, 102 N. W. 753; Gates v. Detroit & Mackinac Ry., 147 Mich. 523, 111 N. W. 101.

Minnesota. Hunter v. Holmes, 60 Minn. 496, 62 N. W. 1131.

Missouri. Drummond Realty & Investment Co. v. W. H. Thompson Trust Co. (Mo.), 178 S. W. 479.

Nebraska. Swobe v. Electric Light Co., 39 Neb. 586, 58 N. W. 181.

New Hampshire. Smart v. Gale, 62 N. H. 62.

New Jersey. United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. L. 286, 78 Atl. 203.

New York. Tracy v. Albany Exchange Co., 7 N. Y. 472, 57 Am. Dec. 538; St. Regis Paper Co. v. Santa

consideration of which B is to pay to A one half of the crops for a certain period of time, a small and unintentional shortage on B's part does not give A the right to avoid such contract.² If A agrees to make advances to B to the amount of B's expenses under the contract, and A has furnished about two-thirds of B's expenses and suggests an arbitration as to A's liability to advance more, B can not treat such conduct on the part of A as discharging him from further liability under the contract.³ If A assigns an invention to B under an agreement by which B is to take out a patent thereon and to pay a certain amount to A, B's conduct in dropping A's claim and taking out a patent on a similar invention in his own name does not discharge B from his duty to pay A, as long as he has retained A's rights under such assignment without regard to the actual merits of A's invention.⁴ A contract to erect and maintain a mill is not discharged by the adversary party's failure to maintain it for the entire time, but an action for damages is the only remedy.⁵ Similar results have been reached where a contract to construct waterworks is departed from in minor points and no opportunity has been given to the water company to correct them;⁶ where a contract to feed cattle is broken only by a failure to construct racks to save the hay, the owner having suffered no loss thereby;⁷ and where a contract to ship goods under the vendee's form of charter party is broken only by using another form of charter party which omits a clause that if the vessel is freed from wharfage during discharge of cargo, freight is to be reduced four and a half pence per ton.⁸ In all these cases the party not in default must perform and sue for damages if he has suffered any. Whether

Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

North Dakota. Gage v. Fisher, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45.

Oregon. Fargo v. Wade, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

West Virginia. Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

Wisconsin. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054; Danielson

v. Danielson, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

² Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45.

³ St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

⁴ Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 50 L. ed. 317.

⁵ Hunter v. Holmes, 60 Minn. 496, 62 N. W. 1131.

⁶ Winfield v. Water Co., 51 Kan. 70, 32 Pac. 663.

⁷ Lassing v. James, 107 Cal. 348, 40 Pac. 534.

⁸ Withers v. Moore (Cal.), 71 Pac. 607.

a partial breach operates as a discharge depends on the relation of the covenant which has been broken to the rest of the contract, on the question of the adequacy of compensation in damages and on the rules of local procedure allowing partial defenses to be made.⁹

• **§ 2982. Partial failure—Full compensation in damages.** Partial failure of consideration in cases in which compensation for breach can be made by awarding damages to the injured party, is analogous to breach of an independent covenant which is independent because it is only a part of the consideration for the covenants of the adversary party.¹ As in the case of such independent covenants,² a partial failure of consideration does not operate as a discharge of the entire contract if compensation for such breach can be made by awarding damages to the adversary party, and if the performance which he has received together with such award of damages will do substantial justice.³ This is true especially under

⁹ See §§ 2982 et seq.

¹ See § 2974.

² See § 2976.

³ **United States.** Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 50 L. ed. 317; Robertson v. Gordon, 220 U. S. 311, 57 L. ed. 236.

Idaho. Daniels v. Englehart, 18 Ida. 548, 39 L. R. A. (N.S.) 938, 111 Pac. 3.

Illinois. Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821; Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 N. E. 714.

Iowa. Galt v. Provan, 131 Ia. 277, 108 N. W. 760.

Kansas. Missouri, K. & T. Ry. v. Ft. Scott, 15 Kan. 435.

Kentucky. Smith v. Howard (Ky.), 105 S. W. 411, 32 Ky. L. Rep. 211.

Maryland. Nes v. Union Trust Co., 104 Md. 15, 64 Atl. 310; Schnepfe v. Schnepfe, 124 Md. 330, 92 Atl. 891; Ady v. Jenkins, 133 Md. 36, 104 Atl. 178.

Massachusetts. Leavitt v. Fletcher, 92 Mass. (10 All.) 119; Lund v. Smith, 191 Mass. 473, 77 N. E. 893.

Michigan. Alderton v. Williams, 139 Mich. 296, 102 N. W. 753; Gates v. Detroit & Mackinac Ry. Co., 147 Mich. 523, 111 N. W. 101.

Missouri. Drummond Realty & Investment Co. v. W. H. Thompson Trust Co. (Mo.), 178 S. W. 479.

New Hampshire. Smart v. Gale, 62 N. H. 62.

New Jersey. United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. L. 286, 78 Atl. 203.

New York. Tracy v. Albany Exchange Co., 7 N. Y. 472, 57 Am. Dec. 538; St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

North Dakota. Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45.

Oregon. Fargo v. Wade, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

West Virginia. Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

Wisconsin. Mueller v. Cook, 125 Wis. 504, 105 N. W. 1054; Danielson v. Danielson, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

See Rescission of Executory Contracts for Partial Failure in Performance, by C. B. Morison, 29 Law Quarterly Review, 61.

statutes which provide that breach shall not discharge or forfeit rights under a contract if compensation is an adequate remedy.⁴ Even though partial failure of consideration does not discharge the contract, it is, however, the basis of an action by the party who is not in default to recover damages.⁵

§ 2983. Specific illustrations. If A sells certain timber to B at a certain price, and as part of such contract A agrees to log such timber at a certain price, and B pays the consideration agreed upon, A can not treat B's delay in permitting A to proceed to log such timber as a discharge of his covenant so to do.¹ The fact that a contractor has not paid the subcontractors in full does not discharge the property owner from his duty to pay the contractor if the subcontractors have omitted to secure liens upon the property for the amounts due to them.² If A gives an option to B for a consideration to be paid by B in the future, and by such contract A agrees to make certain improvements on the land, A's failure to make such improvements does not discharge B from his liability to pay for such option, at least if such improvements would not have increased the value of the property to B and if B has not suffered any damage by reason of A's failure to make such improvements.³ If A has agreed to pack goods belonging to A and to send them to B by a certain time, and if B agrees to furnish labels therefor, B's failure to send labels does not discharge A, at least if A had labels on hand from the previous year and if A refused to perform at all, on B's demand, when there was sufficient time to put on such labels.⁴ An ante-nuptial contract by which the wife is to receive a certain sum in lieu of her dower, is not discharged by the subsequent separation of the parties.⁵ If A sells a business to B and agrees not to compete with B during a certain period of time, A's breach of his covenant not to compete has been held to be a partial failure of consideration which does not discharge B from his liability upon his note given in consideration of the transfer of such business and A's covenant.⁶ If A enters into a contract with B by

⁴ *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45.

⁵ *Coleman v. Valentin*, 30 S. D. 323, 164 N. W. 67.

¹ *Mueller v. Cook*, 126 Wis. 594, 105 N. W. 1054.

² *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

³ *Fargo v. Wade*, 72 Or. 477, L. R. A. 1915A, 271, 142 Pac. 830.

⁴ *Ady v. Jenkins*, 133 Md. 36, 104 Atl. 178.

⁵ *Schnepfe v. Schnepfe*, 124 Md. 330, 92 Atl. 891.

⁶ *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

For the opposite view, see § 2986.

which B is to have the use of certain realty and is to have the right to use a spur track subject to the regulations of the railway, the fact that the railway changes its regulations in such a way that B could not make use of the track does not amount to failure of consideration.⁷ If A leases to B under a contract by which A is to repair the outside of the buildings and B is to pay a certain rent and to repair the inside of the buildings, the failure of A to reconstruct one of the smaller buildings which was destroyed does not discharge B from his duty to pay rent.⁸ Under a contract to erect a mill and maintain and operate it for five years and not to transfer it in that time, breach of the latter stipulation gives rise to an action for damages but does not entitle the adversary party to recover money paid as a consideration for the contract.⁹ Under a similar contract buildings were erected by a manufacturing company under a contract to remove their business, but the removal was never made. This was held to be a breach going to the essence of the contract, and recovery could be had of money paid thereunder.¹⁰ Under a contract for operating a brickyard, breach of a provision by which one party agrees to buy all his supplies of the other does not go to the essence of the contract and does not prevent him from recovering for what he has done.¹¹ The rule that partial failure of consideration does not discharge a contract has been carried to such an extent that failure to furnish water for more than an acre and a half has been held not to be a defense to an action upon a note given in payment for water rights for one hundred and sixty acres.¹²

§ 2984. Partial failure of consideration—Inability to make restitution. If the party who has performed in part can not be placed in statu quo, the adversary party can not treat the contract as discharged because of partial failure of consideration.¹

Under contract whereby A was to convey to B a certain tract of land in consideration whereof B agreed to (1) relinquish her right

⁷ *Roberts v. Chatwin*, 108 Ark. 562, 158 S. W. 497.

⁸ *Leavitt v. Fletcher*, 92 Mass. (10 All.) 119. (Accordingly A may take advantage of a re-entry clause in case of B's failure to pay rent.)

⁹ *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

¹⁰ *Ft. Wayne Electric Light Co. v.*

Miller, 131 Ind. 409, 14 L. R. A. 804, 30 N. E. 23.

¹¹ *Rioux v. Brick Co.*, 72 Vt. 148, 47 Atl. 406.

¹² *Daniels v. Englehart*, 18 Ida. 548, 39 L. R. A. (N.S.) 938, 111 Pac. 3.

¹ *Daniels v. Englehart*, 18 Ida. 548, 39 L. R. A. (N.S.) 938, 111 Pac. 3; *Danielson v. Danielson*, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

of appeal from a certain decree, and (2) quitclaim her interest in other property, a failure of title to the realty quitclaimed by B will not be a ground for rescinding the contract after B has lost her right of appeal.² Even where the party who is not in default might avoid the contract for partial failure of consideration if he returned what he had received thereunder, he can not avoid the contract if he retains substantial and material benefits thereunder.³

§ 2985. Partial failure of consideration as partial defense. In some states a partial failure of consideration may be used as a partial defense in an action on the contract, even if the consideration is not apportioned and the damages are unliquidated.¹ Thus in an action on a single bill given for several fillies, fraud as to their pedigree constituting partial failure of consideration may be set up.²

In other states a partial failure of consideration is not available as a defense to an action on the contract, though it may be the basis of an independent action.³

§ 2986. Partial failure—Vital term. If compensation for a partial failure of consideration will not give full protection to the interests of the party who is not in default, and if the part of the consideration which has failed is a vital element of the contract, such failure of consideration operates as a discharge of the entire contract including the remaining subsidiary provisions.¹ A con-

² *Mullreed v. Thumb*, 119 Mich. 578, 78 N. W. 658.

³ *National Bank v. Sherman*, 23 S. D. 8, 119 N. W. 1010; *National Bank v. Mailloux*, 27 S. D. 543, 132 N. W. 168; *Coleman v. Valentin*, 30 S. D. 323, 164 N. W. 67.

¹ *Withers v. Green*, 50 U. S. (9 How.) 213, 13 L. ed. 109.

² *Withers v. Green*, 50 U. S. (9 How.) 213, 13 L. ed. 109.

³ *Thornton v. Wynn*, 25 U. S. (12 Wheat.) 183, 6 L. ed. 595; *Daniels v. Englehart*, 18 Ida. 548, 39 L. R. A. (N. S.) 938, 111 Pac. 3.

¹ *England. General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

United States. Columbus v. Mercantile Trust & Deposit Co., 218 U. S. 645, 54 L. ed. 1193; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278.

Alabama. Parker v. Bond, 121 Ala. 529, 25 So. 898.

California. Campbell v. Kennedy, 177 Cal. 430, 170 Pac. 1107; *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

Florida. Alachua Phosphate Co. v. Anglo-Continental Guano Works, 51 Fla. 143, 40 So. 71; *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Georgia. Timmerman v. Stanley, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

Illinois. University Club v. Deakin,

tract to sell or to lease realty is discharged by the failure of the vendor to perform a covenant which is a vital part of such contract, although it is but one out of a number of different covenants.² A contract by which A agrees to convey certain realty to X, and X agrees to resell such realty and to divide the profits with A, is discharged if B, who is a co-owner with A, does not join in such conveyance to X.³ If A agrees to construct a building on certain realty and to convey it to B, A's declaration that he will be unable to construct such building is a renunciation of a vital provision of such contract.⁴ A contract by A to convey his franchise for a street railway and his interests in such railway, is broken as to a vital element if A's franchise is of no legal effect.⁵ If A agrees to lease a room to B and also agrees that no other room in such building shall be used for the sale of certain articles which B intends to sell in such room, A's breach of such covenant in

265 Ill. 257, L. R. A. 1915C, 854, 106 N. E. 790.

Iowa. *Temple v. Pennell*, 123 Ia. 729, 99 N. W. 567.

Kentucky. *Monarch v. Owensboro City R. Co.* (Ky.), 85 S. W. 193, 27 Ky. L. Rep. 380; *Seventh St. Planing Mill Co. v. Schaefer* (Ky.), 99 S. W. 341.

Louisiana. *New Orleans Polo Club v. Jockey Club*, 128 La. 1044, 55 So. 668; *Queensborough Land Co. v. Cazeaux*, 136 La. 724, L. R. A. 1916B, 1201, 67 So. 641.

Massachusetts. *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790.

Michigan. *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 306.

Minnesota. *Wasser v. Western Land Securities Co.*, 97 Minn. 460, 107 N. W. 160.

Ohio. *Coffinberry v. Sun Oil Co.*, 68 O. S. 488, 67 N. E. 1069.

Oklahoma. *Brown v. Wilson*, 58 Okla. 392, L. R. A. 1917B, 1184, 160 Pac. 94.

Rhode Island. *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

Washington. *Hodges v. Price*, 38

Wash. 1, 80 Pac. 202; *Dishman v. Huetter*, 41 Wash. 626, 84 Pac. 590; *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

West Virginia. *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

² California. *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

Florida. *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

Iowa. *Temple v. Pennell*, 123 Ia. 729, 99 N. W. 567.

Louisiana. *Queensborough Land Co. v. Cazeaux*, 136 La. 724, L. R. A. 1916B, 1201, 67 So. 641.

Washington. *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

³ *Temple v. Pennell*, 123 Ia. 729, 99 N. W. 567.

⁴ *Walker v. Harbor Business Blocks Co.*, — Cal. —, 186 Pac. 356.

⁵ *Monarch v. Owensboro City R. Co.* (Ky.), 85 S. W. 193, 27 Ky. L. Rep. 380.

leasing a room to X for the sale of such articles is a breach of a vital term in the contract between A and B.⁶ If A has conveyed realty to B under a contract by one term of which A is to build a railway near such realty within a certain time,⁷ or A is to secure a right of way by which B can have access to his realty,⁸ or by which A is to grade and construct an asphalt street with sewer and gas, and also to lay a sidewalk,⁹ or by which A is to maintain an orchard upon such realty so as to convey to B an orchard which bears fruit,¹⁰ A's breach of any one of such covenants is regarded as a breach of a vital term which discharges the contract. If A and B enter into a contract by which A surrenders to B the possession of A's mine, and B is to operate such mine and deposit the proceeds thereof in a given bank in A's name, such latter covenant is vital; and B's act in depositing such proceeds in another bank in his own name is a breach for which A may avoid the contract and take possession of such mine.¹¹ Under a contract by which B was to sell A's realty, as A's agent, and A was to deposit the purchaser's notes with X in order to secure B's commission, and B was to give bond to protect A against the claim of C for part of such commission, A's covenant to deposit such notes was a vital term of the contract and on breach thereof B might recover without showing that he had given such bond.¹² Under a contract by which B conveys realty to A, and A agrees to furnish money to pay off the liens thereon, to sell such realty, and to divide the proceeds with B after repaying to A the advances thus made by him, the covenant to resell is a vital term of the contract; and if A delays an unreasonable time and refuses a number of opportunities to sell, B may have a reconveyance upon tendering the advances made by A.¹³ If A and B enter into a contract by which A leases certain realty to B, and B agrees to construct a building thereon and to pay rent therefor, and A agrees to buy such building at the termination of the lease, B's covenant to pay rent is a vital term

⁶ *University Club v. Deakin*, 265 Ill. 257, L. R. A. 1915C, 854, 106 N. E. 790.

⁷ *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790; *Aurand v. Perry Town Lot & Improvement Co.*, 178 Ia. 262, 159 N. W. 779.

⁸ *Miller v. Beck*, 72 Or. 140, 142 Pac. 603.

⁹ *Tennant Land Co. v. Nordeman*, 148 Ky. 361, 146 S. W. 756.

¹⁰ *Ihrke v. Continental Life Ins. & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

¹¹ *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717.

¹² *Wasser v. Western Land Securities Co.*, 97 Minn. 460, 107 N. W. 160.

¹³ *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107.

of the contract; and if B does not pay rent and A enters by virtue of a re-entry clause, he is not obliged to pay for such building.¹⁴ If the covenant to operate a mine or to drill wells for oil and gas is a vital feature of a mining lease, or of a lease for oil and gas, failure to perform such covenant will be regarded as a discharge of the entire contract.¹⁵

If an employer refuses to continue the employe in his service, and refuses to make further compensation to such employe, this is a breach of a vital term of the contract which discharges the employe from the remaining covenants of such contract,¹⁶ such as a covenant on his part not to compete with his employer within a certain period of time.¹⁷ Whether a covenant not to compete is a vital part of a contract for the sale of a business and of the good will thereof, so that the breach of such covenant will discharge the contract, is a question upon which there seems to be a conflict of authority; although it may be that the conflict is more apparent than real, since in some cases the restraint of competition may be a vital term of the contract and in other cases it may not. Without much discussion as to the actual intention of the parties, it has been held that under a contract by which A leased a quarry to B for a compensation based on the amount of stone quarried by B, and A agreed not to compete with B during such term, A's covenant not to compete was a vital term of such contract, and A's breach of such covenant would operate as a discharge thereof.¹⁸ If the purchaser has obtained possession of the business and has received the good will, the seller's breach of his covenant not to compete has been held to be a defense as to that part of the contract price which was given for such covenant not to compete,¹⁹ even though the parties did not apportion the contract price between the amount paid for the business, the amount paid for the good will, and the amount paid for the covenant not to compete.²⁰ In other jurisdictions it has been held that the covenant not to

¹⁴ *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641.

¹⁵ *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

¹⁶ *General Billposting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

¹⁷ *General Bill & Posting Co. v. Atkinson* [1909], A. C. 118 [affirming (1908), 1 Ch. 537]; *Measures Bros. v. Measures* [1910], 2 Ch. 248 [affirming (1910), 1 Ch. 336].

¹⁸ *Dishman v. Huetter*, 41 Wash. 626, 84 Pac. 590.

¹⁹ *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

²⁰ *Ferris v. Pett*, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

compete was a minor and subsidiary covenant, the breach of which would give rise to an action for damages but would not discharge the contract.²¹

If time is of the essence,²² a delay as to the time of performance may be so material as to discharge the entire contract at the election of the party who is not in default.²³

If A and B on the one side, and C on the other, have entered into a contract to arbitrate, the act of A in bringing an action in violation of such provision may operate as a discharge of the entire contract, so that C may bring an action against B, notwithstanding such agreement.²⁴ Under a contract for installing an apparatus which requires the use of water from the city mains, a violation of a covenant as to the change of pressure caused by such apparatus is vital if, as a result thereof, the city refuses to allow water to be taken from its mains for use therein.²⁵ Under a contract for the sale of goods, which provides that the seller shall declare the name of the vessel to the buyer, such covenant is vital if such goods are bought for the purpose of resale and if the buyer is unable to resell such goods unless the name of the vessel has been declared.²⁶ If a water company agrees to furnish water to a city and to construct a reservoir, the quality of the water is material; and if such water company furnishes water which is polluted by sewage and does not construct such reservoir, the city may treat such contract as discharged because of the breach of vital terms therein.²⁷ A contract whereby a city leases its waterworks to A, who has to operate it and keep the machinery in order, is discharged if A becomes habitually intoxicated and ruins the machinery. The city may rescind such contract, although it contains no forfeiture clause.²⁸ An agreement whereby a wife relinquishes all her rights in her husband's property, in consideration of her having the care and custody of her minor son, is discharged where her husband in his lifetime took such son from her by stealth, detained him during the husband's life, and sued his wife for a divorce,

²¹ *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 9 L. R. A. (N. S.) 979, 92 S. W. 1104.

²² See §§ 2103 et seq.

²³ *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107; *Seventh St. Planing Mill Co. v. Schaefer* (Ky.), 99 S. W. 341.

²⁴ *Alachua Phosphate Co. v. Anglo-*

Continental Guano Works, 51 Fla. 143, 40 So. 71.

²⁵ *J. W. Reedy Elevator Mfg. Co. v. Peck*, 149 Mich. 657, 113 N. W. 300.

²⁶ *Graves v. Legg*, 9 Exch. 709.

²⁷ *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 54 L. ed. 1193.

²⁸ *Mahon v. Columbus*, 58 Miss. 310, 38 Am. Rep. 327.

praying for the custody of such son. The wife can, therefore, assert her rights in her husband's estate upon his death.²⁹ An electric light company made a contract with the citizens of a city to move their plant there, and to make an invoice with a guaranty that the invoice would show three hundred thousand dollars surplus above liabilities. In consideration of this, the light plant was to receive certain land and a bonus. The bonus was paid, and with it the company erected buildings upon the land, but the invoice was never made. This was held to be such failure of consideration as to entitle the parties who had paid the bonus to recover it.³⁰ A owned a patent for a method of transferring wheat from one car to another and weighing it. He made a contract with a railroad company, whereby he was to erect his scales at a given point and transfer grain for the company, and they were to pay him therefor one half of the saving over the old system. After performance of the contract had begun, A gave information as to the weight of the corn to other parties, to the injury of the railroad. This was held to be sufficient breach to justify the railroad in treating the contract as discharged.³¹ A contract to sell a hotel, furniture and fixtures at a certain appraisement, the party refusing to accept the appraisement to forfeit a certain deposit, is discharged if the vendor prevents the vendee from being present at or taking any part in such appraisement. The vendee may therefore recover the amount deposited.³² A note and mortgage given in consideration of money to B, loaned thereafter, may be canceled upon repayment of the amount actually loaned, where the lender refuses to advance the entire amount agreed upon.³³

§ 2987. Failure of consideration for executed conveyance of realty—General principles. If the vendor has performed a contract for the sale or conveyance of realty by executing and delivering a deed therefor, failure of consideration on the part of the purchaser does not discharge the transaction at law; and it does not give to the grantor a right of action at law to avoid such conveyance.¹ This

²⁹ *Bodwell v. Bodwell*, 60 Vt. 101, 28 Atl. 870.

³⁰ *Ft. Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 14 L. R. A. 804, 30 N. E. 23.

³¹ *Lake Shore, etc., R. R. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773.

³² *Tibbetts v. Sartwell*, 67 N. H. 418, 29 Atl. 411.

³³ *Payne v. Loan & Guaranty Co.*, 54 Minn. 255, 55 N. W. 1128.

¹ Contract for support. *McCardle v. Kennedy*, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001.

result is due chiefly to the fact that the common law had no means of canceling a deed which had once taken effect; and, in the classic period, it had no means by which it could compel the grantee to reconvey to the grantor.

The remedy of rescission and cancellation in equity was sufficient in cases of this sort; and if this remedy could be obtained, the grantor could recover his realty; but whether such relief would be given for breach of a contract to convey realty which had been performed by the vendor and under which a deed had been given to the purchaser, was a question upon which there was some divergence of authority. No rescission would be given in equity for partial failure of consideration,² such as a breach of a covenant on the part of the grantee to make use of the realty in a specified manner,³ or a breach of a covenant on the part of the grantee to guarantee dividends on stock which the grantor had accepted in payment for such realty.⁴ If the consideration is executory and especially if it is in any way apportioned to the subject-matter, equity has granted rescission as to the part of the contract which is executory and as to which there is a failure of consideration.⁵ Under a statutory provision to the effect that rescission may be granted for partial failure of consideration, a grantor may have rescission if the grantee has failed to perform his covenant to sell the realty thus conveyed to him, and to divide the proceeds with the grantor after deducting the amount spent by the grantee in paying off liens.⁶ If a husband and wife have entered into a con-

² Alabama. *Piedmont Land Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, 11 So. 332; *Stacey v. Walter*, 125 Ala. 291, 82 Am. St. Rep. 235, 28 So. 89.

Florida. *Marks v. Baker*, 20 Fla. 920.

Illinois. *Jackson v. Jackson*, 222 Ill. 46, 6 L. R. A. (N.S.) 785, 78 N. E. 19.

Iowa. *Parsons v. Crocker*, 128 Ia. 641, 105 N. W. 162.

Missouri. *Haydon v. St. Louis & Santa Fe Ry.*, 222 Mo. 126, 121 S. W. 15.

Texas. *Stitzle v. Evans*, 74 Tex. 596, 12 S. W. 326; *Chicago, T. & M. C. Ry. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

Washington. *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92.

Wisconsin. *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890.

³ *Piedmont Land Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, 11 So. 332; *Haydon v. St. Louis & Santa Fe Ry.*, 222 Mo. 126, 121 S. W. 15; *Chicago, T. & M. C. Ry. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

⁴ *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890.

⁵ *Coffinberry v. Sun Oil Co.*, 68 O. S. 488, 67 N. E. 1069 (rescission of gas and oil lease for refusal to continue to develop tract).

⁶ *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107.

tract for separation, by the terms of which the husband agrees to support the wife and the wife agrees to convey certain community property, the wife may have rescission of such conveyance if the husband does not perform his covenant to support her.⁷

In case of a total failure of consideration, it was held in some jurisdictions that equity would not grant rescission in ordinary cases.⁸ In cases of this sort, equity could ordinarily enforce a vendor's lien, and it could thus give the parties substantially the benefit of full performance on each side, at least if the realty could be sold for the amount of the purchase price which was due and unpaid. It has been held that if a conveyance is made in consideration of a contract to make a devise, equity will not rescind such conveyance unless specific performance of the contract to devise proves impracticable.⁹ Breach of a contract to establish and operate a manufacturing business upon realty conveyed in consideration of such contract does not entitle the grantor to rescission. His remedy is an action on the contract for damages.¹⁰ If A has conveyed realty to B in consideration of B's agreement to build and operate a foundry, equity will not give rescission because of B's breach in the absence of fraud.¹¹

In some jurisdictions, however, equity grants rescission in case of total failure of consideration.¹² If the grantor has accepted the notes of a married woman as payment for the realty and such notes are void, it is said that he may have rescission of the conveyance.¹³ If the grantor makes conveyance to the grantee in consideration of the promise of the grantee to marry the grantor, and the grantee refuses to perform such contract, it is said that the grantor may have rescission.¹⁴ A conveyance of realty made in consideration of

⁷ Yeager v. Yeager, 82 Wash. 271, 144 Pac. 22.

⁸ Alabama. Gardner v. Knight, 124 Ala. 273, 27 So. 298.

Indiana. Lowry v. Higgins, 5 Ind. 507.

Georgia. Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770.

⁹ Riley v. Allen, 54 N. J. Eq. 495, 35 Atl. 654.

¹⁰ Piedmont Land Improvement Co. v. Piedmont Foundry & Machine Co., 96 Ala. 389, 11 So. 332.

¹¹ Miller v. Sutliff, 241 Ill. 521, 89 N. E. 651.

¹² Kentucky. Thomas v. Sweet, 111 Ky. 467, 63 S. W. 787, 65 S. W. 827.

Michigan. Barker v. Smith, 92 Mich. 336, 52 N. W. 723.

Mississippi. Foxworth v. Bullock, 44 Miss. 457 (obiter, in part).

Texas. Lanier v. Foust, 81 Tex. 186, 16 S. W. 994.

Vermont. Chapman v. Long, 66 Vt. 656, 30 Atl. 3.

West Virginia. Lambert v. Lambert, 66 W. Va. 520, 66 S. E. 689.

¹³ Foxworth v. Bullock, 44 Miss. 457 (obiter, in part).

¹⁴ Lambert v. Lambert, 66 W. Va. 520, 66 S. E. 689.

a reconveyance,¹⁵ or a devise thereof,¹⁶ may be set aside for failure of consideration if such reconveyance or will is so defective as to be invalid. Equity will grant rescission of an oil and gas lease, or of a coal lease, because of the failure of the lessee to perform his covenants with reference to the development of such territory, in cases in which such breach on the part of the lessee will inflict irreparable injury on the lessor for which damages will not give an adequate remedy.¹⁷

§ 2988. Conveyance in consideration of contract to furnish support. A conveyance in consideration of a contract to support the grantor is thought by many courts to differ materially from the ordinary contract for the conveyance of realty, which has already been discussed.¹ The contract for support is one the specific performance of which is impossible. It is also impossible to measure the amount of damages in money so as to do justice to the party who is not in default, in case he survives his expectancy of life. In addition to these considerations, there is a greater opportunity for fraud or undue influence in contracts of this sort than in ordinary transactions; and the courts have recognized this fact, though they have not always expressed it. For these reasons it is held in many jurisdictions that if A conveys to B upon consideration that B will support A, and if B does not furnish such support, A may have rescission of such conveyance.² Rescission

¹⁵ *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3. (The grantee refused to make a new and valid reconveyance.)

¹⁶ *Barker v. Smith*, 92 Mich. 336, 52 N. W. 723.

¹⁷ *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553, 34 L. R. A. (N.S.) 34, 106 Pac. 47; *Coffinberry v. Sun Oil Co.*, 68 O. S. 488, 67 N. E. 1069; *Smith v. Root*, 66 W. Va. 633, 30 L. R. A. (N.S.) 178, 66 S. E. 1005.

See also, *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

¹ See § 2087.

² *Colorado. Martinez v. Martinez*, 57 Colo. 292, 141 Pac. 469.

Illinois. Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267; *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015; *McClelland*

v. McClelland, 176 Ill. 83, 51 N. E. 559; *O'Ferrall v. O'Ferrall*, 276 Ill. 132, 114 N. E. 561.

Indiana. Sherrin v. Flinn, 155 Ind. 422, 58 N. E. 549.

Iowa. Walker v. Walker, 104 Ia. 505, 73 N. W. 1073.

Kentucky. Humbles v. Harris, 151 Ky. 685, 152 S. W. 797.

Michigan. Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613.

Minnesota. Bruer v. Bruer, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

New Mexico. Anderson v. Reed, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502.

Oregon. Houston v. Greiner, 73 Or. 304, 144 Pac. 133.

has been given where the grantee failed to give such support,³ as by making the grantor a public charge,⁴ or where he refuses to furnish it,⁵ and conveys to others the realty conveyed to him in consideration of such promise,⁶ or where on the death of the grantee his heirs refuse to furnish it.⁷ Such a conveyance may be set aside for cruel treatment of grantor,⁸ or harsh treatment,⁹ but not for slight annoyances.¹⁰ The fact that the consideration expressed in the deed is one dollar and love and affection,¹¹ or that the property conveyed was encumbered by a mortgage not mentioned in the deed but known to the grantee,¹² does not prevent such right of rescission. Such contracts are often complicated by questions of mental infirmity of the grantor,¹³ insanity of grantor,¹⁴ or undue influence exerted by the grantee,¹⁵ which makes the right

Virginia. *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

West Virginia. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

Wisconsin. *Bogie v. Bogie*, 41 Wis. 209; *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109; *Reoch v. Reoch*, 98 Wis. 201, 73 N. W. 989; *Glocke v. Glocke*, 113 Wis. 303, 57 L. R. A. 458, 89 N. W. 118; *Young v. Young*, 157 Wis. 424, 147 N. W. 361.

³ **Colorado.** *Martinez v. Martinez*, 57 Colo. 292, 141 Pac. 409.

Illinois. *Kusch v. Kusch*, 143 Ill. 353, 32 N. E. 267; *O'Ferrall v. O'Ferrall*, 276 Ill. 132, 114 N. E. 561.

Indiana. *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549.

Kentucky. *Humbles v. Harris*, 151 Ky. 685, 152 S. W. 797.

Michigan. *Lockwood v. Lockwood*, 124 Mich. 627, 83 N. W. 613.

Minnesota. *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. E. 813.

New Mexico. *Anderson v. Reed*, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502.

Virginia. *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

West Virginia. *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

Wisconsin. *Reoch v. Reoch*, 98 Wis. 201, 73 N. W. 989; *Young v. Young*, 157 Wis. 424, 147 N. W. 361.

⁴ *Potter v. Woodruff*, 92 Mich. 8, 52 N. W. 83.

⁵ *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

⁶ *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

⁷ *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Morgan v. Loomis*, 78 Wis. 594.

⁸ *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296.

⁹ *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

Where the grantor is the grantee's mother. *Patterson v. Patterson*, 81 Ia. 626, 47 N. W. 768.

¹⁰ *Tuit v. Smith*, 137 Pa. St. 35, 20 Atl. 579.

¹¹ *Walker v. Walker*, 104 Ia. 505, 73 N. W. 1073.

¹² *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559.

¹³ *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109.

¹⁴ *Potter v. Woodruff*, 92 Mich. 8, 52 N. W. 83.

¹⁵ *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015.

of rescission still clearer. Equity may on giving rescission make allowance for permanent improvements made by the grantee,¹⁶ making him account for timber cut and removed.¹⁷ Equity may give compensation instead of rescission,¹⁸ making such compensation a lien upon the premises conveyed;¹⁹ and such lien must be superior to the interests of the remaindermen where grantor has conveyed to grantee for life, remainder to grantee's children.²⁰ A conveyance by a husband to a trustee for his wife's support in consideration of separation may be canceled if cohabitation is resumed.²¹

In other jurisdictions it seems to be held that equity will decree rescission only if special facts such as the insolvency of the grantee and his consequent inability to respond in damages are shown,²² or if the grantee was guilty of fraud.²³ In cases of this sort equity is not always bound to grant rescission; and if security for the performance of the contract has been given, as by mortgage, equity may give relief by enforcing such security if such decree can be so framed as to do justice.²⁴ Equity may refuse rescission but give compensation,²⁵ and make it a lien upon the realty.²⁶

§ 2989. Total failure of title—Executory contract to convey realty. If a contract for the sale of realty is executory on both sides, total failure of title is failure of consideration for which the purchaser may avoid the contract.¹ In case of total failure of title,

¹⁶ *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109.

¹⁷ *Morgan v. Loomis*, 78 Wis. 594, 48 N. W. 109.

¹⁸ *Boyden v. McRoberts*, 88 Mich. 134, 50 N. W. 115.

¹⁹ *Fitzpatrick v. Fitzpatrick*, 91 Mich. 394, 51 N. W. 1058.

²⁰ *Boyden v. McRoberts*, 88 Mich. 134, 50 N. W. 115.

²¹ *Smith v. King*, 107 N. Car. 273, 12 S. E. 57.

²² *McCardle v. Kennedy*, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001.

²³ *Wood v. Owen*, 133 Ga. 751, 66 S. E. 951.

²⁴ *Danielson v. Danielson*, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

²⁵ *Powers v. Powers* (Ky.), 39 S. W.

825; *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

²⁶ *Martin v. Martin* (Ky.), 20 S. W. 375; *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

¹ *England*. In re Head, 45 Ch. Div. 310.

United States. *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475.

Arkansas. *Tupy v. Kocourek*, 66 Ark. 433, 51 S. W. 69.

California. *Crim v. Umbesen*, 155 Cal. 607, 132 Am. St. Rep. 137, 103 Pac. 178.

Idaho. *Maydale v. Peterson*, 7 Ida. 502, 63 Pac. 1048; *Boyd v. Boley*, 25 Ida. 584, 139 Pac. 139.

Indiana. *Morris v. Goodwin*, 1 Ind. App. 481, 27 N. E. 985.

the purchaser may refuse to perform on his part;² and he may use such failure of title as a defense to an action upon a promissory note which he has given for such realty, as long as such note is not in the hands of a bona fide holder.³ The purchaser may avoid the contract because of such failure of title, and he may recover the purchase money which he has paid to the vendor in performance of such contract,⁴ on surrendering possession to the vendor if the vendee has taken possession under the contract.⁵ If A has made a payment to B for an option upon property to which B had no title and which B never could convey, A may recover the amount thus paid.⁶ If the vendor renounces the contract the vendee may recover what he has paid in.⁷ If the vendor has withdrawn his deed from escrow, contrary to the terms of the contract, the vendee may resist collection of his note for the property in the vendor's hands.⁸ So if the vendor conveys the realty to another, the vendee may resist the collection of notes given by him for the purchase price if not in the hands of a bona fide holder.⁹ If the vendor refuses to deliver a deed when called upon the vendee may

Iowa. *Todd v. State Bank*, 182 Ia. 276, 3 A. L. R. 971, 165 N. W. 593.

Louisiana. *Talbot v. New Orleans Land Co.*, 143 La. 263, 78 So. 553.

Maine. *Frye Pulpwood Co. v. Ray*, 114 Me. 272, 95 Atl. 1039.

Michigan. *Potter v. Ranlett*, 116 Mich. 454, 74 N. W. 661.

Minnesota. *Williams v. Gilbert*, 120 Minn. 299, 129 N. W. 502.

New York. *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233; *Blanck v. Sadlier*, 153 N. Y. 551, 40 L. R. A. 666, 47 N. E. 920.

Ohio. *Lewis v. White*, 16 O. S. 444.

Oklahoma. *Martin v. Spaulding*, 40 Okla. 191, 137 Pac. 882.

Pennsylvania. *Rugg v. Midland Realty Co.*, 261 Pa. St. 453, 104 Atl. 685.

South Dakota. *Poulson v. Markus*, 34 S. D. 428, 148 N. W. 855.

Utah. *Duncan v. Gisborn*, 17 Utah 209, 53 Pac. 1044.

Washington. *Reese v. Westfield*, 56 Wash. 415, 28 L. R. A. (N.S.) 956, 105 Pac. 837.

² *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475; *Maydale v. Peterson*, 7 Ida. 502, 63 Pac. 1048; *Todd v. State Bank*, 182 Ia. 276, 3 A. L. R. 971, 165 N. W. 593; *Poulson v. Markus*, 34 S. D. 428, 148 N. W. 855.

³ *Todd v. State Bank*, 182 Ia. 276, 3 A. L. R. 971, 165 N. W. 593.

⁴ **Arkansas.** *Tupy v. Kocourek*, 66 Ark. 433, 51 S. W. 69.

Indiana. *Morris v. Goodwin*, 1 Ind. App. 481, 27 N. E. 985.

Maine. *Frye Pulpwood Co. v. Ray*, 114 Me. 272, 95 Atl. 1039.

New York. *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233.

Utah. *Duncan v. Gisborn*, 17 Utah 209, 53 Pac. 1044.

⁵ *Sayre v. Mohnney*, 30 Or. 238, 47 Pac. 197.

⁶ *Frye Pulpwood Co. v. Ray*, 114 Me. 272, 95 Atl. 1039.

⁷ *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10 [reversing, 70 Ill. App. 238].

⁸ *Maydale v. Peterson*, 7 Ida. 502, 63 Pac. 1048.

⁹ *Battery Park Bank v. Loughran*, 126 N. Car. 814, 36 S. E. 281.

rescind and recover the purchase price already paid in by him.¹⁰ A vendee in possession can not have indemnity against incumbrances.¹¹

§ 2990. Partial failure of title—Executory contract to convey realty. The effect of failure of title to a part of the realty which the vendor has agreed to convey to the purchaser, upon the remaining covenants of such contract, depends on the question whether the part to which such title fails was a material part of the contract for which the purchaser stipulated, or whether it was a relatively minor and immaterial part of the contract. If the part of the realty to which title fails is a material part of the subject-matter for which the purchaser has stipulated, the purchaser may, if he wishes, treat such failure of title as a discharge of the entire contract.¹ If, however, the realty to which title has failed was a minor and immaterial part of the entire transaction, the purchaser can not treat the contract as discharged by reason of such failure of title.²

§ 2991. Failure of title—Executed conveyance of realty. Upon the question whether a failure of title to realty which has been conveyed to the promisor is such a failure of consideration as to discharge a promise in consideration thereof, there is a divergence of judicial opinion. Some courts hold that such failure of title is not failure of consideration, and that the grantee must perform the contract on his part, his remedy being an action for damages upon the covenants of the deed,¹ if the deed is one in which covenants

¹⁰ *Zimmerman v. Branyan*, 62 N. J. L. 478, 41 Atl. 689; *Duncan v. Gisborn*, 17 Utah 209, 52 Pac. 1044.

¹¹ *Refeld v. Woodfolk*, 63 U. S. (22 How.) 318, 16 L. ed. 370.

¹ *England*. *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Jacobs v. Revell* [1900], 2 Ch. 858.

United States. *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475.

Alabama. *McDennis v. Finch*, 197 Ala. 76, 72 So. 352.

New Jersey. *Reutler v. Ramsin*, 91 N. J. L. 262, 102 Atl. 351.

Ohio. *Hayes v. Skidmore*, 27 O. S. 331.

Oklahoma. *Groves v. Stouder*, 58 Okla. 744, 161 Pac. 239.

Virginia. *Bailey v. James*, 52 Va. (11 Gratt.) 468, 62 Am. Dec. 659.

² *Towner v. Tickner*, 112 Ill. 217; *Steinbach v. Hill*, 25 Mich. 78; *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601; *Heltzel v. Baird*, 90 Or. 156, 175 Pac. 851.

¹ *Alabama*. *Fields v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530.

Connecticut. *Barkhamstead v. Case*, 5 Conn. 528, 13 Am. Dec. 92.

Florida. *Long v. Allen*, 2 Fla. 403, 50 Am. Dec. 281.

have been inserted. Accordingly, in the absence of special circumstances such as fraud, insolvency or non-residence of the grantor,² equity will not grant rescission.³ On the other hand, rescission may be allowed if the purchaser has been induced to enter into the transaction by the fraud of the vendor,⁴ or if the vendor is insolvent, so that the legal remedy of an action for damages will not in fact furnish adequate relief.⁵ Failure of title can not be interposed as a defense in an action for the purchase price.⁶ If the vendee has been placed in possession of the realty he can not rescind for failure of title and defeat recovery on the purchase money notes,⁷

Georgia. Mathis v. Crowley, 146 Ga. 749, 92 S. E. 213.

Indiana. Laughery v. McLean, 14 Ind. 106.

Iowa. Harrison v. Palo Alto County, 104 Ia. 383, 73 N. W. 872.

Maine. Lloyd v. Jewell, 1 Me. 352, 10 Am. Dec. 73.

New Mexico. Reed v. Rogers, 19 N. M. 177, 141 Pac. 611.

New York. Ryerson v. Willis, 81 N. Y. 277.

Ohio. Taylor v. Browder, 1 O. S. 225 (obiter).

Tennessee. Land Co. v. Hill, 87 Tenn. 589, 5 L. R. A. 45, 11 S. W. 797.

Wisconsin. Reuter v. Lawe, 86 Wis. 106, 56 N. W. 472; Topping v. Parish, 96 Wis. 378, 71 N. W. 367.

² Fields v. Clayton, 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530; Abner v. York (Ky.), 41 S. W. 309; Egan v. Yeaman (Tenn. Ch. App.), 46 S. W. 1012.

Even in case of innocent misrepresentation in some states. Abner v. York (Ky.), 41 S. W. 309.

³ **Alabama.** Murkett v. Munford, 70 Ala. 423; Meeks v. Garner, 93 Ala. 17, 8 So. 378; Parker v. Parker, 93 Ala. 80, 9 So. 426; Fields v. Clayton, 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530.

Georgia. Mathis v. Crowley, 146 Ga. 749, 92 S. E. 213.

Kentucky. Abner v. York (Ky.), 41 S. W. 309.

Massachusetts. Earle v. De Witt, 88 Mass. (6 All.) 520.

New Mexico. Reed v. Rogers, 19 N. M. 177, 141 Pac. 611.

New York. Ryerson v. Willis, 81 N. Y. 277.

Ohio. Taylor v. Browder, 1 O. S. 225 (obiter).

Oregon. Fellows v. Evans, 33 Or. 30, 53 Pac. 491.

Tennessee. Land Co. v. Hill, 87 Tenn. 589, 5 L. R. A. 45, 11 S. W. 797; Stokes v. Acklen (Tenn. Ch. App.), 46 S. W. 316.

Wisconsin. Reuter v. Lawe, 86 Wis. 106, 56 N. W. 472; Topping v. Parish, 96 Wis. 378, 71 N. W. 367.

⁴ Perry v. Boyd, 126 Ala. 162, 85 Am. St. Rep. 17, 28 So. 711; Sherwood v. Salmon, 5 Day (Conn.) 439, 5 Am. Dec. 167; Mills v. Morris, 156 Wis. 38, 145 N. W. 369.

⁵ **Matthews v. Crowder**, 111 Tenn. 737, 69 S. W. 779.

⁶ **United States.** Patton v. Taylor, 48 U. S. (7 How.) 132, 12 L. ed. 637.

Illinois. Lafarge v. Mathews, 68 Ill. 328.

Indiana. Wimberg v. Schwegeman, 97 Ind. 528.

Minnesota. Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499, 56 N. W. 826.

Tennessee. Leird v. Abernathy, 57 Tenn. (10 Heisk.) 626.

Texas. Tarlton v. Daily, 55 Tex. 96.

⁷ **Black v. Walker**, 98 Ga. 31, 26 S. E. 477.

unless there are special facts, such as fraud on the part of the vendor, or insolvency or non-residence. If the purchaser has paid the purchase price of the realty, he can not avoid the transaction and recover the amount thus paid in, because of failure of title.⁸ A breach of covenants of seisin,⁹ or of covenants against encumbrances,¹⁰ is not ground for rescission in equity. Therefore, if the vendor removes the defect in title,¹¹ or if the liens which formed a cloud upon the title are barred by limitations,¹² rescission can not be had. While rescission is ordinarily denied to the purchaser on the ground that his remedy at law upon his covenants is adequate, the same result follows where the purchaser has accepted a deed without covenants. In such case no relief can be given to the purchaser;¹³ and he can not avoid the transaction and recover the purchase price which he has paid.¹⁴ The same result follows where he has required warranties but the covenants of warranty are *ultra vires* because the grantor is a county.¹⁵

In some cases this view is based on the theory that the interest of one in possession is a sufficient consideration,¹⁶ and if the vendee wishes to do more than purchase the vendor's interest he should stipulate therefor. In some jurisdictions it is held that a failure of title is a failure of consideration which discharges the vendee from performance.¹⁷ If the grantor breaks his contract to furnish

⁸ *Harrison v. Palo Alto Co.*, 104 Ia. 383, 73 N. W. 872; *Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797.

⁹ *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764.

¹⁰ *Anderson v. Land Co.*, 96 Va. 257, 31 S. E. 82.

¹¹ *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

¹² *Egan v. Yeaman* (Tenn. Ch. App.), 46 S. W. 1012.

¹³ *United States v. Union Pacific Ry. v. Barnes*, 64 Fed. 80.

Arkansas. St. Francis Levee District v. Cottonwood Lumber Co., 86 Ark. 221, 110 S. W. 805.

Michigan. Thorkildsen v. Carpenter, 120 Mich. 419, 79 N. W. 636.

North Carolina. Woodbury v. Evans, 122 N. Car. 779, 30 S. E. 2.

Wisconsin. Drott v. Stevens, 163 Wis. 571, 158 N. W. 329.

¹⁴ *St. Francis Levee District v. Cottonwood Lumber Co.*, 86 Ark. 221, 110

S. W. 805; *Thorkildsen v. Carpenter*, 120 Mich. 419, 79 N. W. 636; *Drott v. Stevens*, 163 Wis. 571, 158 N. W. 329.

¹⁵ *Harrison v. Palo Alto County*, 104 Ia. 383, 73 N. W. 872.

¹⁶ *Carrier v. Eastis*, 112 Ala. 474, 20 So. 595.

¹⁷ *Connecticut. Cook v. Mix*, 11 Conn. 432.

Illinois. Slack v. McLagan, 15 Ill. 242.

Massachusetts. Rice v. Goddard, 31 Mass. (14 Pick.) 293; *Curtis v. Clark*, 133 Mass. 509.

Minnesota. Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909.

North Dakota. Dahl v. Stakke, 12 N. D. 325, 96 N. D. 353.

At an early period in English law, the fact that the lessee took nothing by the lease seems to have been sufficient defense to an action of debt on the lease. *Prior v. Parson*, Y. B. 2 Ed. II, pl. 82, 17 Selden Society 160.

an abstract showing a complete title, the grantee may tender a reconveyance and defeat an action for the purchase money even if he is in undisturbed possession under a warranty deed.¹⁸ If the purchaser wishes relief on this theory, he can not retain the realty which he has received under the contract, since law has no means of divesting the purchaser of his title and restoring it to the vendor; and even if the title is of no effect as against third persons, it is a legal right as between the grantor and the grantee. For this reason, even in jurisdictions in which the purchaser can avoid the transaction because of failure of consideration, he should tender a reconveyance;¹⁹ and if he does not tender reconveyance he can not recover the purchase money in the action of assumpsit.²⁰

§ 2992. Failure of consideration in sales of personalty. If the chattel which is sold is in the possession of the seller, there is an implied warranty that the seller has title thereto, unless there is some agreement to the contrary. Total failure of title to a chattel which is the subject-matter of the contract, amounts to total failure of consideration.¹ If the buyer has paid for such chattel in advance, either in whole or in part, he may recover the money which he has thus paid to the seller.² If several chattels have been sold by an indivisible contract, it has been held in case of a failure of title to a part of such chattels that a pro rata recovery of the purchase price may be had.³ This seems, however, contrary to the general analogies of the law, since, if the contract is an entire one, the courts have no right to make an apportionment of the consideration for the parties, which the parties have not made for themselves; and, accordingly, unless the chattel, the title to which has failed, is the vital and material part of the contract, failure of title to such chattel is a partial failure of consideration for which compensation can be made in damages and which, accordingly, does not discharge the entire contract.⁴ If the seller delivers goods

¹⁸ *Loring v. Oxford*, 18 Tex. Civ. App. 415, 45 S. W. 395.

¹⁹ *Wilson v. Breyfogle*, 63 Fed. 379, 11 C. C. A. 248.

²⁰ *Wilson v. Breyfogle*, 63 Fed. 379, 11 C. C. A. 248.

¹ *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830; *Shores Lumber Co. v. Claneey*, 102 Wis. 235, 78 N. W. 451.

² *United States. In re Syracuse Gardens Co.*, 231 Fed. 284.

Massachusetts. *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830.

New York. *Ledwich v. McKim*, 53 N. Y. 307.

Pennsylvania. *Wilkinson v. Ferree*, 24 Pa. St. 190.

Rhode Island. *Peckham v. Kiernan*, 13 R. I. 354.

³ *Moorhead v. Davis*, 92 Ind. 303; *Routh v. Caron*, 64 Tex. 289.

⁴ See § 2982.

which are entirely worthless,⁵ or if he does not deliver goods at all,⁶ the contract is discharged. If the buyer has paid for the goods in advance and the seller fails to deliver them, the buyer may recover the purchase price which he has thus paid in.⁷

If the seller delivers only a part of the goods which he has agreed to deliver, the buyer may recover for the deficiency.⁸ If the buyer has given his promissory note for the goods in advance, and he subsequently refuses to accept the goods, it has been held that he may show such breach on his part as a defense to an action on the note.⁹

In an executed contract of sale there is, as a rule, no implied warranty of quality, and in the absence of such warranty the vendee is without remedy for defects in quality.¹⁰ If a contract provides for passing the title to chattels in the future and there is an express or implied warranty as to quality, tender of chattels not possessing the qualities specified is a breach which may operate, at the election of the buyer, as a discharge, discharges the contract.¹¹

⁵ *Hixson v. Cook*, 130 Ark. 401, 197 S. W. 698; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523; *Stone v. Frost*, 61 N. Y. 614.

⁶ *Martin v. Cunningham*, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

⁷ *Martin v. Cunningham*, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

⁸ *Creighton v. Comstock*, 27 O. S. 548.

⁹ *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235.

¹⁰ *United States v. Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. ed 987.

Maryland. Horner v. Parkhurst, 71 Md 110, 17 Atl 1027.

Massachusetts. Mixer v. Coburn, 52 Mass. (11 Met.) 550, 45 Am. Dec. 230; *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

Michigan. McCray Refrigerator Co. v. Woods, 90 Mich. 260, 41 Am. St. Rep. 509, 58 N. W. 320.

North Carolina. Dickson v. Jordan, 33 N. Car. (11 Ired.) L. 166, 53 Am. Dec. 403.

Pennsylvania. Lord v. Grow, 39 Pa. St. 88, 80 Am. Dec. 504.

Wisconsin. Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667, 65 N. W. 513.

¹¹ *United States. Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393; *St. Louis Paper Box Co. v. Hubinger Bros. Co.*, 100 Fed. 595, 40 C. C. A. 577, 227 Fed. 804. *Florida. Southern Colonization Co. v. Derfler*, 73 Fla. 924, 75 So. 790.

Iowa. Roper v. Wells, 192 Ia. 237, 165 N. W. 385; *Fulton Bank v. Mathers*, 183 Ia. 226, 166 N. W. 1050.

Kentucky. Glover Machine Works v. Cooke-Jellico Coal Co., 173 Ky. 675, 191 S. W. 516.

Massachusetts. Clark v. Baker, 46 Mass. (5 Met.) 452; *Hallwood Cash Register Co. v. Lufkin*, 179 Mass. 143, 60 N. E. 473.

Michigan. Ripley v. Case, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1007.

Nebraska. McCormick Harvesting Machine Co. v. Knoll, 57 Neb. 700, 78 N. W. 394; *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689, 146 N. W. 937.

If the title to a chattel has passed, but the chattel does not possess the qualities which it was agreed that it should have, the question arises whether the vendee may avoid the contract and resist payment of the purchase price if the contract is still executory on his part, or whether he may only sue for damages, or whether he has an election between these two remedies. If the buyer knew of the breach of warranty when he received and accepted the goods, it is generally held that he waived such breach as a discharge of the contract.¹² If the buyer does not know of the breach of warranty when he receives and accepts the goods, it is held in some jurisdictions that he may treat the breach of warranty, if material, as a discharge of the contract; and if he has not paid the purchase price, he may avoid liability thereon, while if he has paid the purchase price, he may recover such payment.¹³ To exercise this right the vendee must return what he has received

New Jersey. *Smith v. York Mfg. Co.*, 58 N. J. L. 242, 33 Atl. 244; *Meader v. Cornell*, 58 N. J. L. 375, 33 Atl. 960.

New York. *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203.

Virginia. *Virginia-Carolina Chemical Co. v. Carpenter*, 99 Va. 292, 33 S. E. 143.

Washington. *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

¹² See § 3049.

¹³ **Iowa.** *Toledo Savings Bank v. Rathmann*, 78 Ia. 288, 43 N. W. 193; *Aultman v. Trainer*, 80 Ia. 451, 45 N. W. 757; *McCormick Harvesting Machine Co. v. Brower*, 94 Ia. 144, 62 N. W. 700; *Timken Carriage Co. v. Smith*, 123 Ia. 554, 99 N. W. 183; *American Fruit Product Co. v. Davenport Vinegar & Pickling Works*, 172 Ia. 683, 154 N. W. 1031.

Kansas. *French v. Gordon*, 10 Kan. 370; *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739, 26 Pac. 8.

Maine. *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004.

Massachusetts. *Bryant v. Isburgh*,

79 Mass. (13 Gray) 607, 74 Am. Dec. 655; *Morse v. Brackett*, 98 Mass. 205; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485, 33 N. E. 493.

Missouri. *Compton v. Parsons*, 76 Mo. 455; *Aultman v. Hunter*, 82 Mo. App. 632.

Nebraska. *Puntenney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5, 91 N. W. 863.

North Carolina. *Winn v. Finch*, 171 N. Car. 272, 88 S. E. 332.

Oklahoma. *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

Pennsylvania. *Selig v. Rehfuß*, 195 Pa. St. 200, 45 Atl. 919.

Wisconsin. *Merrill v. Nightingale*, 39 Wis. 247; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154; *Kelsey v. Ringrose Net Co.*, 152 Wis. 499, 140 N. W. 66.

See, *Rescission for Breach of Warranty*, by Francis M. Burdick, 4 Columbia Law Review, 1; *Rescission for Breach of Warranty*, by Samuel Williston, 4 Columbia Law Review, 195; and *Rescission for Breach of Warranty*, by Samuel Williston, 16 Harvard Law Review, 465.

under the contract,¹⁴ or he must offer to return it, although actual tender is not necessary if the adversary party makes it clear that the tender will not be accepted.¹⁵ In other jurisdictions it is held that the receipt and acceptance of the goods prevents the buyer from treating the breach of warranty as a discharge,¹⁶ whether he knew of such breach when he received the goods or not. The latter view has frequently been said to be that which commands the support of the weight of authority; but an examination of the decisions seems to indicate that the authority is rather evenly balanced, with a preponderance of authority, especially among the recent cases, in favor of the theory that if the breach of warranty is material, if the seller did not know of such breach when he received the goods, and if he acts promptly and offers to return the goods to the seller, he may avoid the contract. In jurisdictions in which the Uniform Sales Act is in force, this question is settled by legislation. This act provides that, "Where there is a breach of warranty by the seller the buyer may, at his election * * * (d) rescind the contract to sell, or the sale, and refuse to receive the goods, or, if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid."¹⁷

In jurisdictions in which the Uniform Sales Act has not been adopted and in which the courts of last resort have not passed upon this question, it may well be regarded as an open one. In view of the general attitude of the American courts, it would seem that the theory that breach of warranty could not justify rescission after title once had passed was adopted out of unnecessary defer-

¹⁴ *Dean v. Brown*, — Ala. —, 78 So. 966; *Massillon Engine & Thresher Co. v. Schirmer* (Ia.), 93 N. W. 599; *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 558; *Rosenwater v. Selleseth*, 33 N. D. 254, 156 N. W. 540.

¹⁵ *Lake v. Western Silo Co.*, 177 Ia. 735, 158 N. W. 673.

¹⁶ *England*. *Street v. Blay*, 2 B. & Ad. 456; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447.

United States. *Thornton v. Wynn*, 25 U. S. (12 Wheat.) 183, 6 L. ed. 595; *Lyon v. Bertram*, 61 U. S. (20 How.) 149, 15 L. ed. 847.

Connecticut. *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546.

Indiana. *Hoover v. Sidener*, 98 Ind. 290.

Michigan. *H. H. Williams Transportation Line v. Darius Cole Transportation Co.*, 129 Mich. 209, 56 L. R. A. 930, 88 N. W. 473; *Feist v. Root*, 189 Mich. 595, 155 N. W. 491.

Minnesota. *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5.

New York. *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588.

Tennessee. *Allen v. Anderson*, 22 Tenn. (3 Humph.) 581, 39 Am. Dec. 197.

Vermont. *Hoadley v. House*, 32 Vt. 179, 76 Am. Dec. 167.

¹⁷ § 69, Uniform Sales Act.

For a discussion of the propriety of this provision, see *Rescission for Breach of Warranty*, by Samuel Williston, 16 *Harvard Law Review*, 465.

ence to English authority;¹⁸ and that the result thus reached is not justified by sound reasoning. While the lack of an adequate means of transferring title from the grantee to the grantor may require the courts to compel the grantee of realty to rely upon his covenants,¹⁹ equity has not felt bound in this way in all jurisdictions, even in case of real property;²⁰ and there appears to be no reason which will justify the courts in compelling the buyer to keep an article which lacks the material qualities for which he bargained, and to seek redress in damages, for the sole reason that he permitted the title and the possession to pass to him before he could discover the lack of such qualities, even by the exercise of the utmost diligence.

§ 2993. Failure of consideration in assignment of invention or patent. Whether the invalidity of a patent amounts to failure of consideration is a question on which there is a conflict of authority. The English courts hold that it does not amount to failure of consideration;¹ and some of the American courts have taken the same view thereof for a number of different reasons.² Under a contract between A and B, by which the separate inventions of each of these parties were to be sold together in England by B, and on such sale B was to pay a certain amount to A, it was held that if B sold his own invention and tendered to A a reassignment of A's invention, B was obliged to pay the amount specified in the contract, on the theory that B had intended to take chances as to the possibility of patenting such invention in England where the patent rights were to be sold; and that a comparatively small amount was secured to A by the contract while B took a greater chance of profit and the corresponding risk of loss.³ This result has also been justified on the ground that where there was a formal conveyance of the patent right, the only right of the purchaser was upon the covenants contained in such instrument.⁴ Under a contract by which A assigned a part interest in his invention to B, and B then reassigned such interest to A and agreed that the patent should issue in A's name, in consideration of which A gave a note to B, it was held that B did not guarantee the patentability of such invention and that A's inability to secure a patent on such invention was

¹⁸ *Street v. Blay*, 2 B. & Ad. 456.

¹⁹ See § 2987.

²⁰ See §§ 2987 and 2988.

¹ *Adie v. Clark*, L. R. 3 Ch. Div. 134;
Hall v. Conder, 2 C. B. N. S. 22; *Lawes v. Purser*, 6 El. & Bl. 930.

² *Fowler v. Mallory*, 53 Conn. 420;
Clark v. Smith, 21 Minn. 539; *Cansler*

v. Eaton, 55 N. Car. (2 Jones Eq.) 499.

³ *Fowler v. Mallory*, 53 Conn. 420.

⁴ *Cansler v. Eaton*, 55 N. Car. (2 Jones Eq.) 499. (But in this case, however, there appears to have been no evidence of the existence of a prior patent, although such fact was alleged by the defendant.)

not a defense to an action on the note which A gave to B.⁵ Since the invention was A's invention, and since his assignment of an interest in such invention to B seems to have been for value, A was evidently in no position to set up his inability to obtain a patent, as a defense against B. It appeared, however, that B at once secured a patent on the same invention and that A's application was rejected because a patent had issued to B. Such conduct on B's part was held, however, not to be failure of consideration, apparently on the theory that the court would not inquire into the propriety of the action of the United States government in issuing a patent to B and rejecting A's application.⁶ If the assignee or licensee has paid money voluntarily for a patent right, it has been held that such payment can not be recovered,⁷ on the theory that such payment is voluntary and is made with actual or constructive knowledge of the facts.⁸ Recovery is accordingly denied, even if the holder of the patent is guilty of innocent misrepresentation as to its validity.⁹ In some of the courts of the United States it is held that if the patent which is sold, or under which a license is issued, is a patent which is issued by the United States, the invalidity of such patent amounts to failure of consideration.¹⁰ Even in jurisdictions where this rule is recognized, it is held that the English rule is to be applied if the patent in question is an English patent; and the invalidity of such a patent is held not to amount to failure of consideration.¹¹ Even where the patent is issued by the United States there is held to be no failure of consideration if the instrument by which the patent right is transferred does not purport to be a sale of an existing patent right, but a mere quitclaim of whatever claims or interests the assignor may possess.¹² If the patent or the machine made thereunder is worthless, it is held, in a number of jurisdictions, that such fact amounts to a failure of consideration,¹³ on the theory that there is an implied

⁵ Clark v. Smith, 21 Minn. 539.

⁶ Clark v. Smith, 21 Minn. 539.

⁷ Taylor v. Hare, 1 Bos. & P. (N. R.) 260; Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676.

⁸ Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676.

⁹ Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34, 57 Am. Rep. 301, 3 Atl. 676.

¹⁰ Bliss v. Negus, 8 Mass. 46; Dickinson v. Hall, 31 Mass. (14 Pick.) 217; Bierce v. Stocking, 77 Mass. (11 Gray)

174; Lester v. Palmer, 86 Mass. (4 All.) 145; Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Howe v. Richards, 102 Mass. 64; Jackson v. Allen, 120 Mass. 64; Harlow v. Putnam, 124 Mass. 553.

¹¹ Chemical Electric Light & Power Co. v. Howard, 150 Mass. 495, 2 L. R. A. 168, 148 Mass. 352, 23 N. E. 317, 20 N. E. 92.

¹² Gilmore v. Aiken, 118 Mass. 94.

¹³ Smith v. Hightower, 76 Ga. 629; Snyder v. Kurtz, 61 Ia. 593, 16 N. W. 722; Nettograph Machine Co. v. Brown, 28 Okla. 436, 34 L. R. A. (N.E.) 737, 114 Pac. 1102; Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680.

warranty that such patent right and the machines made thereunder will be reasonably adapted for the purpose for which they are sold.

In other jurisdictions the assignee or purchaser is held to assume the risk of the utility of the patent, as well as its validity, even in cases of this sort; and it is held that no failure of consideration exists.¹⁴

B. ENTIRE AND SEVERABLE CONTRACTS

§ 2994. Entire and severable contracts—Nature and definition.

If a contract is made up of two or more covenants on each side, the effect of a breach of one of such covenants upon the right of the adversary party to treat the whole contract as discharged depends in part on the question whether such covenants in effect make an entire contract, or whether they make a number of distinct contracts; or, in other words, whether the contract is entire or severable.¹

The names, "entire" and "severable," describe the nature of each kind of contract with a degree of accuracy which it is difficult to surpass by more elaborate definitions. It is said that an entire contract is one the covenants of which have not been separated by the parties, and which the court can not separate,² since to do so would be to make for the parties a new contract which they might have made for themselves in the first instance, but which they did not make. An entire contract is also said to be one which is intended to accomplish a single object,³ or one in which the parties intend that each of the covenants shall be connected with every other covenant and related thereto.⁴

¹⁴ *Detrick v. McGlone*, 46 Ind. 291.

¹ On this subject generally see, *The Doctrine of Divisible Contracts*, by Frederic C. Woodward, 39 *American Law Register* (N.S.), 1; *Breach of One Installment of a Divisible Contract*, by Francis H. Bohlen, 39 *American Law Register* (N.S.), 391, 468; *Rescission of Divisible Contracts*, by R. C. McMurtree, 15 *American Law Review*, 623; and *The Rescission of Divisible Contracts*, by Van Buren Denslow, 26 *American Law Review*, 20.

For a discussion of entire and severable contracts, see *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, 118 Pac. 165.

² *Alabama*, *Ollinger & Bruce Dry Dock Co. v. Gibbony*, — Ala. —, 81 So. 18.

Minnesota, *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

Mississippi, *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

Oklahoma, *Dunn v. T. J. Cannon Co.*, 51 Okla. 382, 151 Pac. 1167.

Rhode Island, *Garon v. Credit Foncier Canadien*, 37 R. I. 273, 92 Atl. 561 [rehearing denied, *Garon v. Credit Foncier Canadien*, 92 Atl. 1022].

Wisconsin, *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

³ *International Contracting Co. v. United States*, 47 Ct. Cl. 158.

⁴ *Pacific Timber Co. v. Iowa Windmill & Pump Co.*, 135 Ia. 308, 112 N. W. 771; *Dunn v. T. J. Cannon Co.*, 51 Okla. 382, 151 Pac. 1167.

A severable contract is one the covenants of which have been separated by the parties, and which must accordingly be regarded by the courts as consisting, in legal effect, of two or more separate contracts.⁵

§ 2995. Entire and severable contracts—Importance of distinction—Cases not involving breach. The question of the entire or severable character of a contract arises for several different reasons,¹ and, to some extent, the view which the court takes as to the character of the contract depends in part upon the purpose for which the question is raised.² If one covenant of a contract is illegal, as has been said in another connection,³ the validity of the remaining covenants depends upon the character of the contract as a whole; being valid if the contract is severable,⁴ and unenforceable if the contract is entire.⁵

⁵ *Manistee Navigation Co. v. Louis Sands Salt & Lumber Co.*, 174 Mich. 1, 140 N. W. 505; *Cantwell v. Crawley*, 188 Mo. 44, 86 S. W. 251.

¹ See §§ 2083 et seq.

² See §§ 2083 et seq.

³ See §§ 1020 et seq.

⁴ *England. Pickering v. Infracombe Ry.*, L. R. 3 C. P. 235.

United States. Glucose Sugar Refining Co. v. Marshalltown, 153 Fed. 620; *Choctaw, O. & G. R. Co. v. Bond*, 160 Fed. 403, 87 C. C. A. 355 [affirming, *Choctaw, O. & G. R. Co. v. Bond*, 6 Ind. Terr. 515, 98 S. W. 335]; *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 167 Fed. 496 [reversing, 157 Fed. 620].

Alabama. Sims v. Brewing Co., 132 Ala. 311, 31 So. 35; *Birmingham Railway, Light & Power Co. v. Pratt*, 187 Ala. 511, L. R. A. 1915A, 1208, 65 So. 533.

California. Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; *City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841.

Georgia. Long v. Gresham (Ga.), 96 S. E. 211.

Illinois. Corcoran v. Lehigh and Franklin Coal Co., 138 Ill. 390, 28 N. E. 759 [reversing, 37 Ill. App. 577].

Indiana. Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480.

Iowa. Stewart v. Pierce, 116 Ia. 733, 89 N. W. 234; *Livingston v. Chicago & Northwestern Ry.*, 142 Ia. 404, 120 N. W. 1040; *Fryer v. Harker*, 142 Ia. 708, 121 N. W. 528.

Kentucky. Smith v. Corbin, 135 Ky. 727, 123 S. W. 277; *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522.

Massachusetts. Rand v. Mather, 65 Mass. (11 Cush.) 1, 59 Am. Dec. 131.

Missouri. Koontz v. Hannibal Savings and Insurance Co., 42 Mo. 126, 97 Am. Dec. 325.

Nebraska. Faist v. Dahl, 86 Neb. 609, 126 N. W. 84; *Shevalier v. Doyle*, 88 Neb. 500, 130 N. W. 417.

New Jersey. Erie Ry. Co. v. Union Locomotive & Express Co., 35 N. J. L. 240.

Ohio. McCausland Bros. v. Akers, 24 Ohio C. C. 411.

Oklahoma. Huber v. Culp, 46 Okla. 570, 149 Pac. 216.

Washington. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803.

West Virginia. Davisson v. Smith, 60 W. Va. 413, 55 S. E. 466.

Wyoming. Conradt v. Lepper, 13 Wyo. 473, 81 Pac. 307.

⁵ *England. Featherston v. Hutchin-son, Cro. Eliz.* 199.

The entire or severable character of the contract may determine the question of the application and effect of the Statute of

United States. *United States v. Bradley*, 35 U. S. (10 Pet.) 343, 9 L. ed. 448; *Marshall v. Baltimore & Ohio R. R. Co.*, 57 U. S. (16 How.) 314, 14 L. ed. 953; *Providence Tool Co. v. Norris*, 69 U. S. (2 Wall.) 45, 17 L. ed. 868; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382; *Hazelton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939; *Lingle v. Snyder*, 160 Fed. 627, 87 C. C. A. 529; *Cleveland, C. C. & St. Louis Ry. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *Cooper v. Northern Pacific Ry.*, 212 Fed. 533.

Alabama. *Arnold v. Jones Cotton Co.*, 152 Ala. 501, 12 L. R. A. (N.S.) 150, 44 So. 602.

Arkansas. *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, 36 L. R. A. 174, 38 S. W. 343; *Ensign v. Coffelt*, 102 Ark. 568, 145 S. W. 231; *Bryant Lumber Co. v. Fourche River Lumber Co.*, 124 Ark. 313, 187 S. W. 455.

California. *Santa Clara Valley Mill and Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Humboldt County v. Stern*, 136 Cal. 63, 68 Pac. 324; *Getz Bros. v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.

District of Columbia. *Owens v. Wilkinson*, 20 D. C. App. 51.

Illinois. *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167, 64 N. E. 348.

Indiana. *Mount v. Board of Commissioners*, 168 Ind. 661, 14 L. R. A. (N.S.) 483, 80 N. E. 629; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596, 49 N. E. 864.

Iowa. *Gipps Brewing Co. v. De France*, 91 Ia. 108, 51 Am. St. Rep. 329, 28 L. R. A. 386, 58 N. W. 1087; *Barngrover v. Pettigrew*, 128 Ia. 533, 111 Am. St. Rep. 206, 2 L. R. A. (N.S.) 260, 104 N. W. 904.

Kansas. *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11; *Sedgwick County v. State*, 66 Kan. 634, 72 Pac. 284; *Kansas City Elevated Railway Co. v. Rashel Service*, 77 Kan. 316, 14 L. R. A. (N.S.) 1105, 94 Pac. 262; *Ridgway v. Wetterhold*, 96 Kan. 736, 153 Pac. 490.

Kentucky. *Clemons v. Meadows*, 123 Ky. 178, 6 L. R. A. (N.S.) 847, 94 S. W. 13; *Harston v. Ralston*, 174 Ky. 509, 192 S. W. 646.

Maine. *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592.

Massachusetts. *Holt v. O'Brien*, 81 Mass. (15 Gray) 311; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299.

Michigan. *Snyder v. Willey*, 33 Mich. 483; *Lyon v. Waldo*, 36 Mich. 345; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Case v. Smith*, 107 Mich. 416, 61 Am. St. Rep. 341, 31 L. R. A. 282, 65 N. W. 279; *White Star Line v. Star Line*, 141 Mich. 604, 113 Am. St. Rep. 551, 105 N. W. 135; *Anderson v. Branstrom*, 173 Mich. 157, 43 L. R. A. (N.S.) 422, 139 N. W. 40; *Simmer v. Cutter's Estate*, 194 Mich. 34, 160 N. W. 605.

Minnesota. *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, 4 L. R. A. 406, 42 N. W. 872.

Mississippi. *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 8 L. R. A. (N.S.) 1053, 43 So. 435; *American Mfg. Co. v. Crescent Drug Co.*, 113 Miss. 130, L. R. A. 1917D, 482, 73 So. 883.

Missouri. *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; *Malone v. The Fidelity Casualty Co.*, 71 Mo. App. 1.

Montana. *Glass v. Basin & Bay State Mining Co.*, 31 Mont. 21, 77 Pac. 302; *Hughes v. Mullins*, 36 Mont. 267, 13 Am. & Eng. Ann. Cas. 209, 92 Pac. 758.

Frauds.⁶ Under this statute this question may come up in several different ways:

(a) If the contract is oral, and some of the covenants are within the Statute of Frauds, the remaining covenants are unenforceable if the contract is entire,⁷ but enforceable if the contract is severable.⁸

(b) Under the section of the statute which concerns the sale of personal property, the question whether the contract is entire or not is important where the different articles sold are each below the price fixed by the statute for its operation, but the aggregate price exceeds such limit. In this case, if the contract is severable, it can be proved orally,⁹ but if entire, the Statute of Frauds applies, and the contract can not be proved unless that section has been complied with.¹⁰

(c) If personal property is delivered in part, as provided for by the seventeenth section of the Statute of Frauds, the whole contract is enforceable, if entire;¹¹ while if severable, only that part

Nebraska. Padget v. O'Connor, 71 Neb. 314, 98 N. W. 870; Graham v. Hiesel, 73 Neb. 433, 102 N. W. 1010.

New Hampshire. Bixby v. Moor, 51 N. H. 402; Hill v. Hill, 74 N. H. 288, 12 L. R. A. (N.S.) 848, 67 Atl. 406.

New York. Foley v. Speir, 100 N. Y. 552, 3 N. E. 477; Hart v. City Theatres Co., 215 N. Y. 322, 109 N. E. 497.

Ohio. Crawford v. Wick, 18 O. S. 190, 98 Am. Dec. 103; Wideo v. Webb, 20 O. S. 431, 5 Am. Rep. 664; Davy v. Fidelity & Casualty Ins. Co., 78 O. S. 256, 17 L. R. A. (N.S.) 443, 85 N. E. 504.

Oklahoma. Citizens' National Bank v. Mitchell, 24 Okla. 488, 103 Pac. 720; Davis v. Janeway, 55 Okla. 725, L. R. A. 1916D, 722, 155 Pac. 241; Stewart v. Rawleigh Medical Co., 58 Okla. 344, L. R. A. 1917A, 1276, 159 Pac. 1187.

Pennsylvania. Vandegrift v. Vandegrift, 226 Pa. St. 254, 75 Atl. 365; Shields v. Latrobe-McConnellsville Coal & Coke Co., 239 Pa. St. 233, 45 L. R. A. (N.S.) 38, 86 Atl. 784; Kuhn v. Buhl, 251 Pa. St. 348, 96 Atl. 977.

Tennessee. Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 38 L. R. A. (N. S.) 842, 138 S. W. 954.

Texas. Gulf, C. & S. F. R. R. Co. v. Hume, 87 Tex. 211, 27 S. W. 110; Segal v. McCall Co., 108 Tex. 55, 184 S. W. 188; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170, 40 S. W. 837; McNeese v. Carver, 40 Tex. Civ. App. 129, 89 S. W. 430.

Vermont. Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

Washington. Tomkins v. Seattle Construction & Dry Dock Co., 96 Wash. 511, 165 Pac. 384.

West Virginia. Charleston Gas Co. v. Kanawha Gas Co., 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876.

⁶ See § 1425.

⁷ In re Kessler's Estate, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129.

⁸ Lowman v. Sheets, 124 Ind. 416, 7 L. R. A. 784, 24 N. E. 351.

⁹ Johnson v. Buchanan, 29 N. S. 27.

¹⁰ Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48. See § 1425.

¹¹ United States. Garfield v. Paris, 96 U. S. 557, 24 L. ed. 821.

Iowa. Kaufman Bros. v. Farley Mfg. Co., 78 Ia. 679, 16 Am. St. Rep. 462, 43 N. W. 612.

Maine. Weeks v. Orie, 94 Me. 458, 80 Am. St. Rep. 410, 48 Atl. 107.

of it under which such delivery is made is enforceable.¹² If one of the covenants has been performed in full, such performance may amount to technical part performance, or it may prevent the application of the Statute of Frauds on some other theory.¹³ If the contract is entire, such performance of one covenant may render the entire contract enforceable;¹⁴ while if the contract is severable, such performance may affect only the covenant which has thus been performed on the one side, leaving the remaining covenants of the contract subject to the application of the Statute of Frauds.¹⁵

§ 2996. Entire and severable contracts—Importance of distinction—Cases involving breach. If a contract which is made up of two or more covenants on each side has been broken as to one of such covenants only, the question of the effect of such breach upon the remaining covenants of such contract may turn in part on the question of the entire or severable character of the contract. Subject to the controlling principles, such as the relation of the covenants between themselves,¹ and the relation of the covenant which has been broken to the contract taken as a whole,² it may be said that no recovery can be had upon the covenants of an entire contract by a party who has broken a vital precedent or concurrent covenant.³ A, the owner of timber, agreed to cut and haul it to

Massachusetts. French v. Boston National Bank, 179 Mass. 404, 60 N. E. 703.

Michigan. Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. 259.

Missouri. Earl Fruit Co. v. McKinney, 65 Mo. App. 220.

Nebraska. Farmer v. Gray, 16 Neb. 401, 20 N. W. 276.

¹² **Iowa.** Hess v. Dicks, 181 Ia. 342, 104 N. W. 639.

Maine. Weeks v. Crie, 94 Me. 458, 80 Am. St. Rep. 410, 48 Atl. 107.

Michigan. McCormick Harvesting Machine Co. v. Cusack, 116 Mich. 647, 74 N. W. 1005; Brown v. Snider, 126 Mich. 198, 85 N. W. 570.

Minnesota. Hershey Lumber Co. v. St. Paul Sash, Door & Lumber Co., 66 Minn. 449, 69 N. W. 215.

New York. Tompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502.

¹³ **Cochran v. Ward**, 5 Ind. App. 89, 97, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; **Graves v. Goldthwait**, 153 Mass. 268, 10 L. R. A. 763, 26 N. E. 860; **Myers v. Croswell**, 45 O. S. 543, 15 N. E. 866; **Webster-Tapper Co. v. Eastern Hay Co.**, 39 R. I. 482, 98 Atl. 50.

¹⁴ **Miller v. Ball**, 64 N. Y. 286; **Smith v. Underdunk**, 1 Sandf. Ch. (N. Y.) 579.

¹⁵ **Cochran v. Ward**, 5 Ind. App. 89, 97, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; **Graves v. Goldthwait**, 153 Mass. 268, 10 L. R. A. 763, 26 N. E. 860; **Myers v. Croswell**, 45 O. S. 543, 15 N. E. 866; **Webster-Tapper Co. v. Eastern Hay Co.**, 39 R. I. 482, 98 Atl. 50.

¹ See §§ 2041 et seq.

² See §§ 2077 et seq.

³ **California.** **Sterling v. Gregory**, 149 Cal. 117, 85 Pac. 305.

B's mill and there to make it into lumber, and pile it in B's yard. B was by the contract then to pay six dollars a thousand feet therefor. This was so far entire that A could recover nothing for cutting and hauling, where the logs were burned before they were made into timber.⁴

If, on the other hand, the contract is severable, it is in legal effect a number of distinct contracts; and a breach of one covenant does not operate as a discharge of other covenants between the same parties.⁵ In some cases the severable contract seems to be identified with the independent covenant.⁶

If two parties enter into two contracts at the same time, by one of which A sells a certain mine to B, in consideration of a certain portion of the net proceeds, and by the other of which B agrees to hire A as superintendent of a mine for a certain period of time, a breach by the employer, of the contract of employment, does not amount to a breach of the contract concerning payment of the net proceeds.⁷ If two parties enter into contracts, by one of which A

Georgia. Spalding County v. Chamberlin, 130 Ga. 649, 61 S. E. 533.

Michigan. Mailhot v. Turner, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804.

Minnesota. Benson v. Larson, 95 Minn. 438, 111 Am. St. Rep. 479, 104 N. W. 307.

North Carolina. Coggins v. Aetna Ins. Co., 144 N. Car. 7, 119 Am. St. Rep. 924, 8 L. R. A. (N.S.) 839, 56 S. E. 506 (breach of condition).

Ohio. Tiernan v. Beam, 2 Ohio. 383; Petersburg Fire, Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. Hart-Parr Co. v. Duncan, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

Pennsylvania. Martin v. Fridenberg, 169 Pa. St. 447, 32 Atl. 420; Easton v. Jones, 193 Pa. St. 147, 44 Atl. 264.

Wisconsin. McDonald v. Bryant, 73 Wis. 20, 40 N. W. 665; Widman v. Gay, 104 Wis. 277, 80 N. W. 450.

⁴ McDonald v. Bryant, 73 Wis. 20, 40 N. W. 665.

⁵ Arkansas. Less v. English, 75 Ark. 288, 87 S. W. 447.

California. Katz v. Bedford, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

Massachusetts. Mark v. Stuart-Howland Co., 226 Mass. 35, 2 A. L. R. 678, 115 N. E. 42.

Michigan. Gates v. Detroit & Mackinac Ry. Co., 147 Mich. 523, 111 N. W. 101.

Minnesota. McGrath v. Cannon, 55 Minn. 457, 57 N. W. 150.

Nebraska. Burwell & Ord Irrigation & Power Co. v. Wilson, 57 Neb. 396, 77 N. W. 762.

Nevada. Hutchens v. Sutherland, 22 Nev. 363, 40 Pac. 409.

New York. Ming v. Corbin, 142 N. Y. 334, 37 N. E. 105.

Oregon. Pacific Mill Co. v. Inman, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

Virginia. Solenberger v. Gilbert, 86 Va. 778, 11 S. E. 789.

West Virginia. Dillon v. Suburban Land Co., 73 W. Va. 363, 80 S. E. 471.

⁶ Pacific Mill Co. v. Inman, 46 Or. 352, 114 Am. St. Rep. 873, 80 Pac. 424.

⁷ Hutchens v. Sutherland, 22 Nev. 363, 40 Pac. 409.

and B agree to form a stock company to manufacture machines, and by the other of which A guarantees that the machines manufactured can be placed on the market at a certain price, and the contracts are severable contracts, a breach of the contract of guarantee is not a breach of the contract for the organization of the corporation so as to justify abandonment thereof by the other party.⁸ The party not in default may treat default as discharging one branch of a severable contract without seeking to avoid it all. Under an agreement to use "say ten thousand dollars" of certain negotiable paper, the discounting of three notes amounting to more than eleven thousand dollars constitutes severable contracts. Accordingly, the party who is to discount the notes is discharged as to one of the notes to be discounted if the maker is insolvent; and he may avoid such contract, recovering what he has paid thereunder.⁹

§ 2997. General principles of construction applicable. As in other questions of construction,¹ the intention of the parties as to the entire or severable character of the contract must be determined by construing the contract as a whole;² the surrounding circumstances are to be considered;³ and if the contract is ambiguous, the practical construction which the parties have themselves placed upon it is of great weight.⁴

In determining whether a contract is entire or severable, the intention of the parties is paramount,⁵ and, if this intention is

⁸ *Macklem v. Fales*, 130 Mich. 66, 89 N. W. 581.

⁹ *Bank v. Union Trust Co.*, 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029.

See also, *Less v. English*, 75 Ark. 288, 87 S. W. 447.

¹ See § 2038.

² *Baily v. DeCrespigny*, L. R. 4 Q. B. 180; *International Contracting Co. v. United States*, 47 Ct. Cl. 158; *Gilmore v. Samuels*, 135 Ky. 706, 21 Am. & Eng. Ann. Cas. 611, 123 S. W. 271; *Ganong v. Brown*, 88 Miss. 53, 114 Am. St. Rep. 731, 40 So. 556.

³ *Crawford v. Surety Investment Co.*, 91 Kan. 748, 139 Pac. 481.

⁴ *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101; *Manistee Navigation Co. v. Louis Sands Salt & Lumber Co.*, 174 Mich. 1, 140 N. W. 565; *Powell v. Russell*, 88 Miss. 549, 41 So. 5.

⁵ *United States. Pollak v. Electric Association*, 128 U. S. 446, 32 L. ed. 474; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822.

Alabama. Lambie v. Steel Co., 118 Ala. 427, 24 So. 108.

Arkansas. Carr v. Hahn, 133 Ark. 401, 202 S. W. 685.

California. Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305; *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55.

Georgia. Willett Seed Co. v. Kirby-Gundestrup Seed Co., 145 Ga. 559, 89 S. E. 486.

Illinois. Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 59 Am. St. Rep. 272, 47 N. E. 384.

Iowa. Quarton v. American Law Book Co., 143 Ia. 517, 32 L. R. A. (N.S.)

clearly expressed, no question can arise as to which class of contract it is. This intention is, however, often not clearly expressed, as the parties have generally no clear idea whether the contract is entire or severable, and no definite idea of the legal consequences which would follow from its being in either class. The intention of the parties must therefore be deduced from the language used by the application of the ordinary rules of construction.⁶ The rules which are discussed hereafter are not rigid rules of law, but merely guides in aiding the courts to ascertain the intention of the parties.⁷

§ 2998. Construction as affected by purpose for which distinction is made. The rules of construction are applied differently, however, in the different classes of cases in which the question whether the contract is entire or severable may arise. If this question arises in connection with the illegality of one covenant, the general principle applies that the courts will uphold a contract if, by fair construction, it is possible to do so, rather than overthrow

1, 121 N. W. 1009; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

Kansas. *Crawford v. Surety Investment Co.*, 91 Kan. 748, 139 Pac. 481.

Louisiana. *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

Maine. *American Mercantile Exchange v. Blunt*, 102 Me. 128, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Massachusetts. *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306.

Mississippi. *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

Ohio. *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 238.

Oregon. *Hodson-Feenaughty Co. v. Coast Culvert & Flume Co.*, 91 Or. 630, 178 Pac. 382.

Pennsylvania. *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560; *Pro-*

ducers' Coke Co. v. Hillman, 243 Pa. St. 313, 90 Atl. 144.

Tennessee. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, 47 S. W. 498.

Vermont. *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

Washington. *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056.

⁶ *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

"The question whether a contract is entire or divisible, in respect of the question of payment of the consideration, can not be solved by the application of any fixed legal standard. It depends upon the intention of the parties to be gathered from all circumstances surrounding the agreement and from the face of the contract if in writing. It is quite as much, as a rule, a question of fact as of law, particularly where the terms of the agreement rest in parol." *State v. Davis*, 53 N. J. L. 144, 147, 20 Atl. 1080.

See ch. LXIII.

⁷ See §§ 2998 et seq.

it.¹ Accordingly, the test chiefly relied upon in such cases is whether the parties have apportioned the consideration on the one side to the different covenants on the other, one of which covenants is illegal.² If the consideration is apportioned so that for each covenant there is a corresponding consideration, the contract is severable, and the illegality of one covenant does not make the rest unenforceable.³ If, on the other hand, the consideration is not apportioned, and the same consideration supports a legal and illegal covenant, the contract is entire, and is already unenforceable.⁴ If the question arises in connection with the Statute of Frauds, the danger of perjury, especially in contracts for the sale of goods, is just as great in cases in which the parties have apportioned the consideration among the respective articles by fixing the price of each, as it is in cases in which the parties have fixed a gross amount for the entire quantity of goods to be delivered. For this reason the courts seem to regard the contract as *prima facie* entire if entered into between the same parties at the same time;⁵ and comparatively little attention is paid to the test of apportionment of consideration, which seems to be the controlling test in cases of illegality. If the question is one of performance, the courts approach the problem of construction without any prepossession in favor of the entire contract or the severable contract.⁶

§ 2999. Inference arising from use of one or more instruments.

If the covenants are contained in different instruments, the courts incline to treat them as severable.¹ Whether the contract in question is found in one instrument, or in two or more different instruments, is not conclusive as to whether it is entire or severable. On the one hand, the contract found in one instrument may contain two or more severable covenants.² On the other hand, an entire

¹ See § 2050.

² See §§ 1030 et seq.

³ See § 1030.

⁴ See §§ 1031 et seq.

⁵ See § 1425.

⁶ See §§ 2990 et seq.

¹ *United States. Pittsburg, Cincinnati & St. Louis Ry. v. Keokuk & Hamilton Bridge Co.*, 155 U. S. 156, 39 L. ed. 106.

Illinois. Howell v. Moores, 127 Ill. 67, 19 N. E. 863.

Michigan. Hemenway v. Burnham, 90 Mich. 227, 51 N. W. 276.

New York. Kirtz v. Peck, 113 N. Y. 222, 21 N. E. 130.

Pennsylvania. Hennershotz v. Gallagher, 124 Pa. St. 1, 16 Atl. 518.

In most cases of this sort the question whether such covenants are dependent or independent is also presented. The courts prefer to regard such covenants as independent.

² *Edgerton v. Power*, 18 Mont. 350, 45 Pac. 204; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 238.

See § 2086.

contract may be made up of two or more instruments.³ The question to be determined in each case is whether the language of the contract, when read in connection with the surrounding circumstances and the nature of the subject-matter, shows that the parties intended to separate the covenants in the different instruments into different contracts, or whether they intended to combine them into one contract.⁴ A contract by which A agrees to sell to B a number of different tracts of land for an entire sum, is an entire contract, although one bond was given for the performance of such contract as to the land to which A had the legal title, and another bond for the performance of the contract as to the land which A was purchasing from the government.⁵ Accordingly, the purchaser can not enforce specific performance as to the land the legal title to which was in the vendor, without offering to perform the entire contract.⁶ If a tractor engine and plows are bought at the same time with the understanding on the part of both buyer and seller that they are to be used together, the contract is entire, although separate orders and separate notes are given for each because of the fact that the engine is sent from one of the seller's branch agencies and the plows are sent from another.⁷ The fact that the tractor does not perform the work satisfactorily entitles the buyer to avoid the entire contract.⁸ A note and a separate contemporaneous instrument, giving to the maker of the note the right to surrender one hundred shares of certain stock within four months and discharge the note, make together an entire contract.⁹ Two instruments, one of which provides for the sale of a place of business and stock of goods, and the other of which provides that the vendor will not compete in business for a certain period, constitute together an entire contract.¹⁰

³ Louisiana. *Meyer v. Laban*, 51 La. Ann. 1726, 26 So. 463.

Maine. *American Gas & Ventilating Machine Co. v. Wood*, 90 Me. 516, 43 L. R. A. 449, 38 Atl. 548.

Michigan. *Co-operative Telephone Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

Ohio. *Tiernan v. Beam*, 2 Ohio 383.

Oklahoma. *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

Vermont. *Spriggs v. Rutland Ry.*, 77 Vt. 347, 60 Atl. 143.

⁴ See §§ 2086 et seq. and 3000.

⁵ *Tiernan v. Beam*, 2 Ohio 383.

⁶ *Tiernan v. Beam*, 2 Ohio 383.

⁷ *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

⁸ *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

⁹ *American Gas & Ventilating Machine Co. v. Wood*, 90 Me. 516, 43 L. R. A. 449, 38 Atl. 548.

¹⁰ *Meyer v. Labau*, 51 La. Ann. 1726, 26 So. 463.

Separate instruments executed at the same time, but containing no reference each to the other, and supported by separate considerations, are separate and not entire contracts.¹¹ Four contracts, each providing for the sale of a distinct section of land, entered into at the same time, but containing no reference each to the other, constitute separate contracts.¹² A non-negotiable note, and a contract whereby the payee binds himself to his assignee for the payment thereof, are separate contracts.¹³

If one contract is the consideration of the other, the two are entire.¹⁴ If A agrees to buy fruit from one grove which belongs to B in consideration of a contract for handling fruit from another grove, the contracts are entire and the breach of the second contract may be treated by the adversary party as a discharge of the first contract.¹⁵

§ 3000. Construction as affected by nature of subject-matter. In determining whether a contract is entire or severable, the question is whether or not the parties intended to separate the different covenants into distinct contracts; and not whether the subject-matter is one which the parties could in fact have severed if they had wished to do so.¹ Accordingly, performance of part of such contract gives no right of action upon the contract to the party so performing unless he has substantially performed the entire con-

¹¹ *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892; *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

¹² *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892.

¹³ *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

¹⁴ *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

¹⁵ *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

¹ *United States. International Contracting Co. v. United States*, 47 Ct. Cl. 158.

Georgia. Willett Seed Co. v. Kirkeby-Gundestrup Seed Co., 145 Ga. 559, 89 S. E. 486.

Illinois. Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837.

Iowa. Bamberger Bros. v. Burrows, 145 Ia. 441, 124 N. W. 333.

Louisiana. Stockstill v. Byrd, 132 La. 404, 61 So. 446.

Ohio. Stein v. Steamboat Prairie Rose, 17 O. S. 472.

West Virginia. Jameson v. Board of Education, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. Prautsch v. Rasmussen, 133 Wis. 181, 113 N. W. 416.

"The entirety of a contract depends on the intention of the parties and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention but will not overcome the intent to make an entire contract when that is shown." *Shinn v. Bodine*, 60 Pa. 182, 185, 100 Am. Dec. 560; quoted in *Easton v. Jones*, 193 Pa. St. 147, 149, 44 Atl. 264.

tract,² in jurisdictions in which no quasi-contractual right arises in favor of the party in default.³ If realty which includes a homestead is leased, and as part of such contract an agreement is made for the sale of personal property which is upon such premises, the contract is entire; and if the lease is invalid as to the homestead, the entire contract may be avoided.⁴ A contract to sell eight hundred thousand feet of lumber at seven dollars and twenty-five cents per thousand,⁵ or a certain quantity of crushed stone at a certain price per cubic yard,⁶ or to remove all the dirt upon certain lots described, above a certain grade, being two thousand yards more or or less, at six cents a cubic foot,⁷ or to construct a heating plant, the materials and labor necessary for which were each separately valued by the parties,⁸ or to remove several buildings,⁹ are each entire contracts, although it is possible to sever the subject-matter. A contract for hiring a barge at a certain amount per day and fixing no specific time for the return of the barge, is an entire contract, so that one action can be brought for the breach thereof.¹⁰

A contract of employment for a certain length of time at a compensation payable at certain intervals, is an entire contract within the application of these rules.¹¹ A contract to work until a certain "crop should be gathered" is an entire contract.¹² Accordingly, an employe who breaks such contract can not recover anything on the contract for services already rendered thereunder.¹³ Equity

² Illinois. *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837.

Montana. *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 27 Mont. 44, 69 Pac. 241.

Pennsylvania. *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560; *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264.

Wisconsin. *Green v. Hanson*, 89 Wis. 597, 62 N. W. 408; *Widman v. Gay*, 104 Wis. 277, 80 N. W. 450.

³ See ch. LXXXVIII.

⁴ *Mailhot v. Turner*, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804.

⁵ *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264.

⁶ *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416.

⁷ *Widman v. Gay*, 104 Wis. 277, 80 N. W. 450.

⁸ *Riddell v. Ventilating Co.*, 27 Mont. 44, 69 Pac. 241.

⁹ *Green v. Hanson*, 89 Wis. 597, 62 N. W. 408.

¹⁰ *Stein v. Steamboat Prairie Rose*, 17 O. S. 472.

¹¹ **California.** *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337.

New York. *Reab v. Moor*, 19 Johns. (N. Y.) 337.

Ohio. *Larken v. Buck*, 11 O. S. 561.

Texas. *Galveston County v. Ducie*, 91 Tex. 665, 45 S. W. 798.

West Virginia. *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. *Kopplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

¹² *Timberlake v. Thayer*, 71 Miss. 279, 24 L. R. A. 231, 14 So. 446.

¹³ *Timberlake v. Thayer*, 71 Miss. 279, 24 L. R. A. 231, 14 So. 446.

will not give him relief.¹⁶ A contract to work as a gardener for one year at fifty-five dollars a month, from March to November, and fifty dollars a month from then to March first, is an entire contract, and if it is renewed from year to year the employer can not during the year discharge the employe even on notice of a month or more.¹⁸

Under an entire contract for the sale of a specified quantity of goods, the vendee is not obliged to accept less than the quantity contracted for.¹⁶ A contract for the sale of a certain quantity of goods is so far entire that it is generally held that the buyer can not accept a part of the goods and reject the rest.¹⁷ A contract to sell the materials necessary for a specific piece of work is entire,¹⁸ at least so far entire that the purchaser can not be compelled to pay for different instalments as delivered.¹⁹ If A subscribes for stock in a co-operative telephone company, as a part of the transaction by which he leases a telephone, the contract is entire.²⁰

§ 3001. Effect of inconsistent provisions. The greatest difficulty in determining the intention of the parties is found in cases in which certain provisions of the contract, such as the subject-matter and the like, tend to show that the contract is of one character, while other provisions, such as the apportionment or non-apportionment of the consideration, tend to show that it is of the other character. If a number of different articles are sold which can be used only in connection with one another, this fact is generally held to show that the parties intend an entire contract;¹ and this

¹⁶ *Mallory v. Mackaye*, 92 Fed. 749, 34 C. C. A. 653.

¹⁸ *Larkin v. Hecksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703.

¹⁶ *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485; *Equitable Mfg. Co. v. Engelke*, 68 N. J. L. 567 [sub nomine, *Price v. Engelke*, 53 Atl. 698].

¹⁷ *Perry v. Ayers*, 159 Cal. 414, 114 Pac. 46; *Pacific Timber Co. v. Iowa Windmill & Pump Co.*, 135 Ia. 308, 112 N. W. 771; *Simonoff v. Parsons*, 52 Okla. 600, 153 Pac. 152; *Manss-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907.

Contra, *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

¹⁸ *Laclede Construction Co. v. Tudor Iron Works*, 169 Mo. 137, 69 S. W. 384; *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417; *Seibert v. Dunn*, 216 N. Y. 237, 110 N. E. 447.

¹⁹ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

²⁰ *Co-operative Telephone Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

¹ *Boyd v. Second Hand Supply Co.*, 14 Ariz. 36, 123 Pac. 619; *Robinson v. Berkley*, 111 Ia. 550, 82 N. W. 972; *Nichols & Shepard Co. v. Charlebois*, 10 N. D. 446, 88 N. W. 80; *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

inference, which arises from the nature of the subject-matter, is strong enough to overcome the inference of severable contracts, which arises from an apportionment of the consideration;² and contracts of this sort are held to be entire even though the consideration may be apportioned between the different articles.³ The other provisions of the contract, however, such as the fact that the different articles are sold under separate warranties, or that express provision is made for replacing certain of the articles in case they prove defective, may show that the parties intended severable contracts.⁴

§ 3002. Apportionment of consideration—Contract presumed to be severable. While the question of the apportionment of the consideration has not the importance in determining the entire or severable character of contracts for the purpose of performance that it has in determining such character with reference to illegality,¹ the fact that the consideration is apportioned by the parties among the different covenants is generally sufficient to show, in the absence of other provisions in the contract indicating a contrary intention, that the different covenants form severable contracts.² A contract by which A agrees to acquire interests for B in

² See § 3003.

³ *Inman Manufacturing Co. v. American Cereal Co.*, 124 Ia. 737, 100 N. W. 860; *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

⁴ See § 3005.

¹ See §§ 1030 et seq. and 2088.

² *Arkansas. Less v. English*, 75 Ark. 288, 87 S. W. 447.

Illinois. Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248.

Indiana. Weil v. Stone, 33 Ind. App. 112, 104 Am. St. Rep. 243, 69 N. E. 698.

Iowa. McDaniels v. Whitney, 38 Ia. 60; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

Massachusetts. Hill v. Rewee, 52 Mass. (11 Met.) 268; *Edward Thompson Co. v. Washburn*, 191 Mass. 6, 77 N. E. 483; *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306; *Mark v.*

Stuart-Howland Co., 220 Mass. 35, 2 A. L. R. 678, 115 N. E. 42.

Missouri. Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251.

Montana. Mattison v. Connerly, 46 Mont. 103, 126 Pac. 851.

Nebraska. Burwell & Ord Irrigation & Power Co. v. Wilson, 57 Neb. 396, 77 N. W. 762.

New York. Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349.

Ohio. Loomis v. Eagle Bank, 10 O. S. 327.

Pennsylvania. McLaughlin v. Hess, 164 Pa. St. 570, 30 Atl. 491.

Vermont. Scofield v. Grow, 63 Vt. 283, 22 Atl. 457.

Washington. Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056.

West Virginia. Dillon v. Suburban Land Co., 73 W. Va. 363, 80 S. E. 471; *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

two or more different tracts of land, for which B is to furnish the money, is regarded as a severable contract.³ A contract for the loan of a certain sum of money, to be evidenced by a number of notes, is so far severable that the borrower, who has received a part of the loan, can not retain the amount loaned to him and refuse to pay the notes up to such amount because of the failure of the lender to advance the entire sum.⁴ Under an oil and gas lease in consideration of one dollar, and the covenants on the part of the lessee to complete a well in a certain period of time, it is held that the amount of one dollar is the consideration for granting such period to the lessee in which to complete the well, and that the other covenants form the sole consideration for the lease.⁵ Accordingly, the failure of the lessee to complete such well is held to terminate his rights under the lease.⁶ A contract to erect a certain number of houses, at a fixed price for each house, contains severable covenants.⁷ However, a contract to do certain work on four houses at a lump sum, specifying, however, the price estimated for each separate house, has been held to be an entire contract, and a recovery for breach thereof is a bar to subsequent actions thereon.⁸ A contract by which one of the parties agrees to fill orders which the other may send in from time to time, is severable as to each separate order.⁹ A contract to sell a number of articles at a price fixed for each is usually a severable contract.¹⁰ A contract for the sale of an entire set of books, to be paid for in instalments, is so far severable that the price due for each instalment may be recovered before the entire set is delivered, and the seller is not restricted to his action to recover damages for breach

³ *Cantwell v. Crawley*, 188 Mo. 44, 86 S. W. 251.

⁴ *Less v. English*, 75 Ark. 288, 87 S. W. 447.

⁵ *Brown v. Wilson*, 58 Okla. 392, L. R. A. 1917B, 1184, 160 Pac. 94.

⁶ *Brown v. Wilson*, 58 Okla. 392, L. R. A. 1917B, 1184, 160 Pac. 94.

⁷ *Barnard v. McLeod*, 114 Mich. 73, 72 N. W. 24.

⁸ *Broxton v. Nelson*, 103 Ga. 327, 68 Am. St. Rep. 97, 30 S. E. 38.

⁹ *Badger v. Titcomb*, 32 Mass. (15 Pick.) 409, 26 Am. Dec. 611; *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555; *Knight v. New England Worsted Co.*, 56 Mass. (2 Cush.) 271; *Young &*

Conant Mfg. Co. v. Wakefield, 121 Mass. 91; *Raphael v. Reinstein*, 154 Mass. 178, 28 N. E. 141; *West End Mfg. Co. v. P. R. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306; *Hetherington v. William Firth Co.*, 212 Mass. 257, 98 N. E. 797; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 2 A. L. R. 678, 115 N. E. 42.

¹⁰ *A. K. Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *Edward Thompson Co. v. Washburn*, 191 Mass. 6, 77 N. E. 483; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; *Reeves v. Block*, 31 S. D. 60, 139 N. W. 780.

of the contract.¹¹ A contract for the sale of goods to be delivered in a certain number of instalments, for which the purchaser is to pay by giving his note for each instalment, is so far severable that damages arising on the second instalment can not be set off against the note which is given for the first instalment.¹² A contract to make a sample machine and thirty others according to sample, the buyer to pay a certain sum for the sample machine "when delivered complete as per agreement," and a like sum for every other machine, is a severable contract.¹³ A contract whereby a railroad company agrees to construct a railroad in six distinct sections, and the county agrees to issue certain bonds of particular numbers, to be used in payment of each separate section, is a severable contract. Accordingly, if the county refuses to issue bonds for one of such sections because the entire amount would exceed the constitutional limit of indebtedness, the rest of such contract is not thereby discharged.¹⁴ A contract to make a sidewalk "ten feet wide and ——— feet long," the length not being specified, is not an entire contract for the number of feet intended by the parties, and recovery can be had thereunder for work done.¹⁵ A contract to issue annual railroad passes for the life of the promisee has been held to be a severable contract as to each pass, so that a separate action can be brought for each breach.¹⁶

§ 3003. Apportionment of consideration—Contract shown to be entire. While the presence or absence of apportionment of consideration is of great importance in determining whether the contract is entire or severable, as far as questions of performance are concerned, it is not always conclusive. The language of the contract may show that although the consideration is apportioned, the parties may have intended that it should be performed as an entirety.¹ If the parties intend to transfer the realty and person-

¹¹ *Edward Thompson Co. v. Washburn*, 191 Mass. 6, 77 N. E. 483.

¹² *Loomis v. Eagle Bank*, 10 O. S. 327.

¹³ *Flather v. Economy Slugging Machine Co.*, 71 N. H. 398, 52 Atl. 454.

¹⁴ *Croger v. Bayfield County*, 99 Wis. 1; 74 N. W. 635, 77 N. W. 167.

¹⁵ *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

¹⁶ *Curry v. Kansas & Colorado Pacific Ry.*, 58 Kan. 6, 48 Pac. 579.

¹ *Arkansas. Carr v. Hahn*, 133 Ark. 401, 202 S. W. 685.

California. Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305.

Iowa. Sauser v. Kearney, 147 Ia. 335, 126 N. W. 322.

Michigan. Co-operative Telephone Co. v. Katus, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

Missouri. Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251.

ality of a business as a whole, the fact that a separate consideration is named for each for the purpose of determining the amount of

New Jersey. *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

North Dakota. *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002.

Ohio. *Stein v. Steamboat Prairie Rose*, 17 O. S. 472; *Burckhardt v. Burckhardt*, 36 O. S. 261.

Pennsylvania. *Producers' Coke Co. v. Hillman*, 243 Pa. St. 313, 90 Atl. 144.

Wisconsin. *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416.

"It may readily be conceded that if the evidence went no further than to show that, at one and the same time, the parties agreed that the plaintiff should sell to the defendant, at a given price, the oranges from one grove, and that he should deliver to the defendant for handling, the oranges from other groves, for a compensation of fifty cents per box, the agreement for sale and the agreement for handling, would form separate and independent undertakings, and a breach of one would not authorize a rescission of the other. The several things required to be done by plaintiff were to be done at different times, and the money consideration to be paid for them was not entire, but was apportioned to each of the items to be performed. There is ample authority for the proposition that in such case the stipulations are ordinarily regarded as severable and independent. As examples of cases declaring contracts to be severable under such circumstances as those supposed, may be cited: *Norris v. Harris*, 15 Cal. 226 (250); *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Herzog v. Purdy*, 119 Cal. 99 (102), 51 Pac. 27; *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17. But

it must be remembered that the question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction. The court seeks to determine the intent of the parties from a consideration of all the circumstances surrounding the making of the contract. The rule is well stated in *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, as follows: 'A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and independent. * * * On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. * * * It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, but on the whole, the weight of opinion, and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties. This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case.' And the cases relied on by the appellant, in which this court has declared certain contracts to be severable, all recognize

revenue stamps to be placed upon the deed for the realty, does not show that the contract is severable.² A contract for lease of a telephone and for subscription to the stock of a co-operative company, is held to be entire if neither of them would have been entered into but for the other, although the consideration for each is apportioned.³ A contract for the sale of a certain amount of coal at a certain price per ton, to be shipped in instalments,⁴ or a contract to furnish a certain amount of crushed stone at a certain price per cubic yard, to be delivered at a certain quantity per day,⁵ or a contract by a state to sell a tract of one hundred sixty acres at one dollar per acre,⁶ each constitute an entire contract. A contract for transporting a number of barrels of salt at a certain

that the intention of the parties governs and that stipulations apparently distinct and separate may, by the agreement of the parties, be made to be mutually dependent and to form parts of an entire contract. Thus, in *Norris v. Harris*, 15 Cal. 226, Field, C. J., said: 'But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, etc.' *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621, declares that where the price is, by the contract, apportioned to each item to be performed, 'the contract will generally be held to be severable.' And in *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27, the court in speaking of a similar contract, said: 'Such a contract of sale the law regards in general as severable, and we discover no evidence here to take the case out of the rule, nothing to show that the sale of one item was contingent upon the sale of the others, or that the contract was for other reasons an entirety.' * * *

"The case at bar differs in its facts from all those cited, in that the answer alleged and the court found that

the two undertakings of the plaintiff as to the different groves were, in fact, by the agreement of the parties, made parts of one contract, and the agreement to buy the oranges from one grove was in consideration of defendant's having the handling of the oranges from the other groves. This was in effect an allegation and finding that the contract was entire and not severable. Such finding being, as we have seen, sustained by the evidence, it follows that on the refusal by the plaintiff to fully perform his part of the contract, there was a partial failure of consideration which, under section 1689 of the Civil Code, gave the defendant the right to rescind. *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39." *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

See § 2088.

² *Burckhardt v. Burckhardt*, 36 O. S. 261.

³ *Co-operative Telephone Co. v. Katus*, 140 Mich. 367, 112 Am. St. Rep. 414, 103 N. W. 814.

⁴ *Providence Coal Co. v. Cox*, 19 R. I. 380, 35 Atl. 210.

⁵ *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416.

⁶ *State v. Jones*, 21 Nev. 510, 34 Pac. 450.

price per barrel,⁷ or a contract for leasing a vessel at a certain amount per day, no time for the return of such vessel being fixed,⁸ or for thrashing a crop at a certain price per bushel,⁹ is an entire contract. A contract of partnership for a term of five years, one partner to furnish the use of a mill and the capital, and the other to devote his entire time, ability and energy to the business, and to render monthly accounts, is an entire contract.¹⁰ A lease for a specified term, at a specified monthly rental, has been held to be severable in so far that a recovery of an instalment of rent due and unpaid is not a bar to an action to recover instalments which subsequently fall due.¹¹

§ 3004. Non-apportionment of consideration—Contract presumed to be entire. It is, as has been said before,¹ possible for one consideration to support two or more covenants.² The fact that the parties have not apportioned the consideration between the different covenants is ordinarily sufficient, in the absence of other provisions of the contract which indicate a contrary intention, to show that the parties intended an entire contract.³ Contracts by which

⁷ Warehouse & Builders' Supply Co. v. Galvin, 90 Wis. 523, 65 Am. St. Rep. 57, 71 N. W. 804.

⁸ Stein v. Steamboat Prairie Rose, 17 O. S. 472.

⁹ Johnson v. Fehsefeldt, 106 Minn. 202, 118 N. W. 797.

¹⁰ Cockley v. Brucker, 54 O. S. 214, 44 N. E. 590.

¹¹ Barnes v. Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498.

¹ See § 525.

² United States. Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776; Mississippi River Logging Co. v. Robson, 69 Fed. 773, 16 C. C. A. 400.

Illinois. Bates Machine Co. v. Bates, 192 Ill. 138, 61 N. E. 518.

Kansas. Bank v. Rowlinson, 2 Kan. App. 82, 43 Pac. 304.

Ohio. Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oregon. House v. Jackson, 24 Or. 89, 32 Pac. 1027.

Pennsylvania. Philadelphia Ball Club v. Lajoie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.

West Virginia. Rhoades v. Chesapeake & Ohio Ry., 49 W. Va. 494, 27 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209.

³ United States. Poynter v. United States, 41 Ct. Cl. 443.

Georgia. Spalding County v. Chamberlin, 130 Ga. 649, 61 S. E. 533.

Iowa. Galt v. Provan, 131 Ia. 277, 108 N. W. 760.

Maine. American Mercantile Exchange v. Blunt, 102 Me. 128, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Michigan. Lee v. Briggs, 99 Mich. 487, 58 N. W. 477; Mailhot v. Turner, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804.

New Jersey. International Signal Co. v. Marconi Wireless Telegraph Co., 80 N. J. Eq. 319, 104 Atl. 378.

New York. Johnston v. Trask, 116 N. Y. 136, 15 Am. St. Rep. 394, 5 L. R. A. 630, 22 N. E. 377.

A agrees to support B for life, or for a certain specified period, for an entire consideration, are treated as entire contracts.⁴ If the party who has agreed to furnish such support fails or refuses to perform in accordance with the contract,⁵ the party to whom such support is to be furnished may treat 'his as an entire breach, for which he may avoid the contract,⁶ or for which he may recover damages on the theory of a total breach.⁷

A contract to sell a number of articles at a gross price for all is generally inseverable.⁸ A contract to compromise a dispute over a number of patents by paying a certain royalty upon each article sold, without apportioning such royalty among the different patents, is so far entire that the invalidity of a very few of such patents does not discharge the contract.⁹ A contract for shipping cattle and for transporting a caretaker, is entire if it is supported by the same consideration.¹⁰ A policy of insurance upon goods and a building is said to be entire if the premium is not apportioned.¹¹ A contract by which A is to collect claims for B according to A's

North Carolina. *Coggins v. Aetna Insurance Co.*, 144 N. Car. 7, 119 Am. St. Rep. 924, 8 L. R. A. (N.S.) 839, 56 S. E. 506.

Ohio. *Steamboat Wellsville v. Geisse*, 3 O. S. 333; *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. *Davidson v. Gaskill*, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

Vermont. *Spriggs' Admr. v. Rutland R. Co.*, 77 Vt. 347, 70 L. R. A. 930, 60 Atl. 143; *Waite v. Stanley*, 88 Vt. 407, L. R. A. 1916C, 886, 92 Atl. 633.

Washington. *Loveland v. Reese Co.*, 105 Wash. 204, 177 Pac. 719.

West Virginia. *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

⁴ *Parker v. Russell*, 133 Mass. 74; *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 344.

⁵ See § 2930.

⁶ *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 344.

⁷ *Parker v. Russell*, 133 Mass. 74.

⁸ **Massachusetts.** *Miner v. Bradley*, 39 Mass. (22 Pick.) 457; *Clark v. Baker*, 46 Mass. (5 Met.) 452; *Roach v. Lane*, 226 Mass. 593, 116 N. E. 470.

New Jersey. *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417.

Ohio. *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oregon. *Sun Publishing Co. v. Minnesota Type Foundry Co.*, 22 Or. 49, 29 Pac. 6.

Vermont. *Taplin v. Clark*, 89 Vt. 226, 95 Atl. 491.

Wisconsin. *Krause v. Reichel*, 167 Wis. 360, 167 N. W. 817.

⁹ *International Signal Co. v. Marconi Wireless Telegraph Co.*, 89 N. J. Eq. 319, 104 Atl. 378.

¹⁰ *Spriggs' Admr. v. Rutland R. Co.*, 77 Vt. 347, 70 L. R. A. 930, 60 Atl. 143.

¹¹ *Coggins v. Aetna Insurance Co.*, 144 N. Car. 7, 119 Am. St. Rep. 924, 8 L. R. A. (N.S.) 839, 56 S. E. 506.

system of collecting, is so far entire that it is discharged by subsequent legislation which prevents A from employing such system.¹² The fact that separate bonds are given to secure performance of the contracts for the sale of the different tracts of land, does not make the contracts severable if a gross price is to be paid for all the tracts together.¹³ A contract to convey separate tracts of property,¹⁴ or to lumber several different sections of land,¹⁵ is an entire contract. A contract to decorate the walls of a room, to construct the woodwork, and to furnish the room, for a lump sum, is an entire contract.¹⁶ A contract whereby A agrees that B, during his first ten years' occupancy of certain premises, shall be exempt from borough taxation, and shall be supplied with water for the use of his business at a cost not exceeding one hundred dollars a year, is an entire contract.¹⁷ A contract by which A is to receive a certain interest in the estate of a decedent, and also all of B's title to certain personal property, and A agrees to give up all claims against the estate of such decedent and to give certain realty to B, is an entire contract.¹⁸ A contract whereby a broker agrees to buy bonds for a customer, and to take them off his customer's hands at any time, is entire.¹⁹ An offer of a reward for the arrest of two criminals is entire and no recovery can be had for the arrest of one.²⁰ A contract to remove all parts of a wrecked vessel so that a certain depth of water shall be secured, which provides that payment shall be made when the work is completed, is an entire contract.²¹ A contract by which A agrees to put old machinery in running order and to supply new machinery, and B agrees to supply certain other new machinery, to pay a certain sum of money and to pay an extra amount for certain work and for new materials not specified in the contract, is an entire contract.²²

¹² *American Mercantile Exchange v. Blunt*, 102 Me. 128, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

¹³ *Tiernan v. Beam*, 2 Ohio 383.

¹⁴ *Kuhlman v. Wood*, 81 Ia. 128, 46 N. W. 738; *Tiernan v. Bean*, 2 Ohio 383; *Martin v. Fridenberg*, 169 Pa. St. 447, 32 Atl. 429.

¹⁵ *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477.

¹⁶ *Pitcairn v. Phillip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323.

¹⁷ *Phoenix Silk Mfg. Co. v. Rently*, 187 Pa. St. 526, 41 Atl. 523.

¹⁸ *Galt v. Provan*, 131 Ia. 277, 108 N. W. 760.

¹⁹ *Johnston v. Trask*, 116 N. Y. 136, 15 Am. St. Rep. 394, 5 L. R. A. 630, 22 N. E. 377.

²⁰ *Blain v. Express Co.*, 69 Tex. 74, 6 S. W. 679.

²¹ *Poynter v. United States*, 41 Ct. Cl. 443.

²² *Steamboat Wellsville v. Geisse*, 3 O. S. 333.

§ 3005. Non-apportionment of consideration—Contract shown to be severable. Even if the consideration is not apportioned, the contract when taken as a whole may show that the parties did not intend that the contract should be entire.¹ If the risk under a policy of insurance is distinct, it is said that the contract is severable, although a gross premium is paid.² A contract for the sale of a stock of goods, a business and the good will, together with a covenant not to compete, is held to be so far severable that breach of the covenant not to compete is not a defense to an action on the note which is given as the entire consideration.³

In some cases the party who is not in default is held to have the option to treat contracts as severable, although the consideration is not apportioned and although the party who is in default might not be given the same option.⁴ If A has agreed to sell a number of tracts of realty to B at a gross price, and the title to one of such tracts fails, B has been permitted to treat such contract as so far severable that he may recover a fair proportion of the purchase money for the tract the title to which has failed.⁵ A sale of a car-load of lumber has been held to be so far severable that the purchaser may accept the part thereof which conforms to the warranty under which it was sold, and reject the part which does not conform to such warranty.⁶

Even if the price is a gross sum and the articles which are sold are of such a sort that they must be used together, the fact that separate warranties are given for the different articles and that different consequences for breach of warranty are provided as to each article, has been held to show that the contract is severable.⁷

¹Goorberg v. Western Assurance Co., 150 Cal. 510, 119 Am. St. Rep. 246, 10 L. R. A. (N.S.) 876, 89 Pac. 130; Stearns Salt & Lumber Co. v. Dennis Lumber Co., 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91; Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104; Dorr v. Midelburg, 65 W. Va. 778, 23 L. R. A. (N.S.) 987, 65 S. E. 97.

²Goorberg v. Western Assurance Co., 150 Cal. 510, 119 Am. St. Rep. 246, 10 L. R. A. (N.S.) 876, 89 Pac. 130.

In some jurisdictions the fact that the premium is not apportioned is held to be conclusive as to the entire character of the contract. See § 3004.

³Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

Contra, Ferris v. Pett, — R. I. —, 2 A. L. R. 768, 105 Atl. 369.

⁴Stearns Salt & Lumber Co. v. Dennis Lumber Co., 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91; Dorr v. Midelburg, 65 W. Va. 778, 23 L. R. A. (N.S.) 987, 65 S. E. 97.

⁵Dorr v. Midelburg, 65 W. Va. 778, 23 L. R. A. (N.S.) 987, 65 S. E. 97.

⁶Stearns Salt & Lumber Co. v. Dennis Lumber Co., 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

⁷Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208, 76

The fact that one of the articles is sold without any express warranty and that the other is sold on trial, has been held to show that the contract is severable, although the purchase price is a gross sum.⁸ Even the fact that separate warranties are given has been held, however, in some jurisdictions, not to render the contract severable.⁹ If the contract recites a gross sum and provides for separate warranties, the contract has been held to be severable, so that the purchaser can not rescind the entire contract for breach of warranty as to one of the articles,¹⁰ on the theory that the gross sum thus specified was ascertained by estimating the separate price of each article and adding the separate amounts.¹¹

§ 3006. Consideration apportioned in part, and not apportioned in part. If the consideration is in part apportioned and in part entire, the contract is entire.¹ A contract which recites a consideration of one dollar, and which provides that A shall acquire certain interests in different tracts of land with money which is to be furnished by A and B, is regarded as severable, so that it may be enforced as to one of the tracts although it can not be enforced as to the other.² A contract by a county to sell four hundred and twelve acres of land at one dollar and twenty-five cents per acre, and to release the rest of its swamp land claim, is entire.³

§ 3007. Breach of employment contracts. The question of the entirety of a contract of employment is presented in determining whether a separate action can be brought for each breach. An employe who is wrongfully discharged, has a choice of remedies; all of them, according to the view entertained by the majority of the courts, are based upon the theory that the contract is an entire one. He may ignore the contract, and sue in quantum meruit for the services already rendered.¹ Choosing this remedy bars an

N. W. 41; *Northwest Thresher Co. v. Mehlhoff*, 23 S. D. 476, 122 N. W. 428; *Nichols & Shepard Co. v. Chase*, 103 Wis. 570, 79 N. W. 772.

⁸ *Berlin Machine Works v. Miller*, 59 Wash. 572, 110 Pac. 422.

⁹ *Robinson v. Berkey*, 111 Ia. 550, 82 N. W. 972.

¹⁰ *Aultman & Taylor Co. v. Lawson*, 100 Ia. 569, 69 N. W. 865.

¹¹ *Aultman & Taylor Co. v. Lawson*, 100 Ia. 569, 69 N. W. 865.

¹ *Montgomery County v. Emigrant Co.*, 47 Ia. 91.

² *Cantwell v. Crawley*, 188 Mo. 44, 86 S. W. 251.

³ *Montgomery County v. Emigrant Co.*, 47 Ia. 91.

¹ *Keedy v. Long*, 71 Md. 385, 5 L. R. A. 759, 18 Atl. 704.

See ch. LXXXVIII.

action on the contract for damages, to which the employee is otherwise entitled.²

If the employee who is discharged without cause elects to bring an action upon the contract, and not for reasonable value for services rendered, a question is frequently presented whether he must bring one action for damages on the theory that the contract is an entire contract, and that the breach on the part of the employer has operated as a total breach of the entire contract, or whether he may treat the contract as still in effect and may recover his compensation under the contract according to the terms thereof, as the various instalments of such compensation fall due. The English courts were at first inclined to hold that the employee could remain ready and willing to perform and that he could thus keep the contract alive and recover his compensation as the instalments thereof fell due by the terms of the contract.³ It was soon seen, however, that the rule was resulting in great economic loss, since the employee could recover, on this theory, only if he remained idle and ready to serve his employer whenever the employer wished him to serve; and it was furthermore feared that this rule might furnish a constant temptation to employees to provoke their employers to a discharge without giving them technical legal cause therefor; in which case the employees were allowed to recover full compensation while doing no work. The earlier cases were, accordingly, overruled; and it was held that the employee could have but one action on the contract, and that action for the recovery of damages,⁴ which, in cases of this sort, would not be the entire contract price, but rather the contract price less the amount which the employee could earn at similar employment in that neighborhood by the use of due diligence.⁵

In the United States, the courts at the outset were inclined to follow the original English view and permit the employee to recover the full contract price;⁶ and this theory is still held by a number of courts.⁷ The great weight of modern authority, however, is in

² *Keedy v. Long*, 71 Md. 385, 5 L. R. A. 759, 18 Atl. 704.

See ch. LXXXVII and ch. LXXXVIII.

³ *Gandell v. Pontigny*, 4 Campbell, 375.

⁴ *Archard v. Hornver*, 3 Car. & P. 349; *Goodman v. Pocock*, 15 Ad. & EL 576.

⁵ See ch. LXXXVII.

⁶ *Gordon v. Brewster*, 7 Wis. 355.

⁷ *Alabama*. *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426.
North Carolina. *Markham v. Markham*, 110 N. Car. 356, 14 S. E. 963.

Pennsylvania. *Allen v. Colliery Engineers Co.*, 196 Pa. St. 512, 46 Atl. 899.

favor of the theory that the employe has but one right of action in case of unlawful discharge; and that right of action is a right to recover damages.⁸ If the employe recovers a judgment upon the contract on account of the breach thereof by unlawful discharge, such judgment merges the entire cause of action;⁹ and the employe can not maintain another action upon such contract even though, through a mistaken view as to the effect of such breach, he merely sought to recover the compensation which was due under the contract at the time that the action was brought, or at the time of the trial.¹⁰ A different result might be reached, it may be added, in jurisdictions in which the Code of Civil Procedure contains a provision to the effect that in case a less amount than is actually due is sought to be recovered, through a mistake of the pleader, the party who is entitled to recover such amount may maintain another action to recover such additional amount, subject only to the penalty of being obliged to pay the costs of the second action.

Rhode Island. *Frost v. International Rubber Co.*, 37 R. I. 406, 92 Atl. 1022.

Tennessee. *Allen v. Maronne*, 93 Tenn. 161, 23 S. W. 113.

United States. *Pierce v. Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, 43 L. ed. 591.

Connecticut. *Viall v. Lionel Mfg. Co.*, 90 Conn. 694, 98 Atl. 329.

Indiana. *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437.

Iowa. *Weeksman v. Powell*, 178 Ia. 991, 160 N. W. 377.

Maryland. *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509.

New Jersey. *Larkin v. Hecksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703.

New York. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *McCargo v. Jergens*, 206 N. Y. 363, 99 N. E. 838.

Ohio. *James v. Allen County*, 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

West Virginia. *Rhoades v. Chesapeake & Ohio Ry.*, 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209.

Wisconsin. *Kennedy v. South Shore Lumber Co.*, 102 Wis. 284, 78 N. W. 567; *Ornstein v. Yahr & Lange Drug Co.*, 119 Wis. 429, 96 N. W. 826; *Green v. Somers*, 163 Wis. 96, 157 N. W. 529.

⁸ See §§ 1136 et seq. and §§ 2555 et seq.

¹⁰ *United States. Pierce v. Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, 43 L. ed. 591.

Connecticut. *Viall v. Lionel Mfg. Co.*, 90 Conn. 694, 98 Atl. 329.

Indiana. *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437.

Maryland. *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509.

New Jersey. *Larkin v. Hecksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703.

New York. *McCargo v. Jergens*, 206 N. Y. 363, 99 N. E. 838.

Ohio. *James v. Allen County*, 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

Wisconsin. *Ornstein v. Yahr & Lange Drug Co.*, 119 Wis. 429, 96 N. W. 826; *Green v. Somers*, 163 Wis. 96, 157 N. W. 529.

C. INSTALMENT CONTRACTS

§ 3008. Instalment contracts—General nature. Contracts are often made which require delivery, or payment, or both, in instalments. Whether such contracts are entire and whether a breach as to one instalment is a discharge as to the remaining instalments is a question upon which there is hopeless divergence of judicial authority, since different courts act on two distinct theories which sometimes produce the same results, but more often different ones.¹ One theory is that such contracts are entire, and that a breach by one party as to one instalment is the breach of "a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."² The other theory is that such breach does not of itself amount to a discharge, but that it is only when the party who breaks the contract shows that he repudiates his contractual obligation, that it is to be treated as a breach by renunciation,³ and hence a discharge.⁴ In applying this last theory some courts have treated such contracts as entire on one side and apportionable on the other.⁵

¹ "A question has been much debated between counsel as to whether this contract is one deemed an entire or a severable contract, in the language of the courts and law books. Is it such a contract, an entire contract, as would authorize the purchaser of the hay, at any point during the process of delivery, to cancel the contract for the delivery of some bad hay, without liability to damages for breach? Or is it a severable contract denying such power of cancellation, and compelling the purchaser to execute it and look to the seller for compensation in damages for bad hay delivered? I remark that each contract must stand upon its nature and circumstances. Upon this question there is a wilderness of authority through many, many years, and conflicting." *Ellison v. Flat Top Grocery Co.*, 69 W. Va. 380, 38 L. R. A. (N.S.) 539, 71 S. E. 391.

² *Norrington v. Wright*, 115 U. S. 188, 203, 29 L. ed. 366 [quoted in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 254, 261, 30 L. ed. 920].

See, on this question:

Georgia. *Savannah Ice Delivery Co. v. American Refrigerator Transit Co.*, 110 Ga. 142, 35 S. E. 280.

Iowa. *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N. S.) 1, 121 N. W. 1009.

Maryland. *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

Minnesota. *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507.

Nebraska. *Howard County v. Pesha*, — Neb. —, 172 N. W. 55.

Tennessee. *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 38 L. R. A. (N.S.) 416, 140 S. W. 595.

³ See §§ 2908 et seq.

⁴ See § 3013.

⁵ "The contract in this case is clearly an illustration of a contract of sale which is entire on one side and apportionable on the other." *Johnson Forge Co. v. Leonard*, 3 Penne. (Del.) 342, 347, 94 Am. St. Rep. 86, 57 L. R. A. 225, 51 Atl. 305.

It may be observed in advance that the courts which have adopted the theory that the contract is entire, at least for the purpose of authorizing the party who is not in default to treat a material breach as to one instalment as a breach of the entire contract and as a discharge thereof at his election, have been fairly consistent in the application of this theory;⁶ while the courts which have attempted to apply the theory that such a contract is so far severable that a material breach as to one instalment does not authorize the party who is not in default to treat the entire contract as discharged, have not applied the principle logically, but have reserved its application, for the most part, to contracts for the sale of personal property,⁷ leaving the other theory to operate in contracts for work and labor, in building and construction contracts and the like.⁸

It may also be noted in advance that this problem is not, properly speaking, presented where the breach as to one instalment is of so trifling a character that, if the contract had consisted entirely of the covenant for such instalment, together with the covenant in consideration thereof, such breach would not have operated as a discharge.⁹ If a contract requires for delivery about five thousand tons, delivery of forty-six hundred tons is not a discharge of the contract, either as performance or breach; and the seller may deliver the remainder of the entire quantity within a reasonable time thereafter.¹⁰

Neither does the question arise in cases in which the covenant in question is evidently intended by the parties to be an independent covenant;¹¹ and that intention appears in some way other than by the performance of one or more of the instalments of the contract before the breach occurs.¹²

At the other extreme, the question is not, properly speaking, presented where the breach is of such a character that it shows renunciation or repudiation of the entire contract on the part of the party who is in default.¹³ Where such renunciation or repudiation occurs, the party who is not in default may treat such conduct on the part of the adversary party as a discharge of the entire contract.¹⁴ The question of the effect of breach as to one

⁶ See §§ 3011, 3017 and 3020 et seq.

⁷ See §§ 3012, 3017 and 3020 et seq.

⁸ See §§ 3020 et seq.

⁹ *Moore v. United States*, 196 U. S. 157, 49 L. ed. 428.

See §§ 2778 et seq.

¹⁰ *Moore v. United States*, 196 U. S. 157, 49 L. ed. 428.

¹¹ See §§ 2971 et seq.

¹² See §§ 2971 et seq.

¹³ See §§ 2882 et seq.

¹⁴ See §§ 2882 et seq.

instalment, as a discharge of the entire contract, arises therefore where the breach is material; where the covenant is not intended by the parties, when the contract is made, as an independent covenant; and where the party who is in default has not renounced the contract or repudiated his liability under it.

The fact that a contract is performed by one of the parties by delivery in instalments is not of itself sufficient to show that the adversary party is required to pay in instalments.¹⁵ On the contrary, in the absence of some provision in the contract showing a contrary intention, payment is not to be made in instalments because of the fact that the property is to be delivered in instalments; but the entire payment is to be made concurrently with delivery of the last instalment.¹⁶

§ 3009. Purpose of parties in entering into instalment contracts.

Whether the contract is one for the sale of goods to be delivered in instalments, or whether it is a contract for work and labor, or for the construction of some improvement, the party for whose benefit such performance has been made is usually contracting for an entire thing, although he accepts performance in instalments. This is perhaps the clearest of all in building contracts. A contract to build a house would evidently not be performed by constructing a cellar, a framework and a roof; and the omission of the completion of the intervening floors would be such a breach that the party for whom it was built would evidently be justified in treating the contract as discharged.¹ The question is almost as clear in contracts for the construction of other improvements. While a contract for building a road, or a railway, or a sewer, can be performed in instalments, the omission of a number of sections from the entire job would undoubtedly be so far short of substantial performance that the party for whom such work was done could treat the contract as discharged.² In many cases of contracts of sale, whether the sale is of material for the performance of a construction contract, or whether it is a sale of a stock of

¹⁵ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A. L. R. 685, 103 Atl. 417; *Central Georgia Brick Co. v. Carolina Portland Cement Co.*, 136 Ga. 693, 71 S. E. 1048; *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560.

¹⁶ *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 2 A.

L. R. 685, 103 Atl. 417; *Central Georgia Brick Co. v. Carolina Portland Cement Co.*, 136 Ga. 693, 71 S. E. 1048; *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560.

See §§ 3000 et seq.

¹ See § 3022.

² See § 3022.

goods, the purchaser is frequently in as bad a situation if part of the goods are delivered and the rest are delayed or withheld, as is the owner of a house in which the intervening stories are not constructed, or the owner of a railroad from which a number of sections have been omitted. In most of these cases failure to perform one instalment, or a material delay in performance, when time is of the essence of the contract, defeats the purpose for which the contract was made.

In like manner, a party who has stipulated for payment in instalments does so either because he is unwilling to extend credit in excess of a limited amount, or because he has not sufficient capital to perform the contract unless payment is made in instalments. In either case, failure to make such payment, or a material delay therein, compels such party to assume a much greater obligation than he had contracted for, unless he is allowed to treat such breach as a discharge. While the question of materiality of the breach as to that instalment is frequently a difficult one to determine, the general principle that the courts will not force upon the parties contractual obligations into which they have not entered voluntarily, should keep the courts from insisting that either party to such a contract should be compelled to continue performance after a material breach as to one instalment has prevented him from accomplishing the purpose for which he entered into the contract. If the Uniform Sales Act³ is construed as providing that a material breach as to one instalment may be treated by the adversary party as a discharge of the remaining instalments, it has helped to put this branch of the law on a sound basis. If the somewhat ambiguous provision is construed by the court as making it a matter of fact in each case, whether the entire contract should be discharged because of a breach as to one instalment, it should be amended so as to make it clear that a material breach as to any instalment will operate as a discharge of the entire contract.

If the contract is one which is to be performed in instalments by either party or by both parties, it would seem as though it made no practical difference which party was in default. Some courts have, however, treated this problem, especially in contracts for the sale of goods, as if it depended in part on the question whether the seller broke the contract by failing to make delivery, or whether the purchaser broke the contract by failing to make payment. For this reason these questions are considered separately.⁴ While there

³ See § 3018.

⁴ See §§ 3010 et seq.

is some ground for claiming that failure to deliver or to pay the first instalment should have different consequences from failure to deliver or to pay for some subsequent instalments after the earlier instalments have been delivered or paid for, as the case may be, on the theory that such performance has reduced the remaining covenants for delivery or payment in instalments to independent covenants,⁵ it would seem that this principle should not apply to instalment contracts, since it can not properly be said that the delivery of any instalment or the payment therefor is the vital term of the contract, the performance of which reduces the remaining covenants to the rank of independent covenants.⁶ Because of the fact that some emphasis has been laid on the question whether the instalment as to which the parties are in default is the first instalment or some later one, this distinction will also be noticed.⁷

It would seem on principle that no distinction ought to be drawn with reference to the subject-matter of the contract. Contracts for the sale of goods, for the sale of realty, for the construction of buildings or other improvements, and for work and labor, would all seem to be subject to the same general principle. The courts, however, have as a matter of fact treated these different classes of contract in different ways; and even the jurisdictions which have been quite ready to hold that a breach as to one instalment of a contract for the sale of goods should not operate as a discharge of the remaining covenants,⁸ have reached the opposite conclusion in other classes of contracts.⁹

§ 3010. History of English theory of instalment contracts. The views of many of the American courts on the question of the effect of a breach as to one instalment of an instalment contract, have

⁵ See § 2974.

⁶ "It is quite clear upon principle that there can be no valid distinction between the exercise of the right of rescission by the vendor for the failure of the vendee to pay for an instalment delivered, and the exercise of the same right by the vendee upon failure of the vendor to deliver an instalment of goods conforming to the article described in the contract. Mutuality is an essential ingredient of the law of contract, unless expressly excluded; and if this right is more valuable in one than in the other of

the two above supposed circumstances, it is in the latter rather than in the former. This doctrine is applicable to failure in delivery of or payment for any instalment under the contract, whether the first or any later one; the rights of the parties being the same as to any unperformed part of the contract as if that part had been the whole contract." *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368, 38 L. R. A. (N.S.) 548, 79 Atl. 1007.

⁷ See § 3017.

⁸ See §§ 3010 et seq.

⁹ See §§ 3020 et seq.

been greatly affected by the different theories which have been entertained by the different English courts. The question of the effect of non-performance, as distinct from renunciation, was first presented in a case in the exchequer which involved a contract for the sale of goods, to be delivered in instalments, which was broken by the failure of the seller to deliver the quantity agreed upon for the first instalment. The breach was so great as clearly to be material; and it was held that the buyer could treat such default as a discharge of the contract, although it was said that a different rule might apply if the breach were of any instalment except the first, apparently on the theory that, after the delivery of one instalment, the remaining covenants became independent covenants.¹ The question was then presented to the Queen's Bench for determination in a case in which there was a material deficiency in the amount of goods accepted by the buyer for the first instalment. It was held that damages would be sufficient compensation for such a breach, and that the seller should not be at liberty to treat the contract as discharged.² The question then came before the court of common pleas, in a case in which the buyer had failed to pay for the first instalment, claiming a right to withhold it as compensation for the seller's possible breach in delaying delivery of the second instalment; delivery of the first instalment having been delayed, although apparently with the somewhat unwilling consent of the buyer. The seller refused to deliver the second instalment unless the first instalment was paid for, in accordance with the terms of the contract. It was held that such refusal to pay for the first instalment of the goods did not discharge the contract, although, by the terms of the contract, such payment was due before the second instalment was due. The court reached this result on the theory that the conduct of the buyer did not show a renunciation of the contract; and his failure to pay was not due to an inability to pay.³ The earlier case⁴ was justified as a case in which the circumstances surrounding the breach justified the court in

¹ Hoare v. Rennie, 5 Hurl. & N. 19.

See § 3017.

See also, Coddington v. Paleologo, L. R. 2 Ex. 193.

² Simpson v. Crippin, L. R. 8 Q. B. Cases 14.

In this case Hoare v. Rennie (5 Hurl. & N. 19) was criticised as being difficult to understand and to reconcile

with other cases, among which is mentioned Pordage v. Cole, 1 Williams' Saunders, 319, which was a case of a contract under seal, decided at a time when the courts still regarded covenants as *prima facie* independent. See §§ 2944 et seq.

³ Freeth v. Burr, L. R. 9 Q. B. 208.

⁴ Hoare v. Rennie, 5 Hurl. & N. 19.

treating the breach as renunciation. In a similar case, in which the circumstances surrounding the default of the buyer gave to the seller reasonable ground for believing that the buyer would not be able to perform the contract at all, it was held that the seller might treat such breach as a discharge of the contract.⁵

With this lack of harmony on the part of the lower courts, the question was finally presented to the House of Lords in a case⁶ in which the buyer refused to pay for the first instalment under a mistaken view of the law, the buyer thinking that because of the winding up of the corporation from which he had bought the goods he could not make payment so as to protect himself without leave of court. The seller thereupon treated the refusal of the purchaser to pay as discharging the seller from further liability on the contract. It was held that default alone in making payment for the first instalment did not amount to a discharge of the remaining provisions of the contract, and that the facts attending the default showed that the buyer did not intend to renounce liability under the contract. In this case the court professed to be unable to understand why the earlier case,⁷ in which default on the part of the seller in delivering the first instalment was treated as a discharge, should be brought forward.⁸

§ 3011. Failure of buyer to pay instalment due—Theory that contract is discharged. If A and B enter into a contract by which A agrees to sell personal property to B, and B agrees to pay therefor in instalments, many authorities hold that a material and substantial default on the part of B in making one of such payments operates as such a breach of the entire contract that it discharges A, at his election, from further performance of the covenants which were to be performed on his part after such default.¹ In case of

⁵ *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

⁶ *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434.

⁷ *Hoare v. Rennie*, 5 Hurl. & N. 10.

⁸ *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434.

¹ *England. Honck v. Muller*, 7 Q. B. D. 92.

United States. Youghiogheny & O. Coal Co. v. Veretine, 176 Fed. 972.

Arkansas. Harris Lumber Co. v. Wheeler Lumber Co., 88 Ark. 491, 115 S. W. 168.

California. Veerkamp v. Drying Co., 58 Cal. 229, 41 Am. Rep. 265; *California Sugar & White Pine Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671.

Delaware. Johnson Forge Co. v. Leonard, 3 Penne. (Del.) 342, 94 Am. St. Rep. 86, 57 L. R. A. 225, 51 Atl. 305.

Florida. Stokes v. Baars, 18 Fla. 656.

Georgia. Savannah Ice Delivery Co. v. American Refrigerator Transit Co., 110 Ga. 142, 35 S. E. 280.

substantial default in the payment of one or more instalments, the seller may treat the contract as discharged.² The seller is not bound to continue performance even if the buyer or the buyer's assignee subsequently tenders the entire amount which is due.³

Where this theory is recognized, failure to pay is treated as a discharge, even though the amount which the buyer has failed to pay is a comparatively small amount of the entire purchase price,⁴ as long as the breach is so material as to prevent substantial performance.⁵ A default in paying an instalment which amounted to but little over one per cent. of the entire contract price, has been held to be sufficient to justify the seller in treating the contract as discharged.⁶

Indiana. *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574.

Iowa. *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N. S.) 1, 121 N. W. 1009.

Kansas. *Brunswick v. Farmers' Grain, Fuel & Live Stock Co.*, 100 Kan. 261, 164 Pac. 154.

Kentucky. *Southern Coal & Coke Co. v. Bowling Green Coal Co.*, 161 Ky. 477, 170 S. W. 1185.

Maryland. *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Baltimore v. Schaub*, 96 Md. 534, 54 Atl. 106.

Massachusetts. *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900; *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419; *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790.

Michigan. *W. K. Henderson Lumber Co. v. Stilwell*, 130 Mich. 124, 89 N. W. 718.

Minnesota. *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 332; *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507 [citing *Myers v. Gross*, 59 Ill. 436; *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. 551; *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215].

Missouri. *Berthold v. St. Louis Electric Construction Co.*, 165 Mo. 280,

65 S. W. 784; *Strother v. McMullen Lumber Co.*, 200 Mo. 647, 98 S. W. 34.

New Jersey. *Coryell v. Buffalo Union Furnace Co.*, 88 N. J. L. 291, 96 Atl. 55.

New York. *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516.

Pennsylvania. *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560; *Rugg v. Moore*, 110 Pa. St. 236, 1 Atl. 320; *Easton v. Jones*, 193 Pa. St. 147, 44 Atl. 264.

Tennessee. *Ross-Meehan Foundry Co. v. Royer Wheel Co.*, 113 Tenn. 370, 68 L. R. A. 829, 83 S. W. 167; *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 38 L. R. A. (N.S.) 416, 130 S. W. 595.

² *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N.S.) 1, 121 N. W. 1009; *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507.

³ *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N.S.) 1, 121 N. W. 1009.

⁴ *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790.

⁵ See ch. LXXX.

⁶ *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790.

Whether default on the part of the buyer in making payments under an instalment contract operates as a discharge of the contract or not, seems to be regarded by some authorities as a question of fact to be determined from the evidence as a whole in each particular case.¹

§ 3012. Failure of buyer to pay instalment due—Theory that contract is not discharged. In a number of cases it is held that a mere default in payment of an instalment, even though material, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adversary party.¹ Under what is possibly a modification of this theory, the buyer is not allowed to treat the contract as discharged so that he may recover his loss or profits upon deliveries which he has withheld,² even though he may be allowed to treat such default as a discharge for the purpose of enabling him to refuse to deliver further instalments. Under this theory, a default in payment which is due to a mistake,³ such as misinterpretation of the meaning of the contract,⁴ such default is held not to justify the seller in treating the contract as discharged.

§ 3013. Renunciation or abandonment by purchaser as discharge. In some cases the courts justify the result which they have

¹ Collins-Plass Thayer Co. v. Hewlett, 109 S. Car. 245, 95 S. E. 510.

¹ England. Mersey Iron & Steel Co. v. Naylor, 9 App. Cas. 434 [affirming, 9 Q. B. D. 648]; Campbell v. McLeod, 24 N. S. 66.

United States. Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324.

Alabama. Rock Island Sash & Door Works v. Moore-Handley Hardware Co., 147 Ala. 581, 41 So. 806.

California. Cox v. McLaughlin, 54 Cal 605.

Illinois. Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248.

Iowa. Osgood v. Bauder, 75 Ia. 550, 1 L. R. A. 655, 36 N. W. 887; Tuttle-Chapman Coal Co. v. Coaldale Fuel Co., 136 Ia. 382, 113 N. W. 827.

Kentucky. Collins v. Swan-Day Lumber Co., 158 Ky. 231, 164 S. W. 813.

Michigan. West v. Bechtel, 125 Mich. 144, 51 L. R. A. 791, 84 N. W. 69.

New Jersey. Otis v. Adams, 56 N. J. L. 38, 27 Atl. 102.

New York. Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589.

Oregon. Longfellow v. Huffman, 55 Or. 481, 104 Pac. 961.

Virginia. Bethel v. Improvement Co., 93 Va. 354, 57 Am. St. Rep. 808, 33 L. R. A. 602, 25 S. E. 304.

Wisconsin. Campbell & Cameron Co. v. Weiss, 121 Wis. 491, 99 N. W. 340.

² Palm v. Ohio & Mississippi Ry., 18 Ill. 217; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013.

³ Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

⁴ Winchester v. Newton, 84 Mass. (2 All.) 492.

reached, in holding that substantial failure to pay one instalment operates as a discharge of the entire contract, by treating default in payment as equivalent to an abandonment of the contract.¹ and this view has been taken even where the refusal of the seller to pay was due to his claim that the goods which had been delivered and for which payment was sought were of inferior quality.² This reason, however, is far from explaining all of the cases in which the courts have actually reached this result. It is true that in cases in which the party in default has renounced the contract, either expressly or by fair implication,³ as by notifying the adversary party to quit work when he expresses himself as willing to continue if payments were made or assured,⁴ the adversary party may treat such contract as discharged.⁵ If the buyer who is in default has declared his intention of continuing in default in unequivocal terms, and if he has refused performance, either absolutely or upon condition that the seller consent to some modification of the contract, such conduct is undoubtedly such renunciation that the seller may treat the contract as discharged.⁶ If the buyer who has agreed to pay for each instalment within a certain time after it is delivered, refuses to pay for any instalments until all have been delivered, the seller may treat such declaration as renunciation of the contract.⁷ Even under the Uniform Sales Act,⁸ if the buyer fails to pay one or more instalments under circumstances which make it reasonable for the seller to believe that the buyer can not or will not perform further, the seller may treat such default as a discharge.⁹ In many of the cases, however, in which nonpayment is treated as discharge, the buyer who is in default did not renounce the contract; but on the contrary, he was attempting in good faith and to the best of his ability to perform; or his refusal to perform grew out of some

¹Johnson Forge Co. v. Leonard, 3 Penne (Del.) 342, 94 Am. St. Rep. 86, 57 L. R. A. 225, 51 Atl. 305; Bennett v. Taylor, 72 Kan. 598, 84 Pac. 533; Stevens v. Forrest, 183 Mich. 223, 149 N. W. 982; Pittsburg Steel Foundry v. Pittsburg Steel Co., 223 Pa. St. 430, 72 Atl. 813.

²Webster v. Moore, 108 Md. 572, 71 Atl. 466.

³Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324; Landvoigt v. Paul, 27 D. C. App. 423; Quarton v. American Law Book Co., 143 Ia. 517,

32 L. R. A. (N.S.) 1, 121 N. W. 1009; Ambler v. Sinaiko, 168 Wis. 286, 170 N. W. 270.

⁴Tennessee & Coosa Ry. v. Danforth, 112 Ala. 80, 20 So. 502.

⁵See §§ 2882 et seq.

⁶Withers v. Reynolds, 2 Barn. & Ad. 582.

⁷Ambler v. Sinaiko, 168 Wis. 286, 170 N. W. 270.

⁸Ambler v. Sinaiko, 168 Wis. 286, 170 N. W. 270.

⁹Bloomer v. Bernstein, L. R. 9 C. P. 588.

reason other than renunciation of liability.¹⁰ By the device of treating unexcused failure to make a payment as equivalent to a renunciation of contractual liability, the two extreme and inconsistent theories that, on the one hand, default in payment of an instalment is such a breach that the seller may treat the contract as discharged, and, on the other hand, the theory that such default does not amount to discharge unless the buyer has renounced liability under the contract, can be made to blend together so that the contract can be treated as discharged, although the only renunciation which is shown is a failure to pay the instalments of the purchase money when due.

§ 3014. Refusal of buyer to accept instalment. If the buyer refuses to accept an instalment which is tendered to him, such refusal suggests a renunciation or repudiation of liability under the contract on his part, to a much greater degree than failure on his part to pay for the goods after having accepted them; and accordingly it is generally held that his refusal to accept the goods justifies the seller in treating the contract as discharged.¹ Under this theory it is held that if the seller refuses to deliver the second instalment on the ground that the first instalment is not paid for, in accordance with the terms of the contract, and the seller brings an action to recover damages, it is a question of fact to be determined under an appropriate charge whether the conduct of the seller was sufficient to justify the breach on the part of the buyer.² In this case, while the charge of the trial court was held to be very vague, a verdict and judgment in favor of the seller were upheld on the theory that the jury had found its way correctly, although the trial court had not furnished it with a compass.³

§ 3015. Theory that nonpayment prevents performance by adversary party. In other cases default in making payment is treated as a discharge on the theory that the party in default has made performance impossible on the part of the adversary party, by with-

¹⁰ See § 3011.

¹ *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 61 L. R. A. 402; *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27; *Providence Coal Co. v. Coxe*, 19 R. I. 380, 35 Atl. 210.

The seller can not recover the con-

tract price. *Barrie v. Quimby*, 206 Mass. 259, 92 N. E. 451.

See §§ 2882 et seq.

² *Collins-Plass Thayer Co. v. Hewlett*, 109 S. Car. 245, 95 S. E. 510.

³ *Collins-Plass Thayer Co. v. Hewlett*, 109 S. Car. 245, 95 S. E. 510.

holding payments.¹ If this is the real reason for treating nonpayment as a discharge, nonpayment should not be treated as a discharge if the financial condition of the adversary party is such that performance is possible in spite of such default in payment.² If the logical result of this principle is to make the effect of breach upon the contract dependent upon the financial strength of the adversary party, the reason itself is clearly wrong.

§ 3016. Other effects of non-payment by buyer. If the vendor instead of treating nonpayment of one instalment as a discharge, sues to recover such instalment, the contract is so far severable that he may recover any instalment due without waiting until he delivers all the instalments.¹ In a jurisdiction in which the seller may avoid because of the default of the buyer in paying an instalment, the seller may not only treat the contract as discharged, but he may also recover for goods delivered up to the time at which he has elected to treat the contract as discharged.²

If the contract provides in express terms that the seller may cancel the contract for default in any payment, full effect is given to such provision;³ and the fact that the contract further provides that each instalment is to be treated as an independent sale, does not prevent the seller from treating the contract as discharged as to future instalments because of the buyer's default in paying for instalments which have already been delivered.⁴

§ 3017. Failure of seller to deliver instalment. In cases in which the seller is in substantial default for failure to deliver one or more of the instalments due under an instalment contract, it is held in a number of jurisdictions that the buyer may treat such default on the part of the seller as a breach of the entire contract,

¹ *Bean v. Bunker*, 68 Vt. 72, 33 Atl. 1068; *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308.

² *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569 (a building contract).

³ *W. K. Henderson Lumber Co. v. Stilwell*, 130 Mich. 124, 89 N. W. 718; *State v. Davis*, 53 N. J. L. 144, 20 Atl. 1080.

⁴ *Minaker v. California Canneries Co.*, 138 Cal. 239, 71 Pac. 110; *Easton*

v. Jones, 193 Pa. St. 147, 44 Atl. 264.

³ *Cadillac Machine Co. v. Mitchell-Diggins Iron Co.*, — Mich. —, 171 N. W. 479; *Dow Chemical Co. v. Detroit Chemical Works*, — Mich. —, 175 N. W. 269 (under the Uniform Sales Act).

⁴ *Cadillac Machine Co. v. Mitchell-Diggins Iron Co.*, — Mich. —, 171 N. W. 479; *Dow Chemical Co. v. Detroit Chemical Works*, — Mich. —, 175 N. W. 269.

which justifies the buyer in treating the contract as discharged.¹ In some of the cases in which this result has been reached, the seller was in default as to the first instalment or instalments; although this fact is not emphasized, in many of these cases, as the reason for holding the contract to be discharged.² In other jurisdictions, the fact that the vendor is in substantial default in delivering one or more instalments, is held not to be a breach of the entire contract, which will justify the purchaser in refusing to accept the remaining instalments and to pay for them if the seller delivers such remaining instalments in accordance with the terms of the contract.³ Under a contract to deliver iron in specified instalments, failure to deliver one instalment at the time specified, if time is of the essence of the contract, is such a breach as to discharge the vendee.⁴ The same result has been reached under a contract to log and manufacture a certain amount of lumber and to load it on cars one season and to complete the work during the following season where the stipulated amount was not gotten out during the first season.⁵

§ 3018. Effect of Uniform Sales Act. The Uniform Sales Act contains a provision as to the effect of default in the performance

¹United States. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 61 L. R. A. 402; *Consumers' Bread Co. v. Stafford County Flour Mills Co.*, 239 Fed. 693.

Maryland. Bollman v. Burt, 61 Md. 415; *Hazel Hill Canning Co. v. Roberts*, 129 Md. 306, 99 Atl. 424.

Massachusetts. Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451.

New York. Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

Pennsylvania. White v. Wolf, 185 Pa. St. 369, 39 Atl. 1011.

Vermont. Conway v. Fitzgerald, 70 Vt. 103, 39 Atl. 634.

²United States. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366.

Maryland. Bollman v. Burt, 61 Md. 415; *Hazel Hill Canning Co. v. Roberts*, 129 Md. 306, 99 Atl. 424.

Massachusetts. Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451.

Pennsylvania. White v. Wolf, 185 Pa. St. 369, 39 Atl. 1011.

New York. Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

³*Pratt v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 51 Am. St. Rep. 612, 30 L. R. A. 61, 31 Atl. 401; *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, 118 Pac. 165; *Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 583; *Sawyer v. Chicago & Northwestern Ry.*, 22 Wis. 403, 99 Am. Dec. 49.

⁴*Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920.

⁵*Conway v. Fitzgerald*, 70 Vt. 103, 39 Atl. 634.

of an instalment contract on the part of either the buyer or the seller. "Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or to pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."¹ If the question as to the materiality of the breach of the contract means the materiality of the breach of the particular instalment, and if it assumes that the breach as to one instalment, if material as to that instalment, will operate as a discharge of the entire contract at the election of the party who is not in default, no objection can be made to the result, although the wording may not be the clearest imaginable. If the "materiality of the breach" refers to the contract as a whole, and if, after a material breach as to one instalment is shown, the question of fact remains as to the effect of such breach upon the remaining covenants of the contract, the statute avoids laying down a rule as to even the prima facie effect of the breach as to one instalment upon the remaining covenants of the contract.

The courts have not been harmonious in their views as to the effect of this section. In New Jersey this section of the statute is held to alter the original rule, which was that breach as to one instalment on the part of the seller was not a discharge of the remaining covenants of the contract;² and the question of the materiality of the breach, apparently with reference to the entire contract, is said to be a question for the jury unless it is so clear that the court may decide it.³ In this case a deficiency of over four hundred tons in a contract which provided for the delivery of two thousand tons was held to be so clearly a material breach that the court could decide such question without submitting it to the jury.⁴ In this case, however, the buyer had apparently accepted all

¹ § 45 of the Uniform Sales Act (2).

² *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27 (obiter, as the case was one of a delivery of instalments of defective quality).

³ *Du Pont v. United Zinc Co.*, 85 N. J. L. 416, 89 Atl. 992.

⁴ *Du Pont v. United Zinc Co.*, 35 N. J. L. 416, 89 Atl. 992.

of the article which the seller could deliver in spite of the seller's defaults; and the action was brought to recover damages for failure to deliver the difference between the quantity contracted for and the quantity actually delivered.⁵ Under this statute, it has been said that a mere neglect to pay an instalment for a time might not be sufficient, but that if such neglect is coupled with a refusal to make any further payments until all of the property has been delivered, such breach is material if the contract requires payment for each instalment within a certain time after its delivery.⁶ Under this section full effect must be given to a provision in the contract which reserves to the seller the right to treat the contract as discharged if the buyer fails to make prompt payment for the different instalments in accordance with the terms of the contract.⁷

§ 3019. Delivery or tender of defective instalment. If the seller delivers the amount agreed upon for each instalment as it comes due, and the buyer accepts such articles, the fact that the goods delivered in certain instalments are not up to the standard fixed by the contract is said not to be such breach of the entire contract as excuses the buyer from taking and paying for the remaining instalments.¹ The acceptance by the buyer of a defective

⁵ *Du Pont v. United Zinc Co.*, 85 N. J. L. 416, 89 Atl 992

⁶ *Ambler v Sinaiko*, 163 Wis. 236, 170 N. W. 270

⁷ *Dow Chemical Co v. Detroit Chemical Works*, — Mich. —, 175 N. W. 269.

¹ *England. Jonassohn v. Young*, 4 B. & S. 296.

Alabama. Worthington v. Gwin, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739].

Georgia. Miller v. Moore, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360; *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50.

Michigan. Williams v. Robb, 104 Mich. 242, 62 N. W. 352.

New Jersey. Blackburn v. Reilly, 47 N. J. L. 290, 54 Am. Rep. 150, 1 Atl. 27.

New York. Cahen v. Platt, 69 N.

Y. 343, 25 Am. Rep. 203; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304.

Pennsylvania. Scott v. Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753

West Virginia. Ellison v. Flat Top Grocery Co., 60 W. Va. 380, 38 L. R. A. (N.S.) 539, 71 S. E. 391.

Probably no distinction can be drawn between the different kinds of articles which form the subject-matter of the contract of sale; and this principle has been applied to a number of different kinds of articles.

Coal. Jonassohn v. Young, 4 B. & S. 296.

Iron ore. Worthington v. Gwin, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739].

Corn. Miller v. Moore, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360.

Bark. Blackburn v. Reilly, 47 N. J. L. 290, 54 Am. Rep. 150, 1 Atl. 27.

instalment is said to waive his right to treat such breach as a discharge.² The question, however, is one upon which there is said to be "a wilderness of authority,"³ and the cases are far from harmonious.

If the buyer refuses to accept a defective instalment, he may treat the offer of an instalment which is substantially defective as a breach for which he may avoid the entire contract.⁴ If the defects in an instalment which the buyer has accepted are latent, and if the buyer gives notice thereof as soon as he discovers the defects, he may avoid the entire contract in some jurisdictions.⁵

It has been held that if the vendor does not deliver an instalment at the time agreed upon, and the goods are not up to the standard, such default amounts to a breach of the entire contract and the vendee is justified in refusing to accept and pay for subsequent instalments.⁶ If the custom of the trade or business requires the buyer to pay for each car separately, a deficiency in the quantity contained in one car does not authorize the buyer in treating the contract as to the remaining cars as discharged.⁷ If one of the instalments is defective as to quantity and the buyer accepts such instalment with knowledge of such defect, he can not treat the remaining covenants of the contract as discharged so as to justify him in refusing to accept later instalments which conform to the provisions of the contract.⁸

The fact that the buyer has accepted an instalment, the quality of which is defective, does not prevent him from rejecting subsequent instalments which do not conform to the requirements of the

Glass. *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. Rep. 753.

Hay. *Ellison v. Flat Top Grocery Co.*, 69 W. Va. 380, 38 L. R. A. (N.S.) 539, 71 S. E. 391.

²*Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Williams v. Robb*, 104 Mich. 242, 62 N. W. 352; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304.

On the general question of waiver, see §§ 3037 et seq.

³*Ellison v. Flat Top Grocery Co.*, 69 W. Va. 380, 38 L. R. A. (N.S.) 539, 71 S. E. 391.

⁴*Newton v. Bayless Fruit Co.*, 155 Ky. 440, 159 S. W. 968; *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368, 39 L. R. A. (N.S.) 548, 79 Atl. 1007; *Fullam v. Wright & Colton Co.*, 196 Mass. 474, 92 N. E. 711.

⁵*McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 8 L. R. A. (N. S.) 1110.

⁶*Cloth. King Phillip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603.

⁷*Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

⁸*Craig v. Lane*, 212 Mass. 195, 98 N. E. 685.

contract, although the quality of such instalments is as good as the quality of the instalment which the buyer had accepted.¹

§ 3020. Contracts for work and labor—Default by employe. The difficulties which have troubled many courts in dealing with contracts for the sale of goods have seemed to vanish when these courts have turned from a consideration of contracts of sale to a consideration of contracts for work and labor. If the contract of employment is one for a fixed term, and if the contract is to be paid in instalments at certain intervals during such term, it is usually held that such contract is entire;¹ so that an employe who has broken such contract by refusing or omitting to perform further, can not recover on the contract for the work which he has done already.² If the compensation is not to be paid in instalments by the terms of the contract, it is even more clear that the contract is entire.³ A contract to prepare plans and specifications for a building, and to supervise the construction thereof for a certain percentage of the price thereof, is an entire contract;⁴ so that no recovery can be had for preparing the plans and specifications if the architect omits or refuses to perform the contract for supervising the construction.⁵ Under a contract by a teacher to teach for nine months at forty-five dollars per pupil, he can not recover on the contract if he teaches for only eight months and a half.⁶ The

¹ *Jackson v. Rotax Motor & Cycle Co.* [1910], 2 K. B. 937; *Duluth Log Co. v. John C. Hill Lumber Co.*, 110 Minn. 124, 124 N. W. 967.

² *Alabama.* *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426.

California. *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337.

Maryland. *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273, 22 L. R. A. 74, 27 Atl. 501.

Massachusetts. *Davis v. Maxwell*, 53 Mass. (12 Met.) 286.

New Jersey. *Larkin v. Hecksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703.

Ohio. *Larkin v. Buck*, 11 O. S. 561.

Wisconsin. *Kopplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

² *Alabama.* *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426.

California. *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337.

Maryland. *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273, 22 L. R. A. 74, 27 Atl. 501.

Massachusetts. *Davis v. Maxwell*, 53 Mass. (12 Met.) 286.

New Jersey. *Larkin v. Hecksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703.

Ohio. *Larkin v. Buck*, 11 O. S. 561.

Wisconsin. *Kopplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

³ *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200; *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533.

⁴ *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533.

⁵ *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533.

⁶ *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200.

question of the right to recover in quasi-contract in such cases is discussed elsewhere.⁷

A contract for doing certain work is entire, although the compensation is, by the terms of the contract, to be measured in accordance with the quantity of the work as ascertained during actual performance, or by the time necessary for performance, as ascertained by actual performance, and the like.⁸ A contract to thrash a crop of grain at a certain price per bushel is entire,⁹ and the thrasher can not recover reasonable compensation, or on the contract, for thrashing a part of such crop,¹⁰ unless further performance is discharged by some recognized form of discharge,¹¹ or the jurisdiction is one in which a party in default may recover in quasi-contract.¹²

If, however, the parties have treated the contract as severable, effect will be given to the construction which they have thus placed on it:¹³ so that the employe may recover compensation for the work actually done although he abandoned such employment before the end of the period agreed upon.¹⁴

A contract for work and labor is so far entire that minor defects as to one instalment do not authorize the party for whom such work is done to treat the contract as discharged, at least if he has waived such breach by accepting such instalment.¹⁵ If A agrees to mine ore from B's mine and to deliver it to B, the fact that a small part of such ore was not free from foreign substances, as required by the terms of the contract, is not a breach which operates as a discharge, at least if B continues to accept delivery under the contract and if A has incurred heavy preliminary expenses before beginning performance.¹⁶

§ 3021. Contracts for work and labor—Default by employer.
If the employer fails to make payments in accordance with the

⁷ See ch. LXXXVIII.
Employment for six months certain at eleven dollars per month. *Larkin v. Buck*, 11 O. S. 561.

⁸ *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 707.

⁹ *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 707.

¹⁰ *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 707.

¹¹ See ch. LXXV et seq.

¹² See ch. LXXXVIII.

¹³ *Powell v. Russell*, 88 Miss. 549, 41 So. 5.

¹⁴ *Powell v. Russell*, 88 Miss. 549, 41 So. 5.

¹⁵ *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739].

¹⁶ *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739].

In this case the defects were apparently confined to one carload out of a total of eighteen thousand tons.

terms of the contract, a substantial default on his part is such a breach that the adversary party is justified in treating the contract as discharged.¹ This principle applies to cases in which the legal effect of the contract is for payment in instalments as the work progresses, although there is no express provision therefor;² and failure on the part of the person for whom the work is done to pay such instalments when they are, in legal effect, due and payable, justifies the adversary party in treating the contract as discharged.³

§ 3022. Building and construction contracts. A building or construction contract is ordinarily, from its nature, an entire contract, even though provision is made for paying therefor in instalments as the work progresses.¹ If the contract gives the builder

¹ England. *Roberts v. Havelock*, 3 Barn. & Ad 404.

Arkansas. *Eastern Arkansas Hedge Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

California. *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *San Francisco Bridge Co. v. Dumbarton Land & Improvement Co.*, 119 Cal. 272, 51 Pac. 335.

Illinois. *Central Military Tract Ry. v. Spurek*, 24 Ill. 587; *Dobbins v. Higgins*, 78 Ill. 440.

Minnesota. *Newton v. Highland Improvement Co.*, 62 Minn. 436, 64 N. W. 1146.

Washington. *Dyer v. Irrigation District*, 25 Wash. 80, 64 Pac. 1009.

This principle has been applied to a number of different classes of contracts:

Constructing canal. *South Fork Canal Co. v. Gordon*, 73 U. S. (6 Wall.) 561, 18 L. ed. 894.

Setting hedge. *Eastern Arkansas Hedge Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

Building levee. *San Francisco Bridge Co. v. Dumbarton Land & Improvement Co.*, 119 Cal. 272, 51 Pac. 335.

Building road. *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146.

Clearing land. *Newton v. Highland Improvement Co.*, 62 Minn. 436, 64 N. W. 1146.

Digging ditch. *Dyer v. Irrigation District*, 25 Wash. 80, 64 Pac. 1009.

² *Roberts v. Havelock*, 3 Barn. & Ad. 404.

³ *Roberts v. Havelock*, 3 Barn. & Ad. 404.

¹ United States. *South Fork Canal Co. v. Gordon*, 73 U. S. (6 Wall.) 561, 18 L. ed. 894; *Knotts v. Clark Construction Co.*, 249 Fed. 181; *McGowan v. United States*, 35 Ct. Cl. 606.

California. *American-Hawaiian Engineering & Construction Co. v. Butler*, 165 Cal. 497, 133 Pac. 280.

Georgia. *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

Michigan. *Finnegan v. Worden-Allen Co.*, 201 Mich. 445, 167 N. W. 930.

Minnesota. *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003.

Missouri. *Bean v. Miller*, 69 Mo. 384.

West Virginia. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436; *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308.

For purposes of a mechanic's lien. *Grace v. Building Association*, 166 Ill. 637, 46 N. E. 1102 [reversing, 63 Ill. App. 339].

the right to stop work at a certain stage and take a certain sum therefor, it is nevertheless an entire contract if for a complete building.² A contract for moving and repairing an old house and building an addition thereto, to be paid in instalments as the work progresses, is entire. No recovery of instalments can be had if before they come due the building is destroyed by fire.³ Such a contract is, however, so far severable that an action can be brought for each instalment as it comes due.⁴

If the party for whom such work is done is guilty of a material breach as to the time, manner or amount of payment, the party who was to do such work may treat such default as a discharge of the contract;⁵ he may refuse further performance,⁶ and he may recover compensation for work done under the contract,⁷ or he may recover damages for the breach thereof.⁸ If the contract provides for payment to a subcontractor in money, it is held that he may treat the contract as discharged if the principal contractor insists on crediting, as against such instalment, material which the subcontractor has used and which has been furnished by the property owner and paid for by the contractor.⁹

If the party for whom the work is done not only omits to pay an instalment, but refuses to act with the contractor in determining the amount due, the contractor may treat such conduct as a discharge.¹⁰

² *Hunnicut & Bellingrath Co. v. Van Hoose*, 111 Ga. 518, 36 S. E. 660.

³ *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677.

⁴ *Crawford v. McKinney*, 165 Pa. St. 609, 30 Atl. 1047.

⁵ *United States. Guerini Stone Co. v. P. J. Carlin Construction Co.*, 248 U. S. 334, — L. ed. — [reversing *P. J. Carlin Construction Co. v. Guerini Stone Co.*, 241 Fed. 545]; *South Fork Canal Co. v. Gordon*, 73 U. S. (6 Wall.) 561, 18 L. ed. 894; *Knotts v. Clark Construction Co.*, 249 Fed. 181.

California. American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 133 Pac. 280.

Michigan. Finnegan v. Worden-Allen Co., 201 Mich. 445, 167 N. W. 930.

Minnesota. Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003.

Missouri. Bean v. Miller, 69 Mo. 384.

Nebraska. Howard County v. Pesha, — Neb. —, 172 N. W. 55.

Washington. Bishop v. T. Ryan Construction Co., 106 Wash. 254, 180 Pac. 126.

West Virginia. Lunsford v. Wren, 64 W. Va. 458, 63 S. E. 308.

A lessor may treat the failure of the lessee to pay rent as a discharge of a contract by the lessor to furnish power. *Bean v. Fitzpatrick*, 67 N. H. 225, 38 Atl. 722.

⁶ *Peet v. East Grand Forks*, 101 Minn. 518, 112 N. W. 1003.

⁷ *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308.

⁸ *Knotts v. Clark Construction Co.*, 249 Fed. 181.

⁹ *Finnegan v. Worden-Allen Co.*, 201 Mich. 445, 167 N. W. 930.

¹⁰ *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

The contractor, however, can treat the failure of the property owner to pay an instalment as a discharge only if the contractor has performed the covenants of the contract on his part, substantially at least, up to the time of such default on the part of the property owner.¹¹ If the contractor has not performed in accordance with the contract,¹² and if he has failed to furnish bonds required by the contract,¹³ the refusal of the property owner to make further payments is not a breach which will justify the contractor in treating the contract as discharged.

If the contractor wishes to treat such breach as discharge, he must treat it as a discharge of the entire contract,¹⁴ or at least of the covenants of the contract, the performance of which are affected by the default of the property owner.¹⁵ If the contractor continues performance in spite of the default of the property owner, he can not treat such default in making payment as an excuse for delay on his part in performing the contract, unless he is able to show that such delay was caused by the failure of the property owner to make such payments in accordance with the terms of the contract.¹⁶

A provision in a construction contract to the effect that partial payments are to be made on estimates at certain intervals of time, or at certain stages of performance, is held to make the contract so far severable that the contractor may recover for work actually done, although he is subsequently in default,¹⁷ although the property owner may recoup the damages due to such default.¹⁸

V. EFFECT OF BREACH

A. ELECTION

§ 3023. Effect of breach. Until breach no cause of action arises on a contract.¹ Upon breach a cause of action arises in favor

¹¹ Schillinger v. Bosch-Ryan Grain Co., 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132]

¹² Schillinger v. Bosch-Ryan Grain Co., 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹³ Schillinger v. Bosch-Ryan Grain Co., 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹⁴ Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

¹⁵ Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

¹⁶ Chamberlin v. Booth, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

¹⁷ Milske v. Steiner Mantel Co., 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471; Jones v. Whittier, 77 N. J. L. 715, 73 Atl. 497; Dillon v. Suburban Land Co., 73 W. Va. 363, 80 S. E. 471.

¹⁸ Dillon v. Suburban Land Co., 73 W. Va. 363, 80 S. E. 471.

¹ Alabama, Elliott v. Nicoles, 182 Ala. 159, 62 So. 499.

of the party who is not in default, and against the party in default.² Whatever effect the refusal of a party to perform may have upon the property rights of the adversary party, it can not affect the liability of the party in default upon the covenant which he has broken.³

Breach of contract may have three different results according to the circumstances of the case and the election of the party not in default: (1) The party not in default may maintain an action for damages against the party in default,⁴ or under the proper circumstances he may sue in equity for the affirmative relief of specific performance,⁵ or for the negative relief of injunction, rescission or cancellation.⁶ (2) The party not in default may, in some cases, elect to treat such breach as discharge, refuse to perform further, and use such breach as a defense.⁷ (3) If the breach is such as to operate as a discharge of the contract, the party who is not in default, and in some jurisdictions, the party who is in default, may ignore the contract as the basis of rights and may sue in quasi-contract to recover reasonable compensation for what such party has furnished in partial performance of the contract.⁸

California. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

Florida. *Hall v. Northern & Southern Co.*, 55 Fla. 242, 46 So. 178.

Maryland. *Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264.

Minnesota. *Southworth v. Rosendahl*, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717.

Montana. *Chealey v. Purdy*, 54 Mont. 489, 171 Pac. 926.

South Carolina. *Tillinghast v. Lumber Co.*, 39 S. Car. 484, 22 L. R. A. 49, 18 S. E. 120.

²**England.** *Ogdens v. Nelson* [1904], 2 K. B. 410.

Alabama. *Martin v. Powell*, — Ala. —, 75 So. 358.

Colorado. *Henderson v. Spratlen*, 44 Colo. 278, 19 L. R. A. (N.S.) 655, 98 Pac. 14.

Georgia. *Montgomery v. Hunt*, 39 Ga. 499, 27 S. E. 701.

Illinois. *Pungs v. Brake Beam Co.*, 200 Ill. 306, 65 N. E. 645.

Louisiana. *Hebert v. Weil*, 115 La. 424, 39 So. 389.

Maryland. *Ady v. Jenkins*, — Md. —, 104 Atl. 178.

Michigan. *Droppers v. Marshall*, — Mich. —, 4 A. L. R. 1206, 168 N. W. 1001.

Nebraska. *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.) 388, 98 N. W. 872.

Oklahoma. *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

³*Martin v. Powell*, — Ala. —, 75 So. 358.

⁴See ch. LXXXVII.

⁵See ch. LXXXIX.

⁶See ch. XC.

⁷See §§ 3024 et seq.

⁸See ch. LXXXVIII.

§ 3024. Right of party in default. The party who is in default can not elect to treat the contract as discharged if the adversary party wishes to treat it as in effect.¹ In many jurisdictions he can not take advantage of his own breach to recover reasonable compensation for what he has done under the contract, if the adversary party is willing to accept what has been done as full performance.² An insurance company can not discharge a policy by renouncing liability thereunder.³ If the insurance policy is paid up and the beneficiaries do not acquiesce in such renunciation by the insurance company, the policy remains in effect.⁴ If the beneficiaries or the insured object to such renunciation, their right to treat the policy as in effect is even clearer.⁵ If materials for a building are to be delivered in instalments, the default of the seller in delivering part of such material is a breach of which only the purchaser can take advantage; and such breach does not of itself accelerate the time of performance of such contract for the purpose of determining the time within which a lien for such material may be taken.⁶

It is frequently said that a party to an executory contract, except contracts which equity will enforce by the remedies of specific performance,⁷ or injunction,⁸ may break such contract so as to terminate it and to leave in place of his original liability to perform the contract his substituted liability to make compensation to the adversary party for the damage caused by such breach.⁹ Lan-

¹ *In re Hellams*, 223 Fed. 460; *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458.

² *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458.

See ch. LXXXVIII.

³ *United States. Wright v. Manhattan Life Ins. Co.*, 126 Fed. 82.

Iowa. Nutter v. Des Moines Life Ins. Co., 156 Ia. 539, 136 N. W. 891.

Minnesota. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

Missouri. Wayland v. Western Life Indemnity Co., 166 Mo. App. 221, 148 S. W. 626.

New York. Shaw v. Republic Life Ins. Co., 69 N. Y. 286.

Virginia. Clemmitt v. New York Life Ins. Co., 76 Va. 355.

⁴ *Wright v. Manhattan Life Ins. Co.*, 126 Fed. 82.

⁵ *Palmer v. Mutual Life Ins. Co.*, 121 Minn. 395, 141 N. W. 518.

⁶ *In re Hellams*, 223 Fed. 460.

⁷ See ch. LXXXIX.

⁸ See ch. XC.

⁹ *United States. Yates v. United States*, 15 Ct. Cl. 119.

Maryland. Black v. Woodrow, 39 Md. 194.

Massachusetts. Hyland v. Giddings, 77 Mass. (11 Gray) 232 (obiter).

Michigan. Wigent v. Marrs, 130 Mich. 609, 90 N. W. 423.

Minnesota. Gibbons v. Bente, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756; *Southworth v. Rosendahl*, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717, (obiter).

guage is sometimes used which seems to indicate that the courts regard this action of the party who is in default as the exercise of a legal right.¹⁰ It is likely, however, that even the courts which use this language do not really mean that the party in default is exercising a legal right. The breach of a simple contract was originally classed as a sort of private wrong which was little, if any, different from the ordinary tort;¹¹ and the view that breach of a

Nebraska. *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.) 388, 98 N. W. 872.

New York. *Lord v. Thomas*, 64 N. Y. 107.

North Carolina. *Heiser v. Mears*, 120 N. Car. 443, 27 S. E. 117.

North Dakota. *Davis v. Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

Pennsylvania. *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, 18 Atl. 1058.

Rhode Island. *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370.

South Carolina. *Wanda Phosphate Co. v. Gibbon*, 28 S. Car. 418, 13 Am. St. Rep. 600, 5 S. E. 837 (obiter).

Tennessee. *Chicago Building & Mfg. Co. v. Barry* (Tenn. Ch. App.), 52 S. W. 451; *Gardner v. Deeds*, 116 Tenn. 123, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Vermont. *Danforth v. Walker*, 37 Vt. 239.

Virginia. *Clark v. Franklin*, 34 Va. (7 Leigh) 1; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

West Virginia. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235; *Comstock v. J. R. Droney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255.

Wisconsin. *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057; *Lincoln v. Charles Alshuler Manufacturing Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

"Again, it is an elementary principle that, in case of a bargain and sale of goods, not specific, and before they are set aside for the vendee, he notifies the executory vendor that he

elects to and does cancel the contract and will not receive the goods, he can not be made liable for the purchase price, as on a sale of goods, but only for damages for his breach of contract. That being upon the theory, often declared, that, ordinarily, any person has a right to breach his mere executory agreement and submit to damages therefor. *Ward v. Am. H. F. Co.*, 119 Wis. 12, 96 N. W. 388; *Malueg v. Hatten L. Co.*, 140 Wis. 381, 122 N. W. 1057. *Unexcelled F. W. Co. v. Polites*, 130 Pa. St. 536, 18 Atl. 1058, is a good illustrative case." *Lincoln v. Charles Alshuler Manufacturing Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

He is said to have "an unqualified right to abandon the contract at any stage of performance." *Barrie v. Quinby*, 206 Mass. 250, 92 N. E. 451.

¹⁰ *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981; *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N.S.) 60, 147 S. W. 1135; *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235; *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057.

"A person, at law, may of right breach his contract with another and subject himself to the burden of such damages for the benefit of such other as may be necessary to remedy the breach." *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057 [citing *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388].

¹¹ See §§ 25 et seq. ante.

See also discussion in III Black. Com., 153 et seq.

contract is a wrongful act rather than a rightful act is repeated by the courts.¹²

While in many of the cases in which the question comes up the distinction between an exercise of a legal right and a wrongful exercise of the power to break an executory contract which every party thereto has, just as every one has the power to commit a tort or a crime, is ordinarily a mere matter of names without any clear distinction of legal rights, there are certain classes of cases in which the practical result which will be reached if the breach of a contract is regarded as the exercise of a legal right is different from the result that will be reached if the breach of a contract is regarded as the wrongful exercise of the power which the party possesses. If a party has a legal right to break a contract, subject to making a compensation in damages, the performance of such contract by a party who has threatened to break it is sufficient consideration for an additional promise by the adversary party to pay additional compensation for such performance; while, if the breaking of a contract is a wrongful act, no consideration for such subsequent promise will exist. While in some jurisdictions it is held that the performance of a contract is a consideration for a subsequent promise to pay additional compensation therefor,¹³ the great weight of modern authority is to the effect that such performance does not amount to consideration, since the party who has performed had no legal right to do otherwise, although he had the power so to do.¹⁴ The question whether the party in default who commits such a breach as operates as a discharge is exercising his legal right to pay damages in lieu of performance, or whether he is acting wrongfully, is also raised in cases in which the legislature has given the remedy of specific performance or injunction in cases in which equity had not granted such remedies before the enactment of such statute; and such statute is enacted after a contract of that sort has been made and before an action has been brought to enforce such contract, or possibly before a final judgment has been rendered in such an action. Under the constitutional provisions which prevent a state from impairing the obligation of a contract,¹⁵ such a statute is unconstitutional if the party who is in default had the legal right to elect between performing

¹² Long v Conklin, 75 Ill 32; New Orleans v Wardens, 11 La Ann 244

See obiter in Rowland Lumber Co. v. Ross, 100 Va. 275, 40 S. E. 922.

¹³ See § 590.

¹⁴ See § 580

¹⁵ See ch XCV.

or paying damages; while if his breach is a wrongful act, the legislature may grant a new remedy or change a pre-existing remedy as long as the substantive rights of the parties are not impaired.¹⁶ In cases of this sort it is ordinarily held that the statute which provides that a specific performance or injunction may be granted does not impair the obligation of a prior contract.¹⁷ This result can be reached only upon the theory that the party in default has no legal right to elect to pay damages in lieu of performing the contract.

It is true that damages was the only remedy which the common law could give in the exercise of its ordinary jurisdiction; but no reason appears for making an arbitrary selection of the remedy which the court was able to give at one stage of legal development and for saying that the obligation of the contract is limited to this particular remedy. It seems, therefore, to be held, wherever the question is really involved, that the party in default has no legal right to break a valid and subsisting contract; but that, on the contrary, his act in so doing is a wrongful act. What is ordinarily meant by the statement that the party who is in default may terminate the contract and substitute his liability to pay damages for his original obligation, is that the party who is not in default must take proper precautions to mitigate damages wherever this can be done reasonably,¹⁸ and that accordingly he must recognize the fact of breach in such cases and desist from further performance on his part if his act in continuing to perform after he knows of such breach will increase damages.¹⁹

¹⁶ See ch. XCV.

¹⁷ See ch. XCV.

¹⁸ **England.** *Jamal v. Moolla Dawood Sons & Co.* [1916], A. C. 175.

United States. *Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94, 18 L. ed. 752; *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117.

Florida. *Moses v. Autuono*, 56 Fla. 400, 20 L. R. A. (N. S.) 350, 47 So. 925.

Kansas. *Hamilton v. McKenna*, 93 Kan. 207, L. R. A. 1915E, 453, 147 Pac. 1126.

Kentucky. *Cincinnati, New Orleans & Texas Pacific Ry. v. Rose* (Ky.), 21 L. R. A. (N. S.) 681, 115 S. W. 830.

Maine. *Miller v. Mariner's Church*, 7 Me. 51.

Massachusetts. *Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L. R. A. (N. S.) 1087, 76 N. E. 237; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

New York. *Taylor v. Read*, 4 Paige (N. Y.) 561.

West Virginia. *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N. S.) 1130, 57 S. E. 253.

¹⁹ **United States.** *Yates v. United States*, 15 Ct. Cl. 119 (obiter).

Michigan. *International Text-book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98; *Ayer v. Devhn*, 179 Mich. 81, 146 N. W. 257.

While the party who is in default may demand that the adversary party refrain from further performance so as not to increase damages,²⁰ such act does not discharge the party who is in default from liability upon his contract.²¹

If damages are to be measured at the time fixed by the contract for performance, the party who is in default can not alter the time at which damages are to be estimated by repudiating the contract in advance.²² It is said, however, that if the party who is not in default elects to treat a repudiation by the adversary party as a discharge of a contract of sale, and if he proceeds to settle at once, in good faith, with a third person from whom such property had been bought by the other two, his settlement, if in good faith, is binding upon the party in default; and the party who is not in default is not bound to wait until the time fixed for performance.²³

That there is no legal right to break a contract on payment of damages, and that immunity from further liability on payment of damages is merely the consequence of a system of remedies which gives a money judgment for damages as the only remedy for breach of contract, is shown by the fact that if a provision for a penalty is inserted in a contract, a party to such contract can not evade liability thereon by paying such penalty if the actual damages exceed the amount of the penalty.²⁴

Missouri. *Peck v. Kansas City Metal Roofing & Corrugating Co.*, 96 Mo. App. 212, 70 S. W. 160.

Nebraska. *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.) 388, 98 N. W. 872.

New York. *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648.

North Dakota. *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938; *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137.

Vermont. *Danforth v. Walker*, 37 Vt. 239 [s. c., 40 Vt. 257].

Wisconsin. *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *Richards v. Manitowoc & Northern Traction Co.*, 140 Wis. 85, 121 N. W. 937.

²⁰ See § 3032.

²¹ *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92.

²² *Long v. Conklin*, 75 Ill. 32; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

²³ *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.

²⁴ **England.** *Cotterel v. Hooke*, 1 Dougl. 97.

United States. *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Robinson v. Cathcart*, Fed. Cas. No. 11,946, 2 Cranch, C. C. 590.

Minnesota. *Willeston v. Mathews*, 55 Minn. 422, 56 N. W. 1112.

New Hampshire. *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32.

New Jersey. *Gloucester City v. Eschbach*, 54 N. J. L. 150, 23 Atl. 360.

North Carolina. *Rhyne v. Rhyne*, 160 N. Car. 559, 76 S. E. 469.

It is said that a party who is himself in default can not take advantage of subsequent breach by the adversary party.²⁵ This broad and general statement must be understood to be limited by the principles applicable to subsequent covenants and to independent covenants,²⁶ as well as by the principles applicable to breach of vital terms and to breach of minor terms.²⁷

§ 3025. Right of election in case of breach. Even if the breach is of such a type that it may operate as a discharge of the contract,¹ it does not have this effect automatically, at least as long as damages are not increased by failure to treat the contract as discharged.² Breach by one party gives the adversary party an election in so far as his exercise of the right of election does not increase the damages resulting from the breach.³ On the one hand,

Oregon. *Pengra v Wheeler*, 24 Or. 532, 21 L. R. A. 726, 34 Pac 354

Pennsylvania. *Moore v Colt*, 127 Pa. St. 289, 14 Am. St. Rep 845, 18 Atl. 8

Texas. *Commerce Milling & Grain Co v Morris*, 27 Tex. Civ. App 553, 65 S. W. 1118

²⁵ *Myers v. Gross*, 59 Ill. 436; *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. 551; *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215; *Hatton v. Johnson*, 83 Pa. St. 219.

²⁶ See §§ 2951 et seq. and 2971 et seq.

²⁷ See §§ 2981 et seq.

¹ See §§ 2881 et seq.

² **England.** *General Billposting Co. v. Atkinson* [1909], A. C. 118.

United States. *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717; *In re Hellams*, 223 Fed. 460; *Feick v. Stephens*, 250 Fed. 185.

Arkansas. *Fletcher v. Verser*, 79 Ark. 271, 116 Am. St. Rep. 75, 96 S. W. 384.

Georgia. *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

Iowa. *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458.

Louisiana. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 117 La. 1, 41 So. 332; *Murray v. Barnhart*,

117 La. 1023, 42 So. 489; *Jennings-Heywood Oil Syndicate v. Housiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481

Massachusetts. *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

Michigan. *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101

Nebraska. *Fahey v. Updike Elevator Co.*, — Neb. —, 171 N. W. 50

Nevada. *Bradley v. Nevada-California-Oregon Ry.*, — Nev. —, 178 Pac. 906.

New York. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

Washington. *Kennedy v. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043.

West Virginia. *Dorr v. Midelburg*, 65 W. Va. 778, 23 L. R. A. (N.S.) 987, 65 S. E. 97.

³ **England.** *General Billposting Co. v. Atkinson* [1909], A. C. 118.

United States. *World's Fair Mining Co. v. Powers*, 224 U. S. 173, 56 L. ed. 717; *In re Hellams*, 223 Fed. 460; *Feick v. Stephens*, 250 Fed. 185.

in case of breach which may operate as a discharge of the contract,⁴ the party who is not in default may treat the contract as

Arkansas. *Fletcher v. Verser*, 79 Ark. 271, 116 Am St. Rep. 75, 96 S. W. 384.

Louisiana. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 117 La. 1, 41 So. 332; *Murray v. Barnhart*, 117 La. 1023, 42 So. 489; *Jennings-Heywood Oil Syndicate v. Housiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481.

Massachusetts. *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

Michigan. *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101.

Nebraska. *Fahey v. Updike Elevator Co.*, — Neb. —, 171 N. W. 50.

Nevada. *Bradley v. Nevada-California-Oregon Ry.*, — Nev. —, 178 Pac. 906.

New York. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

Washington. *Kennedy v. Mellicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper,

treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." *Frost v. Knight*, L. R. 7 Ex. 111, 112 [quoted in *Roehm v. Horst*, 178 U. S. 1, 11, 44 L. ed. 958].

"It is well settled that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: he may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery the plaintiff must allege and prove performance upon his part, or a legal excuse for non-performance." *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 33 N. E. 773 [quoted in *Longfellow v. Huffman*, 49 Or. 486, 90 Pac. 907].

⁴ See §§ 2862 et seq.

discharged.⁵ On the other hand, if the party not in default will not increase damages by so doing, he may treat the breach as not affecting the continued existence of the contract, and the contract as still being in force.⁶

Election to take either of these alternative rights operates as a waiver of the other. In general usage, however, waiver is used to denote the election to treat the contract as in effect and to waive the right to treat it as discharged; and almost never of the election to treat the contract as discharged and to waive the right to treat it as still in effect.⁷

§ 3026. What amounts to election in case of breach. Election to treat breach as a discharge of the contract consists in words or conduct which show unequivocally that the party who has such right of election intends to treat the contract as discharged.¹ The election of the party who is not in default to treat the breach by the adversary party as discharging the party not in default from the performance of subsequent covenants, does not of itself amount to an election on his part to treat the contract as discharged so as to prevent him from maintaining an action on the contract for the breach thereof.² If a life insurance company has repudiated liability upon its contract, the fact that subsequent premiums were

⁵ *United States. Harriman National Bank v. Seldomridge*, 249 U. S. 1, — L. ed. —; *Shubert v. Rosenberger*, 204 Fed. 934, 45 L. R. A. (N.S.) 1062.

Arkansas. Fletcher v. Verser, 79 Ark 271, 116 Am. St. Rep. 75, 96 S. W. 384.

Illinois. Ptacek v. Pisa, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

Kentucky. Seventh St. Planing Mill Co. v. Schaefer (Ky.), 99 S. W. 341, 30 Ky L Rep 623.

Maryland. Ady v. Jenkins, — Md —, 104 Atl. 178.

Nevada. Bradley v. Nevada-California-Oregon Ry., — Nev. —, 178 Pac. 906.

New York. Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937.

Washington. Garey v. Pasco, 89 Wash. 382, 154 Pac. 433; *Bishop v. T. Ryan Const. Co.*, 106 Wash. 254, 190 Pac. 126.

See, on this subject, *Codification of the Doctrine of Rescission*, by Francis M. Burdick, 4 *Columbia Law Review*, 264, and *Rescission of Executory Contracts*, by C. B. Morison, 23 *Law Quarterly Review*, 398.

⁶ *In re Hellams*, 223 Fed. 460; *Feick v. Stephens*, 250 Fed. 185; *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N. S.) 1223, 70 S. E. 569; *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458; *Shaw v. Republic Life Ins Co.*, 69 N. Y. 286; *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

⁷ See § 3037.

¹ *Shaw v. Republic Life Insurance Co.*, 69 N. Y. 286.

² *Shaw v. Republic Life Insurance Co.*, 69 N. Y. 286.

See §§ 3063 et seq.

neither paid nor tendered does not prevent the beneficiary from bringing an action upon the policy to recover the amount thereof less the unpaid premiums, on the death of the insured.³

If the declarations of the party who is not in default indicate an election to treat the contract as discharged, but his conduct in continuing to accept benefits thereunder indicates that he elects to treat it as in effect and that he waives his right to treat such breach as a discharge,⁴ the inference drawn from his conduct prevails over the inference from his declarations.⁵ Under a contract by which B agrees to advance certain funds to A, A's conduct in accepting advances waives B's default in not advancing as large amounts as he had agreed to advance; and even if A has notified B that he will terminate the contract because of B's default, his conduct in continuing to accept advances operates as a waiver of such notice.⁶

Many of the questions involved in the nature of election are considered in connection with the election of the party in default to

³ *Shaw v. Republic Life Insurance Co.*, 69 N. Y. 286.

"There is no doubt that the defendant repudiated all obligation to the plaintiff, and so declared to her. It would have been a useless act for her after that to have sought the defendant and made offer to pay the annual premium. Nor need she, though the defendant had refused future performance, act with effect until the death of her husband, the event which was contemplated by the contract as giving immediate right of action. It was then she sustained the injury which was the cause of damage to her, by the non-performance by the defendant of their contract. (See, in this particular, the remarks and illustration per Grover, J. [*Burtis v. Thompson*], in 42 N. Y. [246].) We do not perceive that it alters the rule we have stated, that this contract is one of life insurance, and that there might occur several or many occasions when by its stipulations the plaintiff might have precedent conditions to fulfill. It is no more incumbent upon a party to

such a contract to offer performance of the conditions precedent, because they are many and of periodical recurrence, than upon the promisee who has but one act to perform. The declaration of the promisor that he will not perform is an excuse for not offering to perform many and successive conditions, as well as one. For the same reason exists at the occurrence of each period for performance that it would be useless and unavailing to make tender while the declaration was not withdrawn (see *Crist v. Armour*, 34 Barb., 378)." *Shaw v. Republic Life Insurance Co.*, 69 N. Y. 286.

⁴ See §§ 3037 et seq.

⁵ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701.

For cases in which acceptance of benefits precedes the attempt to treat the breach as a discharge, see *Perry v. Ayres*, 159 Cal. 414, 114 Pac. 46; *Pacific Timber Co. v. Iowa Windmill & Pump Co.*, 135 Ia. 308, 112 N. W. 771.

⁶ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701.

treat the contract as still in effect; and in accordance with general usage, they are discussed under waiver.¹

§ 3027. Meaning of "rescission" for breach. In some cases the election to treat the contract as discharged is spoken of as rescission;¹ or it is said that the contract is canceled,² or terminated.³ In other jurisdictions the term "rescission" seems to be limited to the discharge of a contract by the subsequent agreement of the parties.⁴ In other jurisdictions rescission is distinguished from the election to treat the contract as discharged for the purpose of refusing further performance and of bringing an action to recover damages for breach of the contract.⁵ To rescind a contract is said to be "to put it at an end as if it had never been," as dis-

¹ See §§ 3037 et seq.

¹ California. *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061.

Massachusetts. *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

Ohio. *Seeds v. Simpson*, 16 O. S. 321.

Oklahoma. *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288. For a discussion of the meaning of "rescind," see *Cavanagh v. Ridgfield*, — N. J. —, 109 Atl. 515.

² *Harriman National Bank v. Sel-domridge*, 249 U. S. 1, — L. ed. —.

³ *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433.

⁴ *Hochster v. De la Tour*, 2 El. & Bl. 678; *McAllister Coman Co. v. Matthews*, 167 Ala. 361, 140 Am. St. Rep. 43, 52 So. 416; *Adams v. Guiraud*, — Colo. —, 169 Pac. 580; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937.

"Nothing is better settled than that one party to an executory contract, in the absence of fraud or a special reason, can not rescind. To rescind by agreement, the agreement must be mutual, and by all the necessary parties to the original contract. Such rescission must be with the clear knowledge and understanding of the parties. The same degree of proof of rescission will be required as in case

of proof of the contract alleged to have been rescinded. The burden to prove an agreement to rescind is upon the party alleging it." *Adams v. Guiraud*, — Colo. —, 169 Pac. 580.

⁵ *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94; *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937.

"The right of one party to a contract of sale to be excused from further performance where the other party has absolutely refused to perform is distinct from a right to rescind, as upon such refusal the innocent party has the right to recover damages for the injury suffered, but if rescission has taken place the contract then ceases to exist, and not even nominal damages can be recovered. *Whiteside v. Brawley*, 152 Mass. 133; *Speirs v. Union Drop Forge Co.*, 180 Mass. 87. For this reason when the vendor refused to perform, the defendants not only became entitled to recover such damages as had been caused by the breach, but were excused from further performance upon their part. *Hapgood v. Shaw*, 105 Mass. 276; *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275; *United States v. Peck*, 102 U. S. 64." *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520.

tinguished from treating "the contract as ended merely for purposes of further performance," holding "the wrongdoer liable for the damages sustained by reason of the repudiation."⁶ In this sense of the term, rescission is used as equivalent to the election to treat the contract as discharged so that it does not measure the rights of the parties, leaving one or both of the parties to their rights in quasi-contract.⁷ If the vendee elects to treat the default of the vendor as a discharge of the contract, and if the vendee then seeks to enforce a lien for the purchase price of realty, this is said not to be rescission, although the vendee treats the contract as discharged.⁸ If "rescission" is used in the sense of treating the con-

⁶Holt v. United Security Life Insurance & Trust Co., 70 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

⁷Clark v. Gulesian, 197 Mass. 492, 84 N. E. 94; Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937.

See ch. LXXXVIII.

⁸Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937.

"It is insisted that the whole agreement is to be taken together and completely performed or wholly rescinded, and that rescission by the vendee destroys the contract in toto and ab initio. The same argument was urged by counsel in *Rose v. Watson* (10 H. L. Cas. 672), and the complete answer of Lord Westbury has already been quoted. None of the authorities relating to the lien of a vendee, and we have cited but few out of many, seem to regard the doctrine of rescission as at all applicable to the subject. This is not an action at law resting on rescission by which an election is made to declare the contract void in its inception, but a suit in equity resting on the equitable principle that the vendee by the contract and payment acquired an interest in the land. Rescission was neither alleged nor found and as the affirmance was unanimous we can not look into the evidence for further facts. The vendee does not elect to nullify the contract

nor seek remission to his original rights when he asserts his acquired rights, depending wholly on the contract and his action thereunder. He recognizes the contract as a subsisting obligation, valid in its inception and still in force, and founds his entire claim for relief on the theory that because it is valid and he has made payments on it as required by it, he has become an owner of the land in equity to the extent of such payments. He accepts 'the situation which the wrongdoing of the other party has brought about,' and tries to get out of the land what he paid on it under the contract. The termination of a contract as to the future by one party owing to the default of the other is a rescission neither ab initio, nor in any true sense. *Hurst v. Trow P. & B. Co.*, 2 Misc. Rep. 361, 366, 142 N. Y. 637. If it were, it would involve the surrender of possession taken pursuant to a provision authorizing it and the abandonment of all improvements made while in possession. The vendee does not rescind when without fault he goes into a court of equity and insists on a right springing from the contract and payment thereon pursuant to its terms. He does not repudiate the contract, but stands on it and affirms it as the foundation of the right he seeks to enforce, as

tract as inoperative from the beginning, the act of the party who is not in default in bringing an action to recover damages for the breach thereof is said to show his election not to rescind.³

§ 3028. Duty to elect in case of breach. On the happening of a breach which may amount to a discharge, the party who is not in default must elect between treating the contract as discharged and treating the contract as still in effect, so that he may demand a further performance thereof,¹ as long as the election to treat the contract is in effect does not increase damages. The party who has a right to elect whether or not he will treat the contract as discharged has a reasonable time in which to exercise such right of election,² and he must exercise such right of election within a reasonable time.³

fully as if he sought entire specific performance. He does not abandon his equitable ownership by trying to assert it in the only way that it can be asserted. The contract has been performed by him, wholly it may be, or in part, as in the case before us, and as, owing to the fault of the vendor, he can not have the full performance to which he is entitled, he asks for partial performance by the enforcement of the trust created by the contract and payment as provided thereby. He does not sue for money had and received, but to enforce a lien on land into which the money went. Nor does he rescind the contract, which is the source of his lien, by seeking to enforce it to the only extent now possible, owing to the breach by the vendor, but he demands that equity should give him the interest in the land that he acquired by the contract and payment. The denial of that right would be an encouragement to wrongdoing, and to hold that an attempt to foreclose the equitable lien is a rescission of the contract would deny the right in all cases, including those in which the vendee is in possession and has made improvements." *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937.

"Again it is urged that there can

be no lien in the present case, under the authority of *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, and *Jones v. Grove*, 76 Wash. 19, 135 Pac. 488, since it was held in these cases that, where a contract has been rescinded, it is at an end, and no rights exist under it. The contention assumes that, in the present case, there has been a rescission of the contract of purchase. But this is not the fact. On the contrary, the very suit is founded on the assumption of an existing contract and a breach thereof, which will result in a loss to the plaintiff if the relief she seeks is not granted. A rescission in the sense that each of the parties will be relieved from the obligations of the contract may be a part of the final decree, but it is plain that no rescission has as yet taken place." *Ihrke v. Continental L. Ins. & Invest. Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

³*Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325.

¹*Des Allemands Lumber Co. v. Morgan City Timber Co.*, 117 La. 1, 41 So. 332.

²*Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1038.

³*Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

§ 3029. Notice of election to treat breach as discharge. The party who elects to take advantage of breach on the part of the adversary party as a discharge of the contract is bound to give proper notice of his election to treat the contract as discharged, unless the circumstances are such that the party in default must be assumed to have known of such election.¹ The duty to give notice is especially clear where the party in default is proceeding to perform and will be put to additional and unnecessary expense if such notice is not given.²

If, on the other hand, the breach is one which amounts to a total failure of consideration and there are no executory covenants in the performance of which the party who is in default can incur additional expense, notice of an election to treat the contract as discharged is not necessary.³ If A has lent money to B in reliance upon B's promise to execute a note therefor and to deliver certain security for the payment of such obligation, B's failure to execute such note and to deliver such security is a breach of such a character that it is not necessary for A to give notice to B of his election to treat the contract as discharged, before bringing an action to recover the amount thus lent.⁴

Notice, where necessary, must be unequivocal.⁵ Notice of dissatisfaction with the performance which has been tendered is not equivalent to notice of an election to treat the contract as discharged by reason of such default.⁶

§ 3030. Effect of election—Election to treat contract as discharged. When the election is made with full knowledge of the facts, it is final;¹ and the election of one of these rights operates

¹ *Hennessey v. Bacon*, 137 U. S. 78, 34 L. ed. 605; *Watson v. Brown*, 113 Ia. 308, 85 N. W. 28; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701; *Seeds v. Simpson*, 16 O. S. 321.

² *Seeds v. Simpson*, 16 O. S. 321.

³ *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399.

⁴ *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399.

⁵ *Seeds v. Simpson*, 16 O. S. 321.

⁶ *Seeds v. Simpson*, 16 O. S. 321.

¹ *United States. Lima Locomotive & Machine Co. v. National Steel Castings*

Co., 155 Fed. 77, 11 L. R. A. (N.S.) 713; *Graham v. United States*, 188 Fed. 651.

Arkansas. Rodgers v. Wise, 106 Ark. 310, 43 L. R. A. (N.S.) 1009, 153 S. W. 253.

Louisiana. Des Allemands Lumber Co. v. Morgan City Timber Co., 117 La. 1, 41 So. 332.

Washington. Croup v. Humboldt Quartz & Placer Mining Co., 87 Wash. 248, L. R. A. 1918A, 537, 151 Pac. 403.

Wisconsin. Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1033.

as a waiver of the other alternative and inconsistent right.² The election of the party not in default to treat the contract as discharged operates as a final discharge of the contract in the absence of a subsequent waiver thereof acquiesced in by both parties.³ If a breach by the promisor is accepted as discharge by the promisee, the subsequent offer of the promisor to perform does not prevent the contract from operating as a discharge;⁴ nor does it give the promisor the right to recover on the contract;⁵ nor does it prevent him from being liable for breach of such contract.⁶ A breach of a contract of employment which amounts to total discharge, and which is so treated by the employe, operates as a discharge of a covenant on the part of the employe not to compete with his former employer after the termination of his employment.⁷ If the party who is not in default elects to treat the breach of the adversary party as a discharge, he can not enforce a covenant for liquidated damages as far as such damages are incurred after such election to treat the contract as discharged;⁸ nor can he recover instalments which come due under the contract after he has elected to treat it as discharged;⁹ nor can he recover the full contract price as if he had performed in full.¹⁰ If the party who is not in default has elected to treat the breach as a discharge and has entered into other contracts which would prevent him from performance of the

² See §§ 3037 et seq.

³ *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 11 L. R. A. (N.S.) 713; *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 117 La. 1, 41 So. 332; *Murray v. Barnhart*, 117 La. 1023, 42 So. 489; *Croup v. Humboldt Quartz & Placer Mining Co.*, 87 Wash. 248, L. R. A. 1918A, 537, 151 Pac. 493; *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433.

⁴ Contract to furnish certain articles. *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 11 L. R. A. (N.S.) 713.

Contract to convey realty. *Clover v. Gottlieb*, 50 La. Ann. 568, 23 So. 459.

Oil lease containing covenant to drill a well in a certain time. *Murray v. Barnhart*, 117 La. 1023, 42 So. 489.

Contract for constructing waterworks. *Grand Haven v. Waterworks*, 99 Mich. 106, 57 N. W. 1075.

Breach by employe of contract of employment. *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, 18 S. W. 262.

⁵ *The Akaba*, 54 Fed. 197.

⁶ *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 11 L. R. A. (N.S.) 713; *Emack v. Hughes*, 74 Vt. 382, 52 Atl. 1061.

⁷ *General Billposting Co. v. Atkinson* [1909], A. C. 118.

⁸ *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433.

⁹ *Croup v. Humboldt Quartz & Placer Mining Co.*, 87 Wash. 248, L. R. A. 1918A, 537, 151 Pac. 493.

¹⁰ *Rodgers v. Wise*, 106 Ark. 310, 45 L. R. A. (N.S.) 1009, 153 S. W. 253.

contract which is thus discharged,¹¹ or if he has so acted, in order to mitigate damages, that it is no longer practicable for him to perform,¹² he can not thereafter be put in default by the demand of the party who was originally in default that he continue to perform.

If the party who is not in default elects to treat the breach as a discharge of the contract, which enables him to recover what he has furnished under the contract on the theory of quasi-contract, he is precluded by such election from treating the contract as in force for the purpose of enabling him to recover damages which arise solely from the failure of the adversary party to perform the covenants upon his side,¹³ or to recover the price fixed by the contract, on the theory that the contract is still in force.¹⁴ Such election does not preclude him, however, from recovering special damages due to the attempt on his part to perform, for which he can not recover on the theory of quasi-contract.¹⁵ The election of the party not in default to treat a contract as discharged by reason of breach on the part of the adversary party, so as to avoid liability on the executory covenants of the party not in default, does not prevent the party who is not in default from maintaining an action against the party who is in default, to recover damages sustained by reason of such breach.¹⁶

§ 3031. Putting party in default by act of adversary party. The Roman law idea of mora, which was unjustified and inexcusable delay in performance of an obligation, has been carried over into the Louisiana Civil Code;¹ and it is necessary to put the promisor in default by a demand for performance, in order to recover damages.² It is not necessary to put the promisor in default if the promisee wishes to treat the default as a discharge of the con-

¹¹ *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 11 L. R. A. (N.S.) 713; *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378.

¹² *Bradley v. Nevada-California-Oregon Ry.*, — Nev. —, 178 Pac. 906.

¹³ *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325; *Chesley v. Soo Lignite Coal Co.*, 19 N. D. 18, 121 N. W. 73.

¹⁴ *Croup v. Humboldt Quartz & Placer Mining Co.*, 87 Wash. 248, L. R. A. 1918A, 537, 151 Pac. 493.

¹⁵ *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

¹⁶ *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

¹ Civil Code, Art. 1911.

² *Murray v. Barnhart*, 117 La. 1023, 42 So. 489; *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481.

tract.³ It is not necessary to put the promisor in default if he repudiates the contract,⁴ as where he denies the fact that he has entered into such contract,⁵ or declares that he will not perform.⁶

This idea has been adopted in some common-law jurisdictions, and it has been held that in case of mere non-performance, as distinguished from the various types of renunciation by word or act, the party who is not in default must put the adversary party who is already in default into further default by demanding that he perform.⁷

If one of the parties has led the other to believe that strict performance will not be demanded, notice that performance will be insisted upon in accordance with the terms of the original contract must be given for a reasonable time before the adversary party can be regarded as being in default,⁸ even in jurisdictions in which such conduct is not regarded as a final waiver of the right to performance of the contract, according to its original terms.⁹ In some jurisdictions it seems to be held that demand for performance is necessary if no time for performance is fixed by the contract,¹⁰ apparently on the theory that such contract is not to be performed in a reasonable time, but is to be performed on demand.¹¹ Since it is generally held that a contract which does not fix a specific time for performance is to be construed as requiring performance in a reasonable time,¹² it would seem that notice was not necessary,¹³ except in case of concurrent covenants. If the covenants are concurrent, and the contract does not make time of the essence and does not contain a forfeiture clause, either party who wishes to put

³ *Murray v. Barnhart*, 117 La. 1023, 42 So. 489; *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481.

⁴ *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; *Johnson v. Levy*, 122 La. 118, 47 So. 422.

⁵ *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; *Johnson v. Levy*, 122 La. 118, 47 So. 422.

⁶ *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; *Johnson v. Levy*, 122 La. 118, 47 So. 422.

⁷ *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Ackley v. Hunter-Benn & Co.'s Company*, 166 Ala. 295, 51 So. 964.

⁸ *Panoutsos v. Raymond Hadley Cor-*

poration [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767]; *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24; *Mueller v. Cook*, 126 Wis. 504, 105 N. W. 1054.

⁹ See § 3044.

¹⁰ *Ryan v. Litchfield*, 162 Ia. 609, 144 N. W. 313; *Soderlund v. Helman*, 215 Mass. 542, 102 N. E. 899; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

¹¹ For notice as an express condition, see §§ 2609 et seq.

¹² See § 2098.

¹³ *McCall v. Atchley*, 256 Mo. 39, 164 N. W. 503.

the other in default must give notice that he is ready and willing to perform and must demand performance of the adversary party before such adversary party can be put in default.¹⁴

§ 3032. Election of party not in default can not increase damages. A breach which goes to the entire performance may relieve the party in default from further liability under the contract except to pay damages occasioned by such breach.¹ This is not, however, on the theory that the party in default may pay damages as an alternative performance of his contractual obligation,² but rather

14 Arkansas. *Evans v. Ozark Orchard Co.*, 103 Ark. 212, 146 S. W. 511.

California. *Boone v. Templeman*, 158 Cal. 200, 130 Am. St. Rep. 126, 110 Pac. 947; *Stevenson v. Joy*, 164 Cal. 279, 128 Pac. 751.

Kansas. *Knipe v. Troika*, 92 Kan. 549, 141 Pac. 557.

Minnesota. *Tingue v. Patch*, 93 Minn. 437, 101 N. W. 792.

Oregon. *Gray v. Pelton*, 67 Or. 239, 135 Pac. 755.

South Dakota. *Burchfield v. Hageman*, 35 S. D. 147, 151 N. W. 47.

Washington. *Shorett v. Knudsen*, 74 Wash. 448, 133 Pac. 1020; *Garri-son v. Newton*, 96 Wash. 284, 165 Pac. 90.

The application of this principle to the performance of concurrent covenants is discussed elsewhere in detail. See §§ 2967 et seq.

1 United States. *Yates v. United States*, 15 Ct. Cl. 119.

Maryland. *Black v. Woodrow*, 39 Md. 194.

Massachusetts. *Hyland v. Giddings*, 77 Mass. (11 Gray) 232.

Michigan. *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423.

Minnesota. *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

Nebraska. *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (unoff.) 388, 98 N. W. 872.

New York. *Lord v. Thomas*, 64 N. Y. 107.

North Carolina. *Heiser v. Mears*, 120 N. Car. 443, 27 S. E. 117.

North Dakota. *Davis v. Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

Pennsylvania. *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, 18 Atl. 1058.

Rhode Island. *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370.

South Carolina. *Wando Phosphate Co. v. Gibbon*, 28 S. Car. 418, 13 Am. St. Rep. 690, 5 S. E. 837.

Tennessee. *Chicago Building & Mfg. Co. v. Barry* (Tenn. Ch. App.), 52 S. W. 451; *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518.

Vermont. *Danforth v. Walker*, 37 Vt. 239.

Virginia. *Clark v. Franklin*, 34 Va. (7 Leigh) 1; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

West Virginia. *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92; *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235; *Comstock v. J. R. Droney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255.

Wisconsin. *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057; *Lincoln v. Charles Alshuler Manufacturing Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

² See § 3024.

on the theory that it is the duty of the party who is not in default to do nothing to increase damages.³

If the adversary party has already performed his part of the contract fully, such breach fixes the right of the parties in any event, and the question of the effect of further performance by such party can not arise. More difficult questions arise when the adversary party, not being himself in default, has still covenants to be performed when the breach occurs. The adversary party can not ignore the breach, perform the covenants of the contract on his part to be performed, or tender performance, and recover the entire contract price at law as if no breach had occurred,⁴ at least in

³ See ch. LXXXVII.

⁴ *United States. Yates v. United States*, 15 Ct. Cl. 119.

Arkansas. Deutsch v. Dunham, 72 Ark. 141, 105 Am. St. Rep. 21, 78 S. W. 767.

Iowa. Moline Scale Co. v. Beed, 52 Ia. 307, 35 Am. Rep. 272, 3 N. W. 96; *Pate v. Ralston*, 158 Ia. 411, 51 L. R. A. (N.S.) 735, 139 N. W. 906.

Massachusetts. Collins v. Delaporte, 115 Mass. 159; *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451.

Michigan. International Text-book Co. v. Jones, 166 Mich. 86, 131 N. W. 98; *Ayer v. Devlin*, 179 Mich. 81, 146 N. W. 257.

Missouri. Peck v. Kansas City Metal Roofing & Corrugating Co., 90 Mo. App. 212, 70 S. W. 169.

Nebraska. Hixson Map Co. v. Nebraska Post Co., 5 Neb. (unoff.) 338, 98 N. W. 872.

New York. Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648.

North Dakota. Stanford v. McGill, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938; *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137.

Vermont. Danforth v. Walker, 37 Vt. 239 [s. c., 40 Vt. 257].

West Virginia. Comstock v. J. R.

Droney Lumber Co., 69 W. Va. 100, 71 S. E. 255.

Wisconsin. Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388; *Merrick v. Northwestern National Life Insurance Co.*, 124 Wis. 221, 102 N. W. 593; *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Badger State Lumber Co. v. G. W. Jones Lumber Co.*, 140 Wis. 73, 121 N. W. 933; *Richards v. Manitowoc & Northern Traction Co.*, 140 Wis. 85, 121 N. W. 937; *Lincoln v. Charles Alshuler Mfg. Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

"It is the rule in this state that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract.

"The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform. That the contract was not performed fully by plaintiff is obvious, as we said in *International Text-book Co. v. Schulte*, 151 Mich. 151, 114 N. W. 1031. The case of *Wigent*

cases in which the party not in default could not have had specific performance.⁵ This state of facts often exists in breach by renunciation.⁶

§ 3033. Election which increases damages—Recovery of contract price allowed in spite of renunciation. The party who renounces a contract can not compel the party who is not in default to treat such renunciation as a discharge of the contract if the latter does not wish so to do.¹ In case of breach of an executory contract of sale of personalty by renunciation on the part of the buyer, the seller is not bound to attempt to resell such property in order to mitigate damages, before the time fixed for performance.² This result is due to the operation of two different principles; one, that the contract by its terms fixes the time for performance, and the law fixes this as the time for measuring damages; and one of the parties to the contract can not modify the measure of damages by his own act;³ the other, that even if the seller is

v. Marrs, 130 Mich. 609, 90 N. W. 423, completely covers this case. We must assume that the jury found that the plaintiff was informed by defendant that he renounced and refused further performance of the contract at a time when only a few instalments had matured." *International Text-book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98.

§ "The rule is well settled that in executory contracts, where specific performance can not be enforced, either party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. In such cases it is held that an action can not be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract." *Badger State Lumber Co. v. G. W. Jones Lumber Co.*, 140 Wis. 73, 121 N. W. 933.

As to the effect of the right to specific performance, see § 3033.

¹*District of Columbia. King v. Rhodes*, 47 D. C. App. 316.

Massachusetts. Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451.

Minnesota. Gibbons v. Bente, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

North Dakota. Davis v. Bronson, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836; *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137.

Wisconsin. Richards v. Manitowoc & Northern Traction Co., 140 Wis. 85, 121 N. W. 937.

See §§ 2881 et seq.

²*Main Street & Agricultural Park Ry. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, 118 Pac. 165.

³*Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

⁴*Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

bound to mitigate damages, it is impossible to tell whether a resale of the property before the time fixed by the contract for performance will mitigate damages, or will aggravate them.⁴ If the purchaser renounces a contract which provides for the delivery of goods in instalments, it is held that the seller need not treat this renunciation as a breach, but that he may treat the contract as in effect, tendering each instalment as it comes due, and recover damages in case of the failure of the purchaser to accept and to pay for such instalment; and it is said that a judgment upon one instalment will not operate as a merger of the executory covenants of such contract.⁵

In some jurisdictions, accordingly, a party to an executory contract who is not in default is permitted to ignore the attempted breach on the part of the adversary party, and to continue performance even though such performance increases damages.⁶ It has been held that a contractor may continue performance of a building contract in spite of the breach thereof by the owner, and that he may then recover the full contract price.⁷ If a railway company renounces a contract with a traction company to pay for the cost of altering a crossing, it has been held that the traction company may continue to perform and may recover the price to which it was entitled in accordance with the terms of the contract.⁸

In some cases relief is given at common law on this theory only in cases in which specific performance might have been had.⁹ It has been held that where A agrees to furnish support to B's father, X, in consideration of a certain amount per week to be paid semi-annually, A may continue performance in spite of B's notice to A to quit furnishing such support and to look instead to his action at law for damages.¹⁰ This result was justified, however, on the theory that since specific performance of such a contract could have been had in equity,¹¹ law would grant a similar remedy by

⁴ *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

⁵ *Krebs Hop Co. v. Livesley*, 50 Or. 574, 114 Pac. 944, 118 Pac. 165.
See § 2562.

⁶ *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 120 Pac. 223; *Marsh v. Blackman*, 50 Barb. (N. Y.) 329; *Warren v. Shealy*, 82 S. Car. 113, 65 S. E. 1.

⁷ *Warren v. Shealy*, 83 S. Car. 113, 65 S. E. 1.

⁸ *Main Street & Agricultural Park Ry. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937.

⁹ *Marsh v. Blackman*, 50 Barb. (N. Y.) 329.

¹⁰ *Marsh v. Blackman*, 50 Barb. (N. Y.) 329.

¹¹ See ch. LXXXIX et seq. on the question of the right of the parties to specific performance in equity in cases of this sort.

permitting the party who was not in default to perform and to recover compensation at the contract rate.¹² While no logical objection could be made to granting specific performance at law in proper cases and under proper safeguards, the courts have usually proceeded on the theory that law and equity have not yet been so fused together that specific performance can be had at law. In some jurisdictions it is held that under an executory contract for the sale of realty the vendor can recover the purchase price in spite of the renunciation of such contract by the purchaser,¹³ on the theory that equity would give specific performance of such a contract and that accordingly such relief can be had at law.¹⁴

While it is undoubtedly very desirable to fuse law and equity into one consistent and harmonious body of law, and while the historical reasons for the existence of two separate systems have long since ceased to exist, the device of adopting a kind of equitable relief without any of the checks or restrictions which equity has always imposed on granting such relief, seems to be an attempt to solve a complicated problem in a simple manner by ignoring the inherent difficulties instead of trying to avoid them.

§ 3034. Election which increases damages—contract for sale of goods. In some jurisdictions one who has entered into an executory contract for the sale of personalty may continue performance in spite of the renunciation of the contract by the purchaser, and he may recover the purchase price in full.¹

¹² *Marsh v. Blackman*, 50 Barb. (N. Y.) 329.

¹³ *Goodpaster v. Porter*, 11 Ia. 161; *Curran v. Rogers*, 35 Mich. 221; *Garrard v. Dollar*, 49 N. Car. 175, 67 Am. Dec. 271.

¹⁴ *Garrard v. Dollar*, 49 N. Car. 175, 67 Am. Dec. 271.

¹ *United States. Bookwalter v. Clark*, 10 Fed. 793; *Kinthead v. Lynch*, 132 Fed. 692.

Colorado. Colorado Springs Live Stock Co. v. Godding, 20 Colo. 249, 38 Pac. 58; *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 129 Pac. 223.

Illinois. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869.

Indiana. Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140 (obiter); *Gaar v. Fleshman*, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348.

Iowa. McCormick Harvesting Machine Co. v. Markert, 107 Ia. 340, 78 N. W. 33.

Massachusetts. Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117.

Michigan. Meagher v. Cowing, 149 Mich. 416, 112 N. W. 1074.

Missouri. Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; *Crown Vinegar & Spice Co. v. Wehrs*, 59 Mo. App. 493; *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, 120 Mo. App. 438, 96 S. W. 1040 (obiter).

This is, in effect, granting a specific performance at law; and frequently without any of the checks or safeguards drawn around specific performance in equity.² This rule has been criticized,³ and

New York. *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271 (obiter); *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728, 53 L. R. A. 867, 60 N. E. 750 (obiter); *Schwarzer v. Karsch Brewing Co.*, 74 App. Div. 383, 77 N. Y. Supp. 719 (semble).

North Carolina. *National Cash Register Co. v. Hill*, 136 N. Car. 272, 68 L. R. A. 100, 48 S. E. 637.

Ohio. *Shawhan v. Van Nest*, 25 O. S. 490, 18 Am. Rep. 313; *Rhodes v. Mooney*, 43 O. S. 421, 4 N. E. 233.

Oregon. *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698.

Pennsylvania. *Balletine v. Robinson*, 46 Pa. 177.

² See ch. LXXXIX.

³ "The classification of the cases, made by the text writers, is, in some instances, inaccurate. The writers seem not to have observed in all instances the distinctions and tests above mentioned. In other words, they have frequently classed cases in which the title had passed, or in which there was evidence from which the jury might have found the fact, as cases in which it had not passed. In other instances they have failed to observe that the executory contract had become executed so as to pass the title before any renunciation was made by the vendee. Indeed, there are very few cases in which the seller has been allowed to recover the purchase price when the title to the property had not passed to the buyer. The doctrine of election, when the title has not passed, seems to have grown out of an unfortunate and inaccurate interpretation of certain cases made by Mr. Sedgwick in his work on Dam-

ages. He having stated the proposition a good many years ago, certain courts cited his work as authority for it, and, later, the editors of that work have cited these cases to sustain it. His text may have been misinterpreted. Thus, *Dustan v. McAndrew*, 44 N. Y. 72, cites Sedgwick on Damages. Then in the eighth edition of Sedgwick, *Dustan v. McAndrew* is the first case cited. On examination, *Dustan v. McAndrew* will be found to have been a fully executed contract. The hops had been delivered at the place of delivery specified in the contract before there was any dissent on the part of the purchaser. It may also have been an executed contract passing the title at its inception. At any rate, it is not a case in which the title had not passed. An older edition of Sedgwick, the fifth, cited *Graham v. Jackson*, 14 East, 498, *Bement v. Smith*, 15 Wend. 493, and *Thompson v. Alger*, 12 Met. 428, to sustain his proposition. In *Graham v. Jackson*, the case of a sale by a broker in New York, it appeared that the defendant had bought of the plaintiff 300 tons of Campeachy logwood, which the memorandum described as 'shipped at New York * * * to be of real merchantable quality, such as may be determined to be otherwise by impartial judges to be rejected.' Before any objection was made by the purchaser, the logwood arrived in England. Supposing it not to have been an executed contract at its inception, passing the title, it had been executed when the action was brought. It had been delivered at the place stipulated. Upon delivery, it became the property of the purchaser, he having given no

it has been pointed out that many of the cases which are cited in support of this rule are cases in which the title has passed to the purchaser; so that there are no executory covenants to be performed on the part of the seller. In such cases, therefore, the contract price is the measure of recovery, and not damages for the breach, since the seller has performed in full.

Many of the courts which recognize this principle do not, however, limit it to cases in which title has passed to the purchaser; but they extend it to cases in which title would have passed if the buyer had not refused to accept it.⁴ This rule has been applied to a contract to furnish and install a special apparatus, which has been treated as a contract for work and labor to take it without the operation of the Statute of Frauds; and as a contract of sale, to enable the seller to recover the contract price in full.⁵

In the Uniform Sale of Goods Act the legislature has adopted the rule that the purchase price may be recovered without regard to the transfer of title where the price is made payable on a certain day, or where the goods can not be resold readily for a reasonable price.⁶

notice of intention not to receive it. It is not clear that it was an executory contract. If the broker and the seller agreed at the time upon the specific wood loaded on a ship then at New York, ready to be carried to Liverpool, the seller having nothing more to do with it, then, under all the authorities, it was an executed contract of sale, passing title." *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 81 S. E. 235.

⁴ *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 129 Pac. 223; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612.

"While there is not a unanimity of judicial opinion upon the question of acceptance of the goods sold in an action such as this, we think the rule, established by the better reason is that, in an action for goods sold and delivered, the seller is entitled to recover the contract price if he has delivered the property to the purchaser, or done such acts as vested

the title in the purchaser, or would have vested the title in him if he had accepted it." *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612.

⁵ *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 129 Pac. 223.

⁶ "Action for the Price.—(1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that

§ 3035. Election which increases damages—Contract for manufacture of goods. In some jurisdictions contracts for the manufacture of goods for the special needs of a customer, and not for the general market, are treated differently from executory contracts for the sale of goods which are in existence when the contract is made; and it is held that if such goods have been manufactured or prepared for the special needs of the purchaser, he can not repudiate the contract if the manufacturer has performed to this extent, and refuse payment of the contract price. On the contrary, even in jurisdictions in which the contract price ordinarily could not be recovered under like circumstances, the manufacturer of goods which are made for a special order is permitted to treat the goods as the property of the purchaser and to recover the contract price therefor.¹ This result is reached on the theory that the title has passed when the article is made for such special order.² This prin-

the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 64(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."—Section 63, Uniform Sale of Goods Act.

See also, § 68 of the Uniform Sale of Goods Act, which provides:

"Specific Performance.—Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The

judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.'

¹ United States. *Kinhead v. Lynch*, 132 Fed. 692.

Colorado. *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 129 Pac. 223.

Connecticut. *Illustrated Postal Card & Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061.

Kansas. *Bauman v. McManus*, 75 Kan. 106, 10 L. R. A. (N.S.) 1138, 89 Pac. 15.

New Mexico. *Roswell Nursery Co. v. Mielenz*, 18 N. M. 417, 137 Pac. 579.

Ohio. *Shawhan v. Van Nest*, 25 O. S. 490, 18 Am. Rep. 313.

Oregon. *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698.

² *Bement v. Smith* [15 Wend. (N. Y.) 493] was an action brought by the manufacturer of a carriage, made to the order of the defendant for an agreed price. There was no dissent on the part of the defendant until after the sulky had been made and delivered. Therefore, if it were an executory contract in the first instance, it had become executed before

ciple is not limited to goods which are manufactured to a special order, but it applies to any articles which have been prepared for the purchaser so that they can not be used generally; and which will, for practical purposes, be a total loss to the seller if the purchaser does not take them.³ If fruit trees have been prepared for shipment in such a way that they will be practically a total loss to the seller if the buyer does not take them, the seller has been allowed to recover the contract price.⁴ There is some conflict of authority upon this question, however, and it has been held in a similar case that the seller must recover for damages and that he can not maintain an action for the contract price.⁵ In jurisdictions which are not hampered by the doctrine or the theory of the case, the same result will be reached if the property has been so manufactured or prepared that it can not be used generally and that it will be a total loss to the seller, whichever of the theories is invoked. The seller should not be permitted to recover more than the contract price; and if the goods are a total loss to him, the contract price is a measure of recovery. If the purchaser countermands an order for goods before they have been manufactured, and at a time at which the seller can stop performance and thus mitigate damages, it is held that the seller can not proceed with performance so as to aggravate the damages and recover the contract price upon the theory of full performance.⁶ If the contract is re-

the purchaser withdraw his offer to accept. But it was a contract for the manufacture of an article, made to order of the buyer, and was analogous to that of a contract of a sculptor to make a statue, or a painter to make a picture, or a tailor to make a suit of clothes; in all which cases the article, when done, appears to have been intended to be the property of the person for whom it was made. It is not a contract for the manufacture of an article for sale on the market. In a practical sense, it is an agreement on the part of the manufacturer to use his material and bestow his labor and skill in the fabrication of an article for another person.

"As the passing of title is a question of intention, to be ascertained from the facts and circumstances, in the absence of an express stipulation

as to when it shall pass; and it appearing that the article so specially made was intended for no person other than him who ordered it, not the manufacturer for his own use or for sale in the market generally, it seems clear that the intention was that the article should become that of the former on the completion thereof." *Acme Food Co v. Older*, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235.

³ *Roswell Nursery Co. v. Mielenz*, 18 N. M. 417, 137 Pac. 579.

⁴ *Roswell Nursery Co. v. Mielenz*, 18 N. M. 417, 137 Pac. 579.

⁵ *Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561.

⁶ *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 92 S. W. 518 (obiter).

nounced before the seller has begun performance, he can not perform thereafter and recover at the contract rate.¹ If A agrees to make machines for B according to a model which B agrees to furnish, and B fails to furnish such model, A can not perform by constructing machines in accordance with his own model.²

§ 3036. Illustrations of election which increases damages. If the purchaser of realty under an executory contract renounces the contract, the vendor can not recover the purchase price in an action at law, but he is restricted to his right of action for damages.¹

If an executory contract for the sale of goods is broken by renunciation, the vendor can not treat such breach as performance, or continue performance, and maintain an action for the contract price,² even if the article has been altered especially to suit the

¹ *Savage Manufacturing Co. v. Armstrong*, 19 Me. 147.

² *Savage Manufacturing Co. v. Armstrong*, 19 Me. 147.

¹ *Laird v. Pyne*, 8 Dowl. P. C. 860; *Old Colony Railway Corporation v. Evans*, 72 Mass. (6 Gray) 25, 66 Am. Dec. 394; *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 339.

² *England. Valpy v. Oakeley*, 16 Q. B. 941, 21 Eng. Rul. Cas. 39; *Atkinson v. Bell*, 8 Barn. & C. 277.

District of Columbia. King v. Rhodes, 47 D. C. App. 316.

Georgia. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112, 59 L. R. A. 122, 42 S. E. 378.

Iowa. Pate v. Ralston, 158 Ia. 411, 51 L. R. A. (N.S.) 735, 139 N. W. 906.

Maine. Greenleaf v. Gallagher, 93 Me. 540, 74 Am. St. Rep. 371, 45 Atl. 829.

Massachusetts. Clement & Hawkes Mfg. Co. v. Meserole, 107 Mass. 362; *Collins v. Delaporte*, 115 Mass. 159; *Whitney v. Thacher*, 117 Mass. 523; *Whitney v. Boardman*, 118 Mass. 242; *Barry v. Cavanagh*, 127 Mass. 394; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *White v. Solomon*, 164 Mass. 516, 30

L. R. A. 537, 42 N. E. 104; *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451.

Minnesota. Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201, 100 N. W. 1101.

Nebraska. Backes v. Schlick, 82 Neb. 289, 117 N. W. 707.

New Hampshire. Gordon v. Norris, 49 N. H. 376.

New Jersey. Bixler v. Finkle, 85 N. J. L. 77, 88 Atl. 846.

New York. Phelps-Stokes Estate v. Nixon, 222 N. Y. 93, 118 N. E. 241.

North Dakota. Hart-Parr Co. v. Finley, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137.

Pennsylvania. Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 436, 17 Am. St. Rep. 788, 18 Atl. 1058.

Vermont. Danforth v. Walker, 37 Vt. 239.

Virginia. American Hide & Leather Co. v. Chalkley, 101 Va. 458, 44 S. E. 705.

West Virginia. Acme Food Co. v. Older, 64 W. Va. 255, 17 L. R. A. (N.S.) 807, 61 S. E. 235.

Wisconsin. Lincoln v. Charles Alshuler Manufacturing Co., 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908; *J. B. Bradford Piano Co. v. Hacker*, 162 Wis. 335, 156 N. W. 140.

wishes of the purchaser.³ The seller can not increase damages by shipping the goods to the buyer after the buyer has given notice that he will not accept them.⁴

An employe who is wrongfully discharged can not, by the weight of authority, treat the contract as still in force and continue to tender his services, and recover the instalments of his wages as if the contract were still in force.⁵ In some jurisdictions an attorney who has been discharged can not recover the full contract price agreed upon for his services.⁶ If A enters into a construction contract for B, and B subsequently orders A not to continue performance of such contract, A can not recover the full contract price.⁷ Accordingly, if the owner has repudiated a building contract,⁸ as a contract for constructing a monument,⁹ the contractor can not continue performance and recover the contract price. If the owner knows that the contractor will not complete the building according to contract, he must either take the building and use reasonable efforts to complete it or abandon it to the contractor; but he can not let it remain unfinished and increase damages either for deterioration or loss of rental value.¹⁰ After an employer has broken a contract to employ another at work on certain realty, such other can not treat the contract as still in force and continue to enter such realty. He may be treated as a trespasser.¹¹ If A has agreed to furnish advertising for B, and A continues to publish such advertisements after B has notified him to discontinue such advertising, A can not recover the contract price

³ *J. B. Bradford Piano Co. v. Hacker*, 162 Wis. 235, 156 N. W. 140.

⁴ *Hart-Parr Co. v. Finley*, 31 N. D. 130, L. R. A. 1915E, 851, 153 N. W. 137.

⁵ *Maryland. Black v. Woodrow*, 39 Md. 194.

Massachusetts. Hyland v. Giddings, 77 Mass. (11 Gray) 232.

Michigan. Wigent v. Marrs, 130 Mich. 609, 90 N. W. 423.

Minnesota. Southworth v. Rosendahl, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717.

North Dakota. Davis v. Bronson, 2 N. D. 300, 33 Am. St. Rep. 783.

Virginia. Clark v. Franklin, 34 Va. (7 Leigh) 1.

See §§ 2555 et seq.

⁶ *Southworth v. Rosendahl*, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717.

See ch. LXXXVII.

⁷ *Dunn v. Barton*, 40 Minn. 415, 42 N. W. 289.

⁸ *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756; *Davis v. Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

⁹ *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423.

¹⁰ *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292.

¹¹ *Wando Phosphate Co. v. Gibbon*, 28 S. Car. 418, 13 Am. St. Rep. 690, 5 S. E. 837.

from B.¹² If A has agreed to give lessons to B by correspondence for a stipulated consideration, and B refuses to continue such course or to pay, A can not recover the full contract price.¹³

The same principles apply in cases of breach by defective performance. Thus one who accepts and uses defective machinery after knowing of the defects can not thereby increase damages.¹⁴ If a leaky boiler is furnished under a contract guaranteeing it to be first-class, the vendee can not continue to use it after knowing of the defect and increase damages.¹⁵ Under a building contract by which the builder agrees to keep the building or other thing which he has constructed in repair for a certain period, it is the duty of the property owner to give to the contractor an opportunity to make good defects in performance; and he can not destroy the thing which has been built and avoid all liability on the contract without such notice.¹⁶

In cases of this sort it is said that the party who is not in default must either perform as much of the contract as the party who is in default consents to his performing, or else he must treat the contract as discharged and recover a reasonable compensation for what he has done thereunder.¹⁷ The adversary party can not continue performance after breach, perform in part, and recover for such partial performance on quantum meruit.¹⁸

B. WAIVER OF BREACH AS GROUND OF DISCHARGE

§ 3037. Waiver of breach as ground of discharge—Nature of waiver. The effect of breach, both as a ground for treating the contract as discharged, and as giving rise to a right of action for damages, is modified by the doctrine of waiver, so called. As has already been pointed out, in connection with waiver of express conditions the term "waiver" was used at the early law of the act of a thief, in throwing away goods in his flight. The modern law

¹² *Peck v. Kansas City Metal Roofing & Corrugating Co.*, 96 Mo. App. 212, 70 S. W. 169; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388.

¹³ *International Text-book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98.

¹⁴ *Kinney v. Philadelphia Watch Case Co.*, 76 N. J. L. 735, 71 Atl. 269; *Thompson Mfg. Co. v. Gunderson*, 106

Wis. 449, 49 L. R. A. 850, 82 N. W. 299.

¹⁵ *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 53 N. W. 232.

¹⁶ *Kinney v. Philadelphia Watch Case Co.*, 76 N. J. L. 735, 71 Atl. 269.

¹⁷ *McGregor v. Ross*, 96 Mich. 103, 55 N. W. 658.

¹⁸ *McGregor v. Ross*, 96 Mich. 103, 55 N. W. 658.

waiver is usually said to be the intentional abandonment or relinquishment of a known right.¹ The term is actually used to indicate the result of a number of different combinations of fact, rather than to indicate any definite means by which such result is brought about. The result, which is called waiver, is the giving up of an existing right; and when used with reference to a breach, it means, in some cases, the giving up of the right to treat the contract as discharged because of the breach of such contract by the adversary party;² and in other cases it means the giving up of the right to maintain an action to recover damages because of such breach by the adversary party.³ Either of these results may be reached whenever the contract, or a right of action based on the contract, is discharged by voluntary agreement;⁴ and accordingly such subsequent agreement is frequently spoken of as a waiver. While discharge by a new contract is frequently referred to as waiver, waiver does not necessarily rest upon the existence of a new contract; and accordingly waiver of breach as a discharge may exist without any new and additional consideration.⁵

If the party who is not in default has induced the adversary party to continue performance, or otherwise to alter his position, in reliance upon the continued recognition of the existence of such contract by the party who is not in default, the party who is not in default is not permitted to alter his position, and to claim that the contract is discharged, after the party originally in default has altered his position as by continuing performance of such contract.⁶ This result is frequently explained upon the theory of estoppel; and it has accordingly been said that waiver exists only where there is a valid new contract, whether under seal or upon a valuable consideration, or where there is estoppel.⁷ At the same

¹ Waiver is "the intentional relinquishment of a known right." *Griffith v. Newell*, 69 S. Car. 300, 43 S. E. 259 [citing, *Grocery Co. v. Moore*, 63 S. Car. 184, 41 S. E. 88].

"Waiver is the voluntary abandonment or relinquishment by a party of some right or advantage." *Draper v. Oswego County Fire Relief Association*, 190 N. Y. 12, 82 N. E. 755 [quoted in *Clark v. West*, 193 N. Y. 349, 86 N. E. 1].

² See §§ 3038 et seq.

³ See §§ 3062 et seq.

⁴ See §§ 2446 et seq.

⁵ *Mahaska County State Bank v. Crist*, 87 Ia. 415, 54 N. W. 450.

⁶ *Elgar v. Newhall*, — Mass. —, 126 N. E. 661.

See §§ 3040 et seq.

⁷ "Unless a waiver is under seal, or arises from conduct creating an estoppel, it must be supported by an agreement founded upon a valuable consideration." *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602 [citing, *Emerson v. Slater*, 63 U. S. (22 How.) 29, 16 L. ed. 360; *Hastings*

time, as in the case of the waiver of express conditions,⁸ waiver of breach of a covenant is recognized in some jurisdictions in cases in which there is neither a new contract nor an estoppel.⁹

A waiver which is conditioned upon the happening of some future event is inoperative if such condition is broken.¹⁰

§ 3038. Waiver as election. Since election is the choice between two inconsistent rights, waiver is a necessary correlative of election, although it does not seem to be limited to cases of election. Since election exists where there are two or more inconsistent rights, and from their nature the party who makes the election can not take both, the election of one of these rights operates as a renunciation or waiver of the other. As applied to problems of breach, in cases in which the party who is not in default has the right of election between treating the breach on the part of the party who is in default as a discharge of the contract, or treating the contract as in full force and effect, the party who is not in default may, if he elects to do so, take the latter alternative and treat the contract as in effect. Such election waives the right of the party who is not in default to treat the contract as discharged by the breach which such party has thus waived.¹

v. Lovejoy, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 500; *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30].

⁸ See § 2664.

⁹ See §§ 3040 et seq.

¹⁰ *Boulder & Beaver Placer Co. v. Maxwell*, 24 Colo. 87, 48 Pac. 815.

¹ *Canada. Sorette v. Development Co.*, 31 N. S. 427.

United States. District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948; *Graham v. United States*, 188 Fed. 651; *Northwest Auto Co. v. Harmon*, 250 Fed. 832; *Landes v. Klopstock*, 252 Fed. 89; *Stennick v. Jones*, 252 Fed. 345 [opinion modified, 256 Fed. 354].

Arkansas. Grand Lodge A. O. U. W. v. Davidson, — Ark. —, L. R. A. 1917C, 914, 191 S. W. 961.

California. Witmer Brothers Co. v. Weid, 108 Cal. 569, 41 Pac. 491; *Smith*

v. Mathews Construction Co., 179 Cal. 797, 179 Pac. 205.

Florida. Roess Lumber Co. v. State Exchange Bank, 68 Fla. 324, L. R. A. 1918E, 297, 67 So. 188.

Georgia. Pitcher v. Lowe, 95 Ga. 423, 22 S. E. 678; *McAuliffe v. Vaughan*, 135 Ga. 852, 33 L. R. A. (N.S.) 255, 70 S. E. 322.

Illinois. Butterick Publishing Co. v. Whitcomb, 225 Ill. 605, 8 L. R. A. (N. S.) 1004, 80 N. E. 247; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963.

Iowa. Dahl v. Thompson, 98 Ia. 599, 67 N. W. 579.

Kentucky. Louisville & Nashville Ry. v. Mason & Hoge Co. (Ky.), 104 S. W. 975, 31 Ky. L. Rep. 1220.

Louisiana. Des Allemands Lumber Co. v. Morgan City Timber Co., 117 La. 1, 41 So. 332.

Massachusetts. Jones v. Brown, 171 Mass. 318, 50 N. E. 648.

Michigan. Robinson v. Lake Shore & Michigan So. Ry., 103 Mich. 607, 61

§ 3039. Delay as waiver. The party who is not in default has, ordinarily, a reasonable time in which to determine whether he will treat the breach as a discharge or not;¹ and accordingly his delay in treating the contract as discharged, if not exceeding a reasonable time, does not amount to a waiver.²

Delay in avoiding the contract for more than a reasonable time may waive the right to avoid it,³ as where in the meantime the land depreciates in value.⁴ The act of the buyer in keeping an article for an unreasonable time with full knowledge of the facts, waives his right to avoid the contract for defects therein.⁵

§ 3040. Elements of waiver—Inducing action in reliance on waiver—Necessity and effect. If the adversary party acts in reliance upon such waiver and alters his position so that he will be prejudiced if the party who is not in default is allowed to alter his position and to treat the contract as discharged, such conduct on the part of the party who was originally in default prevents the party who is not in default from retracting such waiver.¹ If the

N. W. 1014; *Gates v. Detroit & Mackinac Ry.*, 147 Mich. 523, 111 N. W. 101.

Mississippi. *Klein v. Buck*, 73 Miss. 133, 18 So. 891.

Nebraska. *Izard v. Kimmel*, 26 Neb. 51, 41 N. W. 1068; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325.

New York. *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

North Dakota. *Plummer v. Kelly*, 7 N. D. 88, 73 N. W. 70.

Washington. *Garrison v. Newton*, 06 Wash. 284, 4 A. L. R. 804, 165 Pac. 90.

Wisconsin. *Tickler v. Andrae Mfg. Co.*, 95 Wis. 352, 70 N. W. 202; *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372; *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1038.

¹ *W. F. Main Co. v. Field*, 144 N. Car. 307, 119 Am. St. Rep. 956, 11 L. R. A. (N.S.) 245, 56 S. E. 943; *Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1038.

² *W. F. Main Co. v. Field*, 144 N. Car. 307, 119 Am. St. Rep. 956, 11 L.

R. A. (N.S.) 245, 56 S. E. 943; *Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1038.

³ *Coleman v. Bank*, 115 Ala. 307, 22 So. 84; *Corbett v. Schulte*, 119 Mich. 249, 77 N. W. 947; *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

⁴ *Bennett v. Hickey*, 112 Mich. 379, 70 N. W. 900.

⁵ *Jackson v. Porter Land & Water Co.*, 151 Cal. 32, 90 Pac. 122; *International Harvester Co. v. Brown*, 182 Ky. 435, 206 S. W. 622.

See § 3050.

¹ **Illinois.** *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963.

Kentucky. *Louisville & Nashville Ry. v. Mason & Hoge Co. (Ky.)*, 104 S. W. 975, 31 Ky. L. Rep. 1220.

Michigan. *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101.

New Jersey. *Sun Dredging & Construction Co. v. Ottens*, 84 N. J. L. 740, 87 Atl. 1003.

New York. *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

seller is to deliver articles as the buyer may order and in such quantities as he may designate, it is held that his delivery of a less quantity than is ordered and the acceptance thereof by the buyer will prevent the buyer from treating such deficiency as a discharge, unless the buyer demands further performance in time to enable the seller to comply with such demand.² If a shipper has agreed to furnish articles for transportation, his failure to furnish the quantity which is required by the contract is waived by the conduct of the carrier in failing to furnish sufficient cars to transport the quantity of articles furnished by the shipper and in claiming that the carrier was unable to furnish more cars.³ If the vendor breaks the contract and the vendee insists on his continuing the performance, the vendee can not subsequently elect to treat such breach as a discharge.⁴

If the party who was originally in default has not altered his position in reliance upon the apparent intention of the party who is not in default, to treat the contract as in effect, it is held in some jurisdictions that such conduct on the part of the party who is not in default does not operate as a final waiver; and that, under such circumstances, the party who is not in default may alter his position and treat the contract as discharged, as long as the adversary party has not altered his position.⁵ The fact that one of the parties has waived a provision as to the time of performance, does not make such waiver operative for the entire period of the contract; but on reasonable notice to the adversary party, the party who is not in default may insist on performance in accordance with the terms of the contract, in default of which he may treat the contract as discharged.⁶ If the party who is not in default makes a payment voluntarily with knowledge of the breach, such waiver does not compel him to continue performance thereafter;⁷ and if such payment is voluntarily repaid on demand, the party who was originally in default can not treat the refusal of the adversary party to continue performance as breach.⁸

In other jurisdictions it seems to be held that the deliberate declaration by the party who is not in default of his intention to

² *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

³ *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101.

⁴ *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

⁵ *Sickelsteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024.

⁶ *Panoutsos v. Raymond Hadley Corporation* [1917], 1 K. B. 767.

⁷ *Sickelsteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024.

⁸ *Sickelsteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024.

treat the contract as in effect, in spite of the breach on the part of the adversary party, is a finality; and that the party who has made such declaration can not alter his position, although the party who was in default has not acted in reliance thereon.⁹

While omission on the part of the party who is in default may not of itself amount to such action in reliance upon the apparent intention of the party who is not in default to treat such contract as in effect, that the party who is not in default will be precluded from altering his position, the party who is not in default must at least give reasonable notice of his change of intention, so as to enable the adversary party to perform if he wishes.¹⁰ If the parties to a contract have entered into negotiations for arbitration of a dispute as to the performance of a given covenant, failure to perform such covenant can not be treated as a breach without giving a reasonable notice to the adversary party that performance will be demanded in accordance with the terms of the contract and that such question will not be submitted to arbitration.¹¹ If one of the parties to the contract has waived the provisions thereof as to the time of performance, he can not alter his position without giving a reasonable notice to the adversary party.¹² If an employe for an indefinite period is laid off for a month without pay, and he acquiesces therein and treats the contract as in force, he can not subsequently treat such breach as a discharge and recover on quantum meruit.¹³

§ 3041. Knowledge of breach essential. In order that the promisee may be held to waive a breach of the contract, he must

⁹ Arkansas. *Stewart v. Simon*, 111 Ark. 358, 163 S. W. 1135.

Florida. *Hyer v. York Mfg. Co.*, 58 Fla. 283, 50 So. 485; *Franklin Phosphate Co. v. International Harvester Co.*, 62 Fla. 185, 57 So. 206; *Roess Lumber Co. v. State Exchange Bank*, 68 Fla. 324, L. R. A. 1918E, 297, 67 So. 188.

Georgia. *Atlanta Consolidated Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124.

Idaho. *Smith v. Smith*, 4 Ida. 1, 35 Pac. 697.

Indiana. *McCormick Harvesting Machine Co. v. Yeoman*, 26 Ind. App. 415, 59 N. E. 1069.

¹⁰ *Prentiss v. Lyons*, 105 La. 382, 29 So. 944; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701; *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

¹¹ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701.

¹² *Prentiss v. Lyons*, 105 La. 382, 29 So. 944; *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

¹³ *Forbes v. Appleyard*, 181 Mass. 354, 63 N. E. 894.

know of the fact which constitutes such breach.¹ The knowledge which is required is more than mere suspicion.² The conduct of the party who is not in default, in recognizing the continued existence of the contract in reliance upon the assurance of the adversary party that such adversary party will eventually perform the contract, is not a definite and final waiver of such breach;³ but it is at most a waiver as to the time for performance, and not as to the ultimate performance itself.

The act of the buyer in taking possession of the goods does not waive his right to treat the contract as discharged because of latent defects unknown to him, which prevented the goods from complying with the terms of the contract of sale.⁴ If A has employed B to make certain plans, A's payment of part of the purchase price before he has an opportunity to examine the plans does not waive B's breach in making plans which were not in accordance with the contract.⁵ The act of an insured in waiving one ground of forfeiture does not affect the waiver of another ground of which the insured was ignorant.⁶ The acceptance of the performance of a contract to construct a drain, made as the result of fraud or mistake, does not amount to a final waiver of breach.⁷ In order that acceptance of defective performance of a building contract may

¹ *United States. Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 61 L. R. A. 402.

Alabama. *Fike v. Stratton*, 174 Ala. 541, 56 So. 929.

Idaho. *Steltz v. Armory Co.*, 15 Ida. 551, 20 L. R. A. (N.S.) 872, 99 Pac. 98.

Massachusetts. *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654.

Michigan. *Stevenson v. Log Towing Co.*, 103 Mich. 412, 61 N. W. 536.

New York. *Oswego Falls Pulp & Paper Co. v. Stecher Lithographic Co.*, 215 N. Y. 98, L. R. A. 1916B, 1257, 109 N. E. 92 (obiter).

North Carolina. *W. F. Main Co. v. Field*, 144 N. Car. 307, 119 Am. St. Rep. 956, 11 L. R. A. (N.S.) 245, 56 S. E. 943.

Washington. *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8; *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

Wisconsin. *Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1033.

² *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051.

³ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132]; *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

⁴ *W. F. Main Co. v. Field*, 144 N. Car. 307, 119 Am. St. Rep. 956, 11 L. R. A. (N.S.) 245, 56 S. E. 943; *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

⁵ *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8.

⁶ *Planters' Mutual Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136, 56 S. W. 44.

⁷ For similar facts see *Weston v. Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12; *Van Akin v. Dunn*, 117 Mich. 421, 75 N. W. 938.

operate as a waiver it must be shown that the owner knew of the defects in performance.⁸

The fact that the departure from the specifications was plain does not dispense with knowledge thereof by the owner.⁹ If it is claimed that if one who has a right under contract to have his portrait inserted in a certain history, has accepted in place thereof its insertion in a so-called "portrait gallery" from which historical matter is omitted, it must be shown that he had full knowledge of his rights under the contract and that his portrait was omitted from the sort of work in which he had a right to have it inserted.¹⁰

However, if the want of knowledge is the fault of the party who is alleged to have waived a breach committed by the adversary party, his conduct may amount to a waiver of the breach, even if its existence is unknown to him.¹¹ If proof of printing is submitted to the party for whom the work is done, and he approves it, overlooking an error, he can not object to such error in the finished work as a breach.¹²

§ 3042. Intention to waive breach essential. To operate as a waiver the conduct of the party who is not in default must be such as to show affirmatively his intention to treat the contract as still in effect.¹ This intention may either actually exist or it may so

⁸ *Hayster v. Owen*, 61 Mo. 270; *Farmers' & Traders' National Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243.

⁹ *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243.

¹⁰ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654.

¹¹ *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309.

¹² *Giles Lithograph & Liberty Printing Co. v. Chase*, 149 Mass. 459, 14 Am. St. Rep. 439, 4 L. R. A. 480, 21 N. E. 765.

¹ *Colorado. Boulder Co. v. Maxwell*, 24 Colo. 87, 48 Pac. 815.

Iowa. Singmaster v. Robinson, 181 Ia. 522, 164 N. W. 776; *Roper v. Wells*, 182 Ia. 237, 165 N. W. 385.

Maine. Campion v. Marston, 99 Me. 410, 59 Atl. 548.

Massachusetts. Wilkinson v. Mfg. Co., 169 Mass. 374, 47 N. E. 1020.

Michigan. Stearns Salt & Lumber Co. v. Dennis Lumber Co., 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

Minnesota. Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877.

Montana. First National Bank v. Carroll, 35 Mont. 302, 88 Pac. 1012.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359; *International Harvester Co. v. Thomas*, — N. D. —, 176 N. W. 523.

Ohio. Rheinstrom v. Steiner, 69 O. S. 452, 69 N. E. 745.

Oklahoma. Ross v. Sanderson, — Okla. —, L. R. A. 1917C, 879, 162 Pac. 709; *Hart-Parr Co. v. Duncan*, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

South Carolina. Griffith v. Newell, 69 S. Car. 300, 48 S. E. 259.

appear to exist as to mislead the adversary party and thus work an estoppel.²

Silence on the part of the party not in default does not of itself amount to a waiver.³ If the promisor wrongfully refuses performance, the fact that the promisee is still ready and willing to perform if the promisor will continue to perform, does not of itself show that he has not accepted the promisor's renunciation as a final breach terminating the contract.⁴ His unaccepted offer to continue the contract after breach on certain specified terms does not waive such breach.⁵ The act of the party who is not in default, in signing a written instrument which contains a waiver, is not binding on him if he signs through fraud as to its contents and in ignorance of the provisions of such waiver.⁶

The act of the party in default can not amount to a waiver.⁷ A provision in a construction contract to the effect that an agreement for extra compensation should be indorsed on the contract, is not waived by the performance of such work.⁸

Washington. *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

Wisconsin. *Davis v. La Crosse Hospital Assn.*, 121 Wis. 579, 99 N. W. 351.

"The question of waiver is mainly a question of intention. *Gardner v. New London*, 63 Conn. 267, 23 Atl. 42. It involves the notion of an intention on the part of one having a right to relinquish it." *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602.

² *Starr v. Ship Co.*, 68 Fed. 234.

³ *Eaton v. Gladwell*, 108 Mich. 678, 66 N. W. 598; *Ross v. Sanderson*, — Okla. —, L. R. A. 1917C, 879, 162 Pac. 709; *Davis v. La Crosse Hospital Assn.*, 121 Wis. 579, 99 N. W. 351.

⁴ *Mutual Reserve Fund Life Association v. Taylor*, 99 Va. 208, 37 S. E. 854.

⁵ *Sheffield Furnace Co. v. Coke Co.*, 101 Ala. 446, 14 So. 672.

⁶ *International Harvester Co. v. Thomas*, — N. D. —, 176 N. W. 523.

⁷ *Davis v. La Crosse Hospital Association*, 121 Wis. 579, 99 N. W. 351.

⁸ *Davis v. La Crosse Hospital Association*, 121 Wis. 579, 99 N. W. 351.

"In support of the court's ruling that the provision of the contract in regard to forfeiting claims for additions to the contract work and material was waived, counsel for respondents suggest that such a provision can be waived, and cite *Bannister v. Patty's Exrs.*, 35 Wis. 215. True, such a provision can be waived, but that does not warrant holding, whenever a thing is done under a contract for which, by the terms thereof, additional compensation is dependent upon a certain specified condition being complied with, that such condition was waived as a matter of course because no notice was taken thereof. Such a method of dealing with a contract would result in sanctioning the very looseness, and suggest and give countenance to the very class of controversies such provisions are designed to prevent. There would be, then, little or no use of making a written contract at all, containing such guards, because if one were made the court, upon a controversy thereunder occurring, would look

§ 3043. Conduct of party not in default as waiver. The conduct of the party not in default, which is in accordance with his rights under the terms thereof, does not amount to a waiver of any of the terms of such contract which are inserted for his benefit.¹ The act of one of the parties in demanding full performance of the original contract, does not amount to waiver, even though, through misconstruction of the contract, he demands more by way of performance than he is entitled to.² Acceptance of a temporary bridge provided for by the contract does not amount to acceptance of a permanent bridge constructed thereafter under the contract.³ If the purchaser of goods has a right to accept such goods as conform to the terms of the contract, and to reject the rest, his conduct in accepting such goods as are in conformity to the terms of the contract is not a waiver of the defects in the goods which he rejects.⁴ Conduct which clearly shows the intention of the promisee

to what was in fact done and test the contract by that instead of testing what was done by the contract in determining the legal rights of the parties. There is, at times, rather too much of a tendency to do that, the court acting as a mere arbitrator instead of judicially giving to each party his legal rights. Parties must be left to make their own contracts, and without any protection from improvident provisions embodied therein, in the absence of clear evidence of a modification or some relievable fraud or mistake. A contract once made can be subsequently varied by the parties thereto, and by parol, but a mere breach of contract, or failure to comply with the provisions therein upon which certain advantages are made to depend, should not be deemed a waiver of those parts of the agreement which would otherwise condemn the party guilty of the breach to damages, or condemn the party failing to perform such agreement to lose the advantages just as the contract provides.

"In the circumstances before us, a provision should not be deemed waived in the absence of clear and satisfactory evidence showing such to have

been the intention of the parties, or showing an estoppel in pais. Certainly, the mere failure to do the very thing which the parties stipulated should work a forfeiture, is not sufficient. Otherwise the rule would be that, instead of a provision in a contract working a forfeiture under the circumstances therein prescribed, the doing of the thing which was stipulated should work a forfeiture would always be held not to do so, but to waive the conditions of the contract in that regard." *Davis v. La Crosse Hospital Association*, 121 Wis. 579, 99 N. W. 351.

¹ *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357; *Goodspeed v. United Shoe Machinery Co.*, 141 Mich. 672, 104 N. W. 982; *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

² *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

³ *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357.

⁴ *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

not to accept the performance tendered, does not amount to a waiver of breach.⁵ While payment by a party who is not in default may, if unexplained, show his intention to waive breach by the adversary party, a payment which is coupled with a demand for performance of the contract by the adversary party does not amount to a waiver.⁶ If the owner denies that the contractor has performed his contract, but agrees to pay the contractor's workmen, such payment does not waive breach by the contractor.⁷ Still less does conduct by the promisee, which amounts merely to preparation on his part for performance, constitute an acceptance and waiver of breach.⁸ Where a number of farmers had contracted with A for the construction of a ditch, the fact that they levied an assessment upon themselves, and thereby raised the contract price, is not an acceptance of A's performance.⁹

On the one hand, conduct on the part of the party who is not in default, which is consistent with his determination not to treat the defective performance as a satisfaction of his rights under the contract, can not amount to waiver.¹⁰ The fact that a contractor continues work in spite of a default in payment, does not operate as a waiver of such default as a discharge of the contract, if such contractor objects to such default at the time.¹¹ The fact that the party who is not in default continues performance for a short time, so as to accommodate the party who is in default, is not inconsistent with his declaration that he treated such default as a discharge of the contract;¹² and it does not prevent him from treating such contract as discharged by reason of such breach.¹³ In a jurisdiction in which the seller is permitted to accept such portion of the goods which are offered to him, as conforms to the terms of the contract, and to reject the rest, his action in so doing is not a waiver as to the articles thus tendered which do not satisfy the

⁵ *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486; *California Well Drilling Co. v. California Midway Oil Co.*, 178 Cal. 337, 177 Pac. 849; *Griffith v. Newell*, 69 S. Car. 300, 48 S. E. 250.

⁶ *Griffith v. Newell*, 69 S. Car. 300, 48 S. E. 259.

⁷ *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486.

⁸ *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486.

⁹ *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486.

¹⁰ *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91; *Finnigan v. Worden-Allen Co.*, 201 Mich. 445, 167 N. W. 930; *Bishop v. T. Ryan Const. Co.*, 106 Wash. 254, 180 Pac. 126.

¹¹ *Finnigan v. Worden-Allen Co.*, 201 Mich. 445, 167 N. W. 930.

¹² *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

¹³ *Bishop v. T. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

provisions of the contract.¹⁴ The action of the party who is not in default, in reliance upon the promise of the party who is in default to make good such default and to perform the contract in accordance with the terms thereof, does not amount to waiver of such default.¹⁵ If the seller assures the buyer that the defects in the thing sold are not serious and that he will remedy them, the action of the buyer in continuing to make use of the thing which he has bought is not waiver, as a matter of law.¹⁶ The act of the property owner in paying contractor under a contract, in reliance upon the promise of the contractor to continue performance and to furnish the property owner with receipts from the materialmen, is not a final waiver by the owner of his right to insist upon performance of such provisions.¹⁷ The act of a purchaser of realty in continuing performance is not a waiver of a defect in the title if he continues performance in reliance upon the vendor's promise to correct such defect.¹⁸

On the other hand, in case of a variance between the acts and the declarations of the party who is not in default, effect will ordinarily be given to his acts which recognize the existence of the contract, in preference to his prior declarations which treat the contract as discharged.¹⁹ If the party who is not in default objects

¹⁴ *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

¹⁵ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132]; *Roper v. Wells*, 182 Ia. 237, 165 N. W. 385; *Read v. Loftus*, 82 Kan. 485, 31 L. R. A. (N.S.) 457, 108 Pac. 850; *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

¹⁶ *Roper v. Wells*, 182 Ia. 237, 165 N. W. 385; *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

¹⁷ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹⁸ *Read v. Loftus*, 82 Kan. 485, 31 L. R. A. (N.S.) 457, 108 Pac. 850.

¹⁹ *Trinidad Asphalt Manufacturing Co. v. Buckstaff Bros. Manufacturing Co.*, 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293.

"There is much force in plaintiff's argument that great loss would accrue to it by a sudden termination of business relations between the parties, and that it ought not to be subjected to such loss as a condition of insisting upon the forfeiture. On the other hand, should plaintiff be permitted to reap the benefits of the agreement and at the same time claim that it was canceled? The loss to the defendants from a sudden termination of business relations and their loss after a short prolongation thereof would not differ very materially, while to the plaintiff, if it could continue the business uninterrupted, the difference would be very great. In the latter case it might sustain practically no loss at all, while in the former it might seriously affect its whole business for a time. When it elected to break with the defendants it was incumbent upon it to weigh the advan-

to the breach, but continues performance, his conduct in continuing performance is regarded as superseding his oral objection; and such conduct on his part operates as a waiver of such breach, in spite of his oral objection thereto.²⁰

§ 3044. Waiver of prior breach as waiver of entire covenant.

A waiver of one breach does not amount to a waiver of other and subsequent breaches.¹ Where a contract is payable in instalments, waiver of a breach by delay in paying earlier instalments is not a waiver of the right to require the subsequent instalments to be paid when due, if the promisor is not misled by the conduct of the promisee.² This is especially clear where the party in default is notified that subsequent breaches will not be waived.³ Waiver of a breach by failure to pay a premium when due, as a ground of forfeiture, and giving an extension of time by taking a note therefor, does not waive a right secured by the contract to forfeit the policy if such note is not paid when due.⁴ The fact that a provision requiring performance at a specified time is waived, does not excuse the party in default from the duty to perform within a reasonable time thereafter.⁵ Paying certain instalments

tages and disadvantages of the situation. It ought not to be permitted to accept the advantageous part, namely, that of securing control of defendants' business, and at the same time compel them to accept its terms of a temporary continuance thereof in order that it might relieve itself from the consequent loss of flatly standing upon its right of forfeiture. When declarations and conduct are at variance, as here, the conduct and acts of the party must be held to outweigh the declarations and be controlling. For these reasons it is considered that the plaintiff, by its continuing the business with the defendants in the manner and under the circumstances stated after October 2, 1911, waived the forfeiture." *Milwaukee Boston Store v. Katz*, 153 Wis. 492, 140 N. W. 1038.

²⁰*Capper v. Manufacturers' Paper Co.*, 86 Kan. 355, 121 Pac. 519; *St.*

Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701.

¹*Carroll v. Mundy*, — Ia. —, 4 A. L. R. 811, 170 N. W. 790; *Disbrow v. Harris*, 122 N. Y. 362, 25 N. E. 356; *Patterson v. Glassmire*, 166 Pa. St. 230, 31 Atl. 40.

²*San Francisco Bridge Co. v. Improvement Co.*, 119 Cal. 272, 51 Pac. 335; *Wilkinson v. Blount Mfg. Co.*, 169 Mass. 374, 47 N. E. 1020; *Herman v. Gieseke* (Tex. Civ. App.), 33 S. W. 1006; *Beltinck v. Tacoma Theatre Co.*, 61 Wash. 132, 111 Pac. 1045.

³*Strauss v. Russell Co.*, 85 Fed. 589; *Beltinck v. Tacoma Theatre Co.*, 61 Wash. 132, 111 Pac. 1045.

⁴*Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. ed. 765.

⁵*Panoutsos v. Raymond Hadley Corporation* [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767]; *Carroll v. Mundy*, — Ia. —, 4 A. L. R. 811, 170 N. W. 790.

under a building contract, without the certificate of the architect or engineer, does not waive the owner's right to require such certificate before paying the final instalments.⁶ Making part payments on a building contract does not of itself waive defects in performance so as to amount to a final acceptance of the work.⁷ Waiver of a provision of a contract as to the time of performance does waive provisions as to the method of performance.⁸ Under a contract to raise an employe's salary if he abstains from drinking and gambling, refraining from discharging him for the continuation of such condition does not waive the condition as to an increase of salary.⁹

§ 3045. Free choice of party not in default essential. If the conduct of the party who is not in default, in accepting benefits under the contract, is relied upon as waiver of breach thereof, such acceptance can not be regarded as amounting to a waiver unless the party who is not in default has a choice between accepting such benefits and rejecting them; and if, for any reason, he has no practical choice, his acceptance can not of itself be regarded as amounting to a waiver.¹ Questions of this sort often arise under

⁶ *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10, 35 Atl. 832; *Yahr v. School District*, 99 Wis. 281, 74 N. W. 779.

⁷ *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989.

⁸ *Building contract. Jacksonville & Atlantic Ry. v. Woodworth*, 26 Fla. 368, 8 So. 177.

Mining contract. Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

⁹ *Van Vleet v. Hayes*, 56 Ark. 128, 19 S. W. 427.

See, however, *Clark v. West*, 193 N. Y. 349, 86 N. E. 1.

¹ *Alabama. Catanzano v. Jackson*, — Ala. —, 73 So. 510.

California. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357.

Idaho. Steltz v. Armory Co., 15 Ida. 551, 20 L. R. A. (N.S.) 872, 99 Pac. 98.

Illinois. Butterick Publishing Co. v. Whitcomb, 225 Ill. 605, 8 L. R. A. (N. S.) 1004, 80 N. E. 247.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Massachusetts. Gillis v. Cobe, 177 Mass. 584, 59 N. E. 455.

Michigan. Hanley v. Walker, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57.

Minnesota. Jordan v. Van Duzee, 139 Minn. 103, 165 N. W. 877.

Mississippi. Robinson v. De Long, 118 Miss. 280, 79 So. 95.

New York. Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442.

North Dakota. International Harvester Co. v. Thomas, — N. D. —, 176 N. W. 523.

Oklahoma. Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036.

Washington. Taylor v. Finch Investment Co., 65 Wash. 435, 118 Pac. 330.

Wisconsin. Manthey v. Stock, 133 Wis. 107, 113 N. W. 443; *Rhein v. Burns*, 162 Wis. 309, 156 N. W. 138.

building contracts. One upon whose land the building has been erected by another has, in the view of many courts, no fair choice between accepting or rejecting the work done. Unless he takes possession of the property, he is either obliged to abandon his land or to remove or tear down the building erected, often at great expense. Accordingly, it has been held that the mere fact that the owner takes possession of a building erected upon his land is not such acceptance as to waive a breach by the contractor,² such as the failure of the contractor to produce the architect's certificate of performance which is required by the terms of the contract.³ Such conduct on the part of the property owner is not such waiver of performance on the part of the contractor as to enable the contractor to recover on the contract if he has not performed it, at least substantially.⁴ If a contract for painting a house is not per-

² *Alabama*. Catanzano v. Jackson, — Ala. —, 73 So. 510.

California. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357.

Idaho. Steltz v. Armory Co., 15 Ida. 551, 20 L. R. A. (N.S.) 872, 99 Pac. 98.

Iowa. Brent v. Head, 138 Ia. 46, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Mississippi. Robinson v. De Long, 118 Miss. 280, 79 So. 95.

New York. Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442.

Oklahoma. Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036.

Washington. Taylor v. Finch Investment Co., 65 Wash. 435, 118 Pac. 330.

Wisconsin. Manthey v. Stock, 133 Wis. 107, 113 N. W. 443.

³ *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Hanley v. Walker*, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57.

⁴ *Alabama*. Catanzano v. Jackson, — Ala. —, 73 So. 510.

Arkansas. Fitzgerald v. La Porte, 64 Ark. 34, 40 S. W. 261.

California. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357.

Idaho. Steltz v. Armory Co., 15 Ida.

551, 20 L. R. A. (N.S.) 872, 99 Pac. 98.

Iowa. Brent v. Head, 138 Ia. 46, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 16 L. R. A. (N.S.) 489, 69 Atl. 417.

Michigan. Hanley v. Walker, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57.

Minnesota. Elliott v. Caldwell, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845.

Mississippi. Robinson v. De Long, 118 Miss. 280, 79 So. 95.

Missouri. Haynes v. Church, 88 Mo. 285, 57 Am. Rep. 413.

Montana. Franklin v. Schultz, 23 Mont. 165, 57 Pac. 1037.

New Hampshire. Fuller v. Brown, 67 N. H. 188, 34 Atl. 463.

New Jersey. Feeney v. Bardsley, 66 N. J. L. 239, 49 Atl. 443.

New York. Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442.

North Dakota. Anderson v. Todd, 8 N. D. 158, 77 N. W. 599.

Ohio. Bender v. Buehrer, 8 Ohio C. C. 244, 4 Ohio C. D. 507.

Oklahoma. Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036.

Washington. Taylor v. Finch Investment Co., 65 Wash. 435, 118 Pac. 330.

Wisconsin. Manthey v. Stock, 133 Wis. 107, 113 N. W. 443; *Rhein v. Burns*, 162 Wis. 309, 156 N. W. 138.

formed substantially, the fact that the owner makes use of such house after such defective performance does not show a waiver of such breach or an acceptance of such performance.⁵ The use of a cathedral is not of itself acceptance of performance of a contract for tiling the roof thereof.⁶ Making use of steps and a walk leading from a door to the street,⁷ or making use of a boiler placed in a factory to furnish motive power,⁸ do not of themselves waive breaches of such contracts. If the contractor has deceived the property owner as to the performance of the contract, conduct of the property owner which is induced by such fraud is not a waiver of breach on the part of the contractor;⁹ and, on the other hand, such fraud on the part of the contractor waives the omission of the property owner to furnish the contractor with a written statement of the defects, as is required by the terms of the contract.¹⁰

However, the act of a city in accepting inferior water which is furnished by a water company, has been regarded as a voluntary waiver of the breach by the water company as to the quality of water to be furnished,¹¹ although, for a time at least, the city had no real choice but to accept the water, such as it was.

§ 3046. Express approval of performance tendered. Express acquiescence in performance as tendered, thereby inducing the adversary party to believe that such performance is accepted as complete performance, amounts to a waiver.¹ If the owner of a building in fact acquiesces in and approves of the work as done, such approval amounts to an acceptance,² and waives objections such as failure to conform to the dimensions specified.³ Accordingly such

⁵ *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

⁶ *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

⁷ *Givinnup v. Shies*, 161 Ind. 500, 69 N. E. 158.

⁸ *Manitowoc Steam Boiler Works Co. v. Glue Co.*, 120 Wis. 1, 97 N. W. 515.

⁹ *Patten & Davies Lumber Co. v. Amigo Co.*, — Cal. —, 183 Pac. 439.

¹⁰ *Patten & Davies Lumber Co. v. Amigo Co.*, — Cal. —, 183 Pac. 439.

¹¹ *Creston Waterworks v. Creston*, 101 Ia. 687, 70 N. W. 739.

¹ *Arkansas. Grand Lodge A. O. U. W. v. Davidson (Ark.)*, L. R. A. 1917C, 914, 191 S. W. 961.

Illinois. Hills v. McMunn, 232 Ill. 488, 83 N. E. 963.

Michigan. Strome v. Lyon, 110 Mich. 680, 68 N. W. 983.

Oregon. Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

Vermont. Shum v. Claghorn, 69 Vt. 45, 37 Atl. 236.

Virginia. Stonega Coke & Coal Co. v. Addington, 112 Va. 807, 37 L. R. A. (N.S.) 969, 73 S. E. 257.

² *Strome v. Lyon*, 110 Mich. 680, 68 N. W. 983; *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126; *Shum v. Claghorn*, 69 Vt. 45, 37 Atl. 236.

³ *Hutchins v. Webster*, 165 Mass. 439, 43 N. E. 186.

parts of a building as have been completed, accepted and paid for by the owner before the entire building is completed, are thenceforth at the owner's risk in case of loss by fire.⁴ Under some statutes occupying a building is conclusive evidence of its completion. This is true only where the provisions of the statute requiring such contract to be filed have been fully complied with.⁵ An approval of proof of printing submitted for examination, and a direction to go ahead and print, is an acceptance of such proof, even though a material misprint was overlooked by both parties to the contract.⁶ Approval of a clay model of a monument prevents the vendee from subsequently avoiding liability because he is dissatisfied with the plaster cast made therefrom.⁷ In building contracts a disregard of certain covenants thereof by both parties while the contract is being performed is a waiver of such provisions and a breach thereof can not be subsequently invoked as a discharge of the contract.⁸ Provisions as to the method of determining extras,⁹ such as a provision requiring the written authority of the architect or engineer therefor,¹⁰ or forbidding subcontracting without the owner's written consent,¹¹ are waived by acting without reference thereto. Terms and specifications in a building contract,¹² or a provision requiring the certificate of the architect or engineer before payment,¹³ may be waived by the parties. If A has agreed to do certain work in a mine, and B has agreed to keep the mine free from water, A's conduct in notifying B that A can bail the water out is a waiver of B's duty under the contract to keep the mine free from water.¹⁴ A provision for forfeiture of a contract for printing,

⁴ *McAlpine v. Female Academy*, 101 Wis. 468, 78 N. W. 173.

⁵ *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629.

⁶ *Giles Lithograph & Liberty Printing Co. v. Chase*, 149 Mass. 459, 14 Am. St. Rep. 439, 4 L. R. A. 480, 21 N. E. 765.

⁷ *Thomas v. Gage*, 156 N. Y. 612, 51 N. E. 307.

⁸ *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022; *Wood v. Boney* (N. J. Eq.), 21 Atl. 574; *Beswick v. Platt*, 140 Pa. St. 28, 21 Atl. 306.

⁹ *Meyer v. Berlandi*, 53 Minn. 59, 54 N. W. 937.

¹⁰ *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Campbell v. Kimball*, 87 Neb. 309, 127 N. W. 142; *Bannon v. Jackson*, 121 Tenn. 381, 130 Am. St. Rep. 788, 117 S. W. 504; *McGrath Construction Co. v. Waupaca-Green Bay Ry.*, 148 Wis. 372, 134 N. W. 824.

¹¹ *Danforth v. Tennessee & Coosa Ry.*, 93 Ala. 614, 11 So. 60.

¹² *Wood v. Boney* (N. J. Eq.), 21 Atl. 574; *Beswick v. Platt*, 140 Pa. St. 28, 21 Atl. 306.

¹³ *O'Rourke v. Burke*, 44 Neb. 821, 63 N. W. 17.

¹⁴ *Stonega Coke & Coal Co. v. Ad-dington*, 112 Va. 807, 37 L. R. A. (N. S.) 969, 73 S. E. 257.

in case of assignment, is waived by acting under the contract with full knowledge of such assignment.¹⁵ A contract requiring written notice of defects in an article sold is waived by the vendor's acting upon a verbal notice.¹⁶ A provision in a contract to convey land to a corporation to be organized, that the capital stock shall be taken by bona fide and responsible parties, is waived where the promisor becomes a stockholder and acquiesces in the expenditures of money on behalf of the corporation without paying his subscription himself, and with presumptive knowledge of the financial responsibility of the remaining stockholders.¹⁷ A covenant not to use certain realty as a hotel,¹⁸ or a covenant to build to a certain line,¹⁹ may each be waived by acquiescing in a different use of such realty. A provision that a contract for extension of time on debts by taking the debtor's notes therefor shall not take effect unless all the creditors enter into such contract, is waived by accepting such notes when some creditors have not assented.²⁰

§ 3047. Acceptance of defective performance as waiver—General principles. If the promisee with full knowledge of the facts voluntarily accepts less than full performance of the contract, the promisee thereby waives such breach of contract as a ground of discharge.¹ The effect of acceptance as a waiver of promisee's

¹⁵ Norton v. Roslyn, 10 Wash. 44, 38 Pac. 878.

¹⁶ Dean v. Nichols & Shepard Co., 95 Ia. 80, 63 N. W. 582.

¹⁷ Work v. Welsh, 160 Ill. 468, 43 N. E. 719.

¹⁸ Hemsley v. Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132 [affirming without report, 62 N. J. Eq. 164, 50 Atl. 14].

¹⁹ Scollard v. Normile, 181 Mass. 412, 63 N. E. 941.

²⁰ Garner v. Fite, 93 Ala. 405, 9 So. 367.

¹ California. North American Dredging Co. v. Outer Harbor Dock & Wharf Co., 178 Cal. 406, 173 Pac. 756; Smith v. Mathews Construction Co., 179 Cal. 797, 179 Pac. 205.

Delaware. Draper v. Randolph, 4 Har. (Del.) 454.

Illinois. Butterick Publishing Co. v. Whitcomb, 225 Ill. 605, 8 L. R. A. (N.

S.) 1004, 80 N. E. 247; Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 N. E. 714.

Iowa. Westervelt v. Huiskamp, 101 Ia. 196, 70 N. W. 125; Creston Water Works v. Creston, 101 Ia. 687, 70 N. W. 739; Wells v. Hocking Valley Coal Co., 137 Ia. 526, 114 N. W. 1076.

Kansas. Capper v. Paper Co., 86 Kan. 355, 121 Pac. 519.

Kentucky. Owensboro City R. Co. v. Barber Asphalt Paving Co. (Ky.), 107 S. W. 244, 32 Ky. L. Rep. 844.

Maine. Adams v. Hill, 16 Me. 215.

Massachusetts. Wiley v. Athol, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311; Burke v. Coyne, 188 Mass. 401, 74 N. E. 942 (obiter).

Minnesota. O'Dea v. Winona, 41 Minn. 424, 43 N. W. 97; Gray v. New Paynesville, 89 Minn. 258, 94 N. W. 721.

right to invoke a breach of the promisor as a discharge of the contract is especially clear where the promisor tenders a substantial performance of the contract which is accepted by the promisee.²

Acceptance of defective performance does not amount to waiver if such performance is accepted in reliance upon the promise of the adversary party to perform in accordance with the terms of the contract.³ Waiver of defective performance is sometimes spoken of as though it gave no right to recover on the contract itself, for the contract price, but as though it imposed a liability to pay what the performance was reasonably worth.⁴

§ 3048. Acceptance of defective performance of contracts for work and labor, or construction contracts. If an agent or employe has been guilty of conduct for which he could be discharged, the act of the employer in continuing to accept his services, with knowledge of the facts, operates as a waiver of such ground of discharge.¹ If A has agreed to pay a certain sum to B for the

Missouri. *Murray v. Farthing*, 6 Mo. 251; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882.

New York. *Vanderbilt v. Eagle Iron Works*, 25 Wend. (N. Y.) 665; *Weston v. Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701; *Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

Rhode Island. *Kerr v. Armstrong*, — R. I. —, 110 Atl. 416.

Tennessee. *Tennessee Coal, Iron & Railroad Co. v. Wilson* (Tenn. Ch. App.), 46 S. W. 342.

"It can hardly be open to dispute that whatever the parties to a contract consent to treat and accept as a performance of its conditions will so be treated by the court." *Wells v. Hocking Valley Coal Co.*, 137 Ia. 526, 114 N. W. 1076.

² *United States. Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

Arkansas. *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

California. *Griffith v. Happersberger*, 86 Cal. 605, 614, 25 Pac. 137, 487.

New York. *Smith v. Alker*, 102 N. Y. 87, 5 N. E. 791; *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418.

Texas. *Linch v. Elevator Co.*, 80 Tex. 23, 15 S. W. 208.

Wisconsin. *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

³ *Goodspeed v. United Shoe Machinery Co.*, 141 Mich. 672, 104 N. W. 682.

⁴ *Bluthenthal & Bickart v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434.

¹ **Alabama.** *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46.

Illinois. *Butterick Publishing Co. v. Whitcomb*, 225 Ill. 605, 8 L. R. A. (N. S.) 1004, 80 N. E. 247.

Massachusetts. *Daniell v. Boston & Maine Ry.*, 184 Mass. 337, 68 N. E. 337.

Nebraska. *Nesbit v. Giblin*, 96 Neb. 369, L. R. A. 1915D, 477, 148 N. W. 138.

Wisconsin. *Bast v. Byrne*, 51 Wis. 531, 37 Am. Rep. 841, 8 N. W. 494; *Tickler v. Andrae Mfg. Co.*, 95 Wis. 352, 70 N. W. 292.

performance of certain work, and a greater sum upon the happening of some specific event,² as upon condition that the adversary party refrain from the use of intoxicating liquor,³ and such condition subsequent is broken, A's subsequent promise to pay the full amount of such compensation in spite of such breach of condition is a waiver of such condition. The default of the contractor under a construction contract, in furnishing material other than that provided for in the specifications, is waived by the act of the adversary party in accepting such work and in paying for it, with knowledge of the facts.⁴ A clause in a building contract, requiring the contractor to give bond, is waived by allowing him to construct the building without giving such bond.⁵ The same rule applies where a provision that no subcontracts shall be let without the owner's written consent is waived by the owner's permitting subcontractors to do part of the work without objection.⁶ Omission to give notice of a meeting to determine questions of performance of a building contract is waived by the presence of the representatives of the party to whom such notice was not properly given.⁷ If A is to complete a tramway by a certain date, and haul logs for B, and A does not complete the tramway by the date specified, the fact that B urges A to complete it waives a right given to B by the terms of the contract to forfeit the contract to take charge of and complete the tramway if A does not complete it by the time agreed upon.⁸ Acceptance by an engineer or architect who is authorized to represent the owner in a building contract, waives such defects in the material tendered in performance of the contract as could be discovered by exercising ordinary care.⁹ Failure to make a test which could have determined the question of performance, has been held to waive possible defects, the existence of which could have been proved or disproved by such test.¹⁰

² *Clark v. West*, 193 N. Y. 349, 86 N. E. 1.

³ *Clark v. West*, 193 N. Y. 349, 86 N. E. 1.

⁴ *Owensboro City R. Co. v. Barber Asphalt Paving Co.* (Ky.), 107 S. W. 244.

⁵ *Devlan v. Wells*, 65 N. J. 213, 47 Atl. 467.

See to the same effect, *Ford v. Dyer*, 148 Mo. 528, 49 S. W. 1091, and *Kerr v. Armstrong*, — R. I. —, 110 Atl. 416.

⁶ *Danforth v. Tennessee & Coosa Ry.*, 93 Ala. 614, 11 So. 60.

⁷ *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

⁸ *Thompson Lumber Co. v. Howard* (Ky.), 57 S. W. 615; *Howard v. Thompson Lumber Co.*, 106 Ky. 566, 50 S. W. 1092.

⁹ *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372; *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136.

¹⁰ *Peck-Williamson Heating & Ventilating Co. v. McKnight*, 140 Tenn. 563, 205 S. W. 419.

Other illustrations of acceptance with full knowledge of the facts, amounting to a waiver of breach as a ground for discharge, are found in contracts for constructing waterworks,¹¹ for installing plumbing,¹² for installing a heating plant,¹³ for paving streets and alleys,¹⁴ constructing ditches,¹⁵ constructing a building,¹⁶ or a party wall,¹⁷ or digging a well, even if the supply of water subsequently fails.¹⁸

Breach of a contract to furnish support is waived by continuing to receive support under such contract.¹⁹

§ 3049. Acceptance of defective performance of contract for sale of realty. The right to avoid a contract for the sale of realty,¹ as for the vendor's failure to furnish an abstract of title,² or because of a defect in the title,³ or because a building on the property extends over the boundary line,⁴ may be waived, even after a notice of forfeiture has been given, if both parties treat the contract as still in force.⁵ A contract for the sale of land, requiring the vendee to pay taxes, is not discharged by vendee's failure to pay such taxes where subsequently the vendor recognizes such contract as in full force.⁶

§ 3050. Acceptance of property delivered as performance—Intended as waiver. If the promisee, with the knowledge of the

¹¹ *Creston Waterworks Co. v. Creston*, 101 Ia. 687, 70 N. W. 739; *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714; *Wiley v. Athol*, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311; *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 145, 39 S. W. 768.

¹² *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942 (obiter).

¹³ *Peck-Williamson Heating & Ventilating Co. v. McKnight*, 140 Tenn. 563, 205 S. W. 419.

¹⁴ *Philadelphia v. Hays*, 93 Pa. St. 72.

¹⁵ *Flick v. Mining Co.*, 16 Colo. App. 485, 66 Pac. 453; *Swank v. Barnum*, 63 Minn. 447, 65 N. W. 722.

¹⁶ *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816; *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126.

¹⁷ *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854.

¹⁸ *Wunsch v. Boldt*, 4 Tex. App. Civ. 76, 15 S. W. 193.

Contra, if the contractor has agreed to furnish an "inexhaustible" supply. *Vincent v. Morrison*, 58 Mo. App. 497.

¹⁹ *Dunklee v. Hooper*, 69 Vt. 65, 37 Atl. 225.

¹ *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601.

² *McAlpine v. Reicheneker*, 56 Kan. 100, 42 Pac. 339.

³ *Coleman v. Bank*, 115 Ala. 307, 22 So. 84.

⁴ *Corbett v. Schulte*, 119 Mich. 249, 77 N. W. 947.

⁵ *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892.

⁶ *Matthews v. Kerfoot*, 167 Ill. 313, 47 N. E. 859; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149.

breach, voluntarily retains property delivered to him in performance of the contract, which property it is possible for him to return to the promisor, such retention will amount to a waiver of the breach so as to preclude him from using such breach as a discharge.¹ Under a contract for the sale of chattels, acceptance of chattels which do not conform to the terms of the contract, with full knowledge of such facts, or with full opportunity to learn them, is a waiver of such breach, at least in the absence of a warranty, and the vendee can not subsequently avoid the contract by reason thereof.² The act of the buyer in accepting goods which are de-

¹United States. *German Savings Institution v. Refrigerating Co.*, 70 Fed. 146, 17 C. C. A. 34.

Alabama. *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739]; *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440, 103 Am. St. Rep. 58, 37 So. 199.

California. *Vallens v. Tillmann*, 103 Cal. 187, 37 Pac. 213.

Iowa. *Wells v. Hocking Valley Coal Co.*, 137 Ia. 526, 114 N. W. 1076; *Wetter v. Otto*, 179 Ia. 873, 162 N. W. 12.

Kentucky. *Glover Machine Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516; *International Harvester Co. v. Brown*, 182 Ky. 435, 206 S. W. 622.

Mississippi. *J. I. Case Threshing Machine Co. v. McCoy*, 111 Miss. 715, 72 So. 138; *Lumbermen's Supply Co. v. Poplarville Sawmill Co.*, 117 Miss. 274, 78 So. 157.

Montana. *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653; *St. Paul Machinery Mfg. Co. v. Bruce*, 54 Mont. 549, 172 Pac. 330 (obiter).

Washington. *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, L. R. A. 1915B, 1131, 140 Pac. 381.

Wisconsin. *J. B. Bradford Piano Co. v. Baal*, 166 Wis. 134, 164 N. W. 822.

See also, though not a question of breach, *School Sisters of Notre Dame v. Kusnitt*, 125 Md. 323, L. R. A. 1916D, 792, 93 Atl. 928.

²**Alabama.** *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382 [sub nomine, *Worthington v. Givin*, 24 So. 739] (a case in which the breach was so trifling as not, in all probability, to prevent substantial performance); *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440, 103 Am. St. Rep. 58, 37 So. 199; *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279.

California. *Vallens v. Tillmann*, 103 Cal. 187, 37 Pac. 213; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722.

Indiana. *O'Brien v. Higley*, 162 Ind. 316, 70 N. E. 242.

Iowa. *Hirshhorn v. Stewart*, 49 Ia. 418; *Frey-Sheckler Co. v. Brick Co.*, 104 Ia. 494, 73 N. W. 1051; *Wetter v. Otto*, 179 Ia. 873, 162 N. W. 12.

Kentucky. *Glover Machine Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516.

Massachusetts. *Giles Lithographic & Liberty Printing Co. v. Chase*, 149 Mass. 450, 14 Am. St. Rep. 439, 4 L. R. A. 480, 21 N. E. 765; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 155 Mass. 211, 29 N. E. 470.

Michigan. *Henkel v. Welsh*, 41 Mich. 664, 3 N. W. 171.

Minnesota. *Potter v. Holmes*, 87 Minn. 477, 92 N. W. 411.

Mississippi. *J. I. Case Threshing Machine Co. v. McCoy*, 111 Miss. 715, 72 So. 138; *Lumbermen's Supply Co. v. Poplarville Sawmill Co.*, 117 Miss. 274, 78 So. 157.

received under a contract of sale, knowing that there is a deficiency in quantity, operates as a waiver of such breach for the purpose of treating the contract as discharged,³ although it is not a waiver of his right to recover damages for such deficiency.⁴ One who has accepted a delivery of less than the quantity to which he is entitled, without demand for the delivery of the rest of such quantity, can not treat the contract as discharged without such demand.⁵ If a water company has agreed to furnish "wholesome, clear, potable water," its breach in furnishing water of inferior quality is waived by the action of the city in accepting and making use of the water which is actually furnished.⁶ If goods which have been sold are to be delivered in instalments, and the seller tenders a greater quantity for one instalment than the buyer has agreed to accept, the conduct of the buyer in accepting it waives such breach.⁷ Under a contract of sale which provides for certain specified tests, the act of the buyer in accepting and using the property without such test is a waiver of such test and of such defects as would have been discovered if such test had been made.⁸ Accepting seats of a different design,⁹ beds of a different width,¹⁰ or soda

Missouri. *Gaff v. Homeyer*, 59 Mo. 345.

Montana. *Hillman v. Luzon Cafe Co.*, 49 Mont. 180, 142 Pac. 641.

New York. *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814; *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 238.

Oklahoma. *Luger Furniture Co. v. Street*, 6 Okla. 312, 50 Pac. 125.

Oregon. *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 390.

Pennsylvania. *Taylor v. Saurman*, 110 Pa. St. 3, 1 Atl. 40; *Houston v. Cook*, 153 Pa. St. 43, 25 Atl. 622.

Washington. *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, L. R. A. 1915B, 1131, 140 Pac. 381.

Wisconsin. *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 23; *Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 49 L. R. A. 859, 82 N. W. 299; *J. B. Bradford Piano Co. v. Baal*, 166 Wis. 134, 164 N. W. 822.

³*Heath & Milligan Mfg. Co. v. National Linseed Oil Co.*, 197 Ill. 632, 64 N. E. 732 (the real question in this

case was whether "gallon" meant the statutory gallon or the customary gallon, it being held to mean the latter); *Dalzell v. Fahys Watch Case Co.*, 138 N. Y. 285, 33 N. E. 1071; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814; *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

⁴*Dalzell v. Fahys Watch Case Co.*, 138 N. Y. 285, 33 N. E. 1071; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

⁵*Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

⁶*Creston Water Works v. Creston*, 101 Ia. 687, 70 N. W. 739.

⁷*Capper v. Manufacturers' Paper Co.*, 86 Kan. 355, 121 Pac. 519.

⁸*Slinger v. Totten*, 38 S. D. 240, L. R. A. 1917C, 539, 160 N. W. 1008; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, L. R. A. 1915B, 1131, 140 Pac. 381.

⁹*Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 390.

¹⁰*Luger Furniture Co. v. Street*, 6 Okla. 312, 50 Pac. 125.

ash of a lower per cent. of alkali" from that specified in the contract, waives the right to treat such breach as a discharge.

§ 3051. Acceptance of property not intended as waiver. Acceptance, in this sense, includes the physical act of taking possession of the goods and also the intention of retaining them.¹ Since intention to waive breach is an essential element of waiver, the mere fact of possession of the property tendered by the adversary party in performance of the contract is not conclusively an acceptance so as to waive breach.² Whether physical receipt of property which is delivered under a contract is a waiver of complete performance, is ordinarily a question of fact depending on the actual intention of the parties.³ If the purchaser has a right to accept that part of the goods delivered which conforms to the contract, and to reject the rest, his acceptance of a part of the goods is not a waiver of defects in the part which he has thus rejected.⁴ Inspection by an agent of the buyer at the seller's factory has been held not to be a waiver of defects if such inspector is appointed voluntarily by the buyer for the accommodation of the seller.⁵ The fact that the promisee takes possession of the property tendered in performance, for the purpose of testing it, and seeing whether it complies with the terms of the contract or not, does not amount to an acceptance.⁶ If A digs a well for B, agreeing that it shall furnish water for certain purposes, B's act in using such well to test its capacity does not amount to an acceptance thereof so as to waive breach.⁷ Retaining an article in reliance upon the promise of the seller to remedy defects, is not a waiver of such defects.⁸

¹ Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 28.

² Omaha Beverage Co. v. Temp Brew Co., — Ia. —, 171 N. W. 704.

³ Iowa. Omaha Beverage Co. v. Temp Brew Co., — Ia. —, 171 N. W. 704.

⁴ Michigan. Kronman v. Gardella, 190 Mich. 645, 157 N. W. 377.

⁵ North Carolina. Hall Furniture Co. v. Crane Mfg. Co., 169 N. Car. 41, L. R. A. 1915E, 428, 85 S. E. 35.

⁶ Ohio. Rheinstrom v. Steiner, 69 O. S. 452, 69 N. E. 745.

⁷ Oklahoma. Hart-Parr Co. v. Duncan, — Okla. —, 4 A. L. R. 1434, 181 Pac. 288.

⁸ Rhode Island. Pennington v. Howland, 21 R. I. 65, 79 Am. St. Rep. 774, 41 Atl. 891.

⁹ Campion v. Marston, 99 Me. 410, 59 Atl. 548.

¹⁰ Stearns Salt & Lumber Co. v. Dennis Lumber Co., 188 Mich. 700, 2 A. L. R. 638, 154 N. W. 91.

¹¹ First National Bank v. Carroll, 35 Mont. 302, 88 Pac. 1012.

¹² Wind v. Her, 93 Ia. 316, 27 L. R. A. 219, 61 N. W. 1001.

¹³ Genni v. Hahn, 82 Wis. 90, 51 N. W. 1096.

¹⁴ Roper v. Wells, 182 Ia. 237, 165 N. W. 385; United Iron Works v. Rathskeller Co., 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

The act of the buyer in reselling goods before he has an opportunity to inspect them does not operate as a waiver of defects therein.⁹ Payment of a draft which is necessary to enable the buyer to get the bill of lading is not a waiver of unknown defects.¹⁰

If, however, certain defects are apparent, and known to the promisee, his act in making use of part of such property amounts to an acceptance of the entire lot offered and such defects are thereby waived.¹¹ Thus if A, who has agreed to give certain securities to B to secure a debt of B's, tenders B a note in place of such security, and on B's refusal to take it A throws it on the table in front of B and goes away without it, such facts do not constitute an acceptance by B.¹²

§ 3052. Waiver of provisions as to time of performance—General principles. If the promisor has made default in performance with respect to the time thereof, and the promisee subsequently permits him or induces him to continue performance,¹ or accepts performance thereafter,² or accepts payments made in performance,³ or accepts notes for a period exceeding the original term of

For an extreme case, see *International Harvester Co. v. Thomas*, — N. D. —, 176 N. W. 523.

⁹*Kronman v. Gardella*, 100 Mich. 645, 157 N. W. 377.

¹⁰*Omaha Beverage Co. v. Temp Brew. Co.*, — Ia. —, 171 N. W. 704.

¹¹*Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 28.

¹²*Whyte v. Rosencrantz*, 123 Cal. 634, 60 Am. St. Rep. 90, 56 Pac. 436.

¹*United States. Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *German Savings Institute v. Machine Co.*, 70 Fed. 146, 17 C. C. A. 34.

Alabama. Andrews v. Tucker, 127 Ala. 602, 29 So. 34.

Illinois. McArthur Brothers v. Whitney, 202 Ill. 527, 67 N. E. 163.

Kansas. Missouri, K. & T. Ry. v. Pratt, 64 Kan. 118, 67 Pac. 464.

Kentucky. Louisville & Nashville Ry. v. Mason & Hoge Co. (Ky.), 104 S. W. 975.

Louisiana. Prentiss v. Lyons, 105 La. 382, 29 So. 944.

Maryland. Orem v. Keelty, 85 Md. 337, 36 Atl. 1030.

Nebraska. Fahey v. Updike Elevator Co., — Neb. —, 171 N. E. 50.

Oregon. Neppach v. Oregon & Cal Ry., 46 Or. 374, 80 Pac. 482.

Vermont. Bean v. Bunker, 68 Vt. 72, 33 Atl. 1068.

Washington. Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026; *Garrison v. Newton*, 96 Wash. 284, 4 A. L. R. 804, 165 Pac. 90.

²*Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Jeffrey Mfg. Co. v. Iron Co.*, 93 Fed. 408; *Northwest Auto Co. v. Harmon*, 250 Fed. 832; *Neosho City Water Co. v. Neosho*, 136 Mo. 408, 38 S. W. 89.

³*Northwest Auto Co. v. Harmon*, 250 Fed. 832.

Alabama. Davis v. Robert, 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114; *Sewell v. Pearcy*, 187 Ala. 322, 65 So. 803.

credit,⁴ or otherwise treats such contract as still in force,⁵ such breach is waived. The act of one party in accepting payment in instalments waives the default of the adversary party in failing to make the payment as provided by the terms of the original contract.⁶ If a contract provides expressly that either party may avoid the contract in case of failure of one of the parties to perform by a specified time, the fact that neither party elects to avoid the contract amounts to a waiver of such default as to time.⁷

§ 3053. Waiver of provisions as to time of performance—Specific illustrations. Permitting a contractor to complete a building contract, or a construction contract, after the time fixed by such contract for performance, waives the right to treat such default as discharge.¹ If one who has sold a business and agreed not to compete accepts payment therefor after the buyer is in default, the seller can not thereafter treat such default as discharging him from his covenant not to compete.² If the buyer does not take the property within the time agreed upon, the seller may treat such default as a discharge; but if the seller continues to deliver such property

Connecticut. *Bronson v. Leibold*, 87 Conn. 293, 87 Atl. 979.

Georgia. *McAuliffe v. Vaughan*, 135 Ga. 852, 33 L. R. A. (N.S.) 255, 70 S. E. 322.

Illinois. *Fitzgerrell v. Turner*, 223 Ill. 322, 79 N. E. 76.

Oregon. *Miller v. Beck*, 72 Or. 140, 142 Pac. 603.

Vermont. *Mack v. Dailey*, 67 Vt. 90, 30 Atl. 686.

⁴ *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752.

⁵ *Cole v. United States*, 23 Ct. Cl. 341; *Prentiss v. Lyons*, 105 La. 382, 29 So. 944; *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867; *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

Contract for sale of realty after default by vendee. *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Marx v. Oliver*, 246 Ill. 316, 92 N. E. 864; *Moore's Estate*, 191 Pa. St. 600, 43 Atl. 474.

After default by vendor. *Garbes v. Roberts*, 98 Wis. 173, 73 N. W. 905.

Contract for the sale of stock. *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

Contract for delivering bonds to be held as collateral security. *Herr v. Sullivan*, 25 Colo. 190, 54 Pac. 637.

Contract for constructing streets after default by the contractor. *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030.

⁶ *Northwest Auto Co. v. Harmon*, 250 Fed. 832.

⁷ *Stennick v. Jones*, 252 Fed. 345 [opinion modified, 256 Fed. 354].

¹ *Kentucky. Louisville & Nashville Ry. v. Mason & Hoge Co. (Ky.)*, 104 S. W. 975.

Michigan. *Barnard v. McLeod*, 114 Mich. 73, 72 N. W. 24.

Montana. *Wortman v. Montana Central Ry.*, 22 Mont. 266, 56 Pac. 316.

Texas. *Linch v. Elevator Co.*, 80 Tex. 23, 15 S. W. 208.

Washington. *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142.

² *McAuliffe v. Vaughan*, 135 Ga. 852, 33 L. R. A. (N.S.) 255, 70 S. E. 322.

without notice to the contrary, it will be presumed that he was delivering it under the original contract.³ While one who has delivered goods under a contract of sale without an agreement for credit, may retake such goods after the buyer takes possession thereof and fails to pay therefor, the conduct of the seller in permitting the buyer to keep possession of such goods operates as a waiver of such right.⁴ If the buyer has agreed to secure the permits which are necessary to enable the seller to deliver the goods which have been sold, the seller may waive such default on the part of the buyer by treating the contract as in effect after such default.⁵ If certain work is to be performed on receiving notice a certain time before performance is to begin, the omission to give such notice is said to operate as waiver of the duty of the adversary party to perform.⁶

Breach of a contract to make a designated payment at a designated time, as a means of securing the release of a lot from a trust deed, is waived by the payee's recognizing such contract as still existing.⁷ A default on the part of the vendor of realty in perfecting the title by a certain time, is waived by the conduct of the purchaser in treating such contract as in effect,⁸ as by treating the contract as in effect while the vendor attempts to perfect the title,⁹ or by accepting the abstract after the time fixed for performance.¹⁰ Delay on the part of the purchaser may be waived by the conduct of the vendor in recognizing the contract as in effect,¹¹ as by the conduct of the vendor in notifying the purchaser where the deed of the property can be obtained on payment therefor.¹²

§ 3054. Delay caused by party not in default, or assented to by him. That failure to take advantage of delay in performance as a discharge of the contract operates as a waiver is clear where

³ *Cole v. United States*, 23 Ct. Cl. 341.

⁴ *Frech v. Lewis*, 218 Pa. St. 141, 120 Am. St. Rep. 864, 11 L. R. A. (N. S.) 948, 67 Atl. 45.

⁵ *Fahey v. Updike Elevator Co.*, — Neb. —, 171 N. E. 50.

⁶ *Mueller v. Cook*, 126 Wis. 504, 105 N. W. 1054.

⁷ *Lapsley v. Howard*, 119 Mo. 489, 24 S. W. 1020.

⁸ *Smith v. Burnham*, 2 Anstr. 527;

Seton v. Slade, 7 Ves. Jr. 265; *Garrison v. Newton*, 96 Wash. 284, 4 A. L. R. 804, 165 Pac. 90.

⁹ *Garrison v. Newton*, 96 Wash. 284, 4 A. L. R. 804, 165 Pac. 90.

¹⁰ *Smith v. Burnham*, 2 Anstr. 527; *Seton v. Slade*, 7 Ves. Jr. 265.

¹¹ *Marx v. Oliver*, 246 Ill. 316, 92 N. E. 864.

¹² *Marx v. Oliver*, 246 Ill. 316, 92 N. E. 864.

the delay has been requested by the promisee,¹ or where he has authorized the same in advance,² or led the adversary party to believe that strict performance would not be insisted on,³ or where modifications of the contract requested by him have caused such delay in performance.⁴ An oral extension of time, whether valid as a new contract or not,⁵ operates in many jurisdictions as a waiver of the provision of the original contract, fixing the time of performance.⁶ If a machine is sold under a provision for its return in case it does not comply with certain requirements by a specified time, the request of the seller that the buyer keep the machine beyond such time, in order to enable the seller to adjust such machine, operates as a waiver of such provision as to time; and if such machine does not eventually satisfy such requirements, the seller may rescind after the expiration of such time.⁷ A delay in suing on an insurance policy for a period greater than that fixed by such policy, does not prevent recovery if made at the suggestion of an agent of the insurer.⁸ If the collector for a telephone company suggests a delay in the payment of rental for a telephone, the telephone company can not thereafter use such delay as a ground for forfeiture of the contract.⁹ Under a building contract a contractor is excused for delay which is caused by a change in the plans,¹⁰ or material¹¹ ordered by the owner. Even if the con-

¹ *Hinckley v. Steel Co.*, 121 U. S. 264, 30 L. ed. 967; *Guthrie v. Carpenter*, 162 Ind. 417, 70 N. E. 486; *Barnes v. Stacy*, 79 Wis. 55, 48 N. W. 53; *Lorenz v. Hart-Parr Co.*, 146 Wis. 261, 50 L. R. A. (N.S.) 796, 131 N. W. 446.

² *United States. Emerson v. Slater*, 63 U. S. (22 How.) 28, 16 L. ed. 360. *Illinois. Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963.

Michigan. Loveridge v. Shurtz, 111 Mich. 618, 70 N. W. 132; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049.

Pennsylvania. Clark v. Bache, 186 Pa. St. 343, 40 Atl. 484.

Virginia. Atlantic & D. Ry. v. Construction Co., 98 Va. 503, 37 S. E. 13.

³ *Lessell v. Goodman*, 97 Ia. 681, 59 Am. St. Rep. 432, 66 N. W. 917.

⁴ *Davis v. Badders*, 95 Ala. 348, 10

So. 422; *Cornish v. Suydam*, 99 Ala. 620, 13 So 118.

⁵ See §§ 2489 et seq.

⁶ *Guthrie v. Carpenter*, 162 Ind. 417, 70 N. E. 486; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049; *Lorenz v. Hart-Parr Co.*, 146 Wis. 261, 50 L. R. A. (N.S.) 796, 131 N. W. 446.

⁷ *Lorenz v. Hart-Parr Co.*, 146 Wis. 261, 50 L. R. A. (N.S.) 796, 131 N. W. 446.

⁸ *Hall v. Union Central Life Insurance Co.*, 23 Wash. 610, 83 Am. St. Rep. 844, 51 L. R. A. 288, 63 Pac. 505.

⁹ *Ashley v. Telephone Co.*, 25 Mont. 286, 64 Pac. 765.

¹⁰ *Dodd v. Churton* [1897], 1 Q. B. 562; *Texas & St. Louis Ry. v. Rust*, 19 Fed. 239.

¹¹ *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126; *Lilly v. Person*, 168 Pa. St. 219, 32 Atl. 23.

tract provides that orders for extra work must be in writing, delay caused by the contractor's complying with oral orders of the owner is excused.¹² On the other hand, he may decline to perform after the plans are changed unless the architects put extra allowance for changes in writing as required by the contract, and he may decline to act under oral allowance.¹³ However, if the promisor has specifically agreed to take all risks, he is not allowed to show that improper performance on the part of the promisee caused breach by the promisor.¹⁴

§ 3055. When performance is due after waiver of provisions as to time. A waiver of a provision fixing the time for performance does not confer upon the adversary party the right to fix the time for performance at his election.¹ Under a subsequent agreement to extend the time of performance to a certain date, there is no waiver of the right to treat the contract as discharged by failure to perform at that date.² If there is no definite extension of time, the adversary party must perform within a reasonable time, and his failure to perform within a reasonable time will operate as a discharge of the contract.³ Waiver of the provision of the contract which fixes the time for performance prevents default as to the time of performance from operating as a discharge; and while the party who has waived such provision may withdraw such waiver, if without consideration, and demand performance within a reasonable time, he can not withdraw such waiver without notice and treat prior defaults as operating as a discharge.⁴ While a party who has contracted for security for deferred payments, and who has waived such provision, may

¹² *Focht v. Rosenbaum*, 176 Pa. St. 14, 34 Atl 1001.

¹³ *Mitchell v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205.

¹⁴ *Warren-Scharf Asphalt Paving Co. v. St. Paul*, 60 Minn. 453, 72 N. W. 711.

¹ *Mays v. Blair*, 120 Ark. 69, 179 S. W. 331; *Carroll v. Mundy*, — Ia. —, 4 A. L. R. 811, 170 N. W. 790; *Drown v. Ingels*, 3 Wash. 424, 28 Pac. 759; *Opsjon v. Engebo*, 73 Wash. 324, 131 Pac. 1146; *Cosby v. Honaker*, 57 W. Va. 512, 50 S. E. 610.

² *Drown v. Ingels*, 3 Wash. 424, 28 Pac. 759.

³ *Mays v. Blair*, 120 Ark. 69, 179 S. W. 331; *Carroll v. Mundy*, — Ia. —, 4 A. L. R. 811, 170 N. W. 790; *Opsjon v. Engebo*, 73 Wash. 324, 131 Pac. 1146; *Cosby v. Honaker*, 57 W. Va. 512, 50 S. E. 610.

⁴ *Panoutsos v. Raymond Hadley Corporation* [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767]; *Prentiss v. Lyons*, 105 La. 382, 29 So. 944; *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

retract such waiver on reasonable notice and demand such security, he can not do so without giving reasonable notice.⁵

§ 3056. Waiver of provisions as to payment. Acceptance of methods of payment other than those provided for by the contract waives the covenants of such contract with regard to such payment.¹ An agreement to accept a draft unconditionally is waived by accepting a draft which is accepted conditionally.² A provision that an agent would indorse notes taken by him for his principal is waived by accepting notes indorsed by him without recourse.³ A provision to pay cash is waived by accepting a cognovit note,⁴ and a provision requiring certified checks to be given is waived by accepting uncertified checks.⁵ A provision fixing the place of performance is waived by acquiescing in a demand for performance elsewhere.⁶ A waiver of interest as to one overdue instalment, is not a waiver of interest upon instalments which subsequently are not paid at maturity.⁷

§ 3057. Arbitrary refusal, or assignment of ground as waiver of breach caused thereby. If one of the parties to a contract has refused to perform under any circumstances, or if he has refused to perform and he has alleged a specific ground as the reason for such refusal, the question is occasionally presented whether such refusal operates as a waiver of a breach on the part of the adversary party which is not assigned as the reason for such refusal. This depends in part, in some jurisdictions at least, on the question whether by such refusal, whether absolute or qualified, the adversary party was induced to refrain from performing or tendering performance.

It is generally held that if one party refuses to perform, either absolutely or qualifiedly, such refusal prevents him from taking advantage of any breach by the adversary party which is com-

⁵ *Panoutsos v. Raymond Hadley Corporation* [1917], 2 K. B. 473 [affirming (1917), 1 K. B. 767].

¹ *Plummer v. Kelly*, 7 N. D. 88, 73 N. W. 70.

Method of weighing ore to determine royalty due under a mining lease. *American Manganese Co. v. Manganese Co.*, 91 Va. 272, 21 S. E. 466.

² *Ryalla v. Moody*, 102 Ala. 519, 15 So. 240.

³ *Aultman v. Martin*, 49 Neb. 103, 68 N. W. 340.

⁴ *Clark v. Bache*, 186 Pa. St. 343, 40 Atl. 484.

⁵ *Millar v. Smith*, 28 Tex. Civ. App. 386, 67 S. W. 429.

⁶ *Kuhn v. McKay*, 7 Wyom. 42, 49 Pac. 473, 51 Pac. 205.

⁷ *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108.

mitted in reliance upon such refusal and in the belief that further performance will be useless or unnecessary.¹ A provision in an insurance policy which requires proof of loss to be submitted in a certain time is waived by the company's denial of liability under the policy,² as on the ground of suicide.³ A policy on property in Porto Rico excepted loss during invasion or rebellion unless satisfactory proof was made that it was due to some cause other than such invasion or rebellion. The duty of producing such proof which rests upon the insured is waived by a notice given by the insurer, without demanding proof, that it will not pay the loss because due to one of the excepted causes.⁴ If one party to the contract refuses to accept performance of any kind under any circumstances, and thereby leads the adversary party to refrain from tendering performance, such refusal is said to waive such failure to perform.⁵ A variance between a lease contracted for, and the one offered, is waived by the lessee's refusal to accept any lease at

¹ England. *Bank of China, Japan and the Straits v. American Trading Co.* [1894], A. C. 266.

United States. *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. ed. 385; *St. Louis Dressed Beef Co. v. Maryland Casualty Co.*, 201 U. S. 173, 50 L. ed. 712; *Phenix Ins. Co. v. Luce*, 123 Fed. 257.

Georgia. *Cowdery v. Greenlee*, 126 Ga. 786, 8 L. R. A. (N. S.) 137, 55 S. E. 918.

Indiana. *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340; *Millikan v. Hunter*, 180 Ind. 149, 100 N. E. 1041.

Iowa. *Condon v. Des Moines Mutual Hail Assn.*, 120 Ia. 80, 94 N. W. 477.

Massachusetts. *Freeland v. Ritz*, 154 Mass. 257, 26 Am. St. Rep. 244, 12 L. R. A. 561, 28 N. E. 226; *Smith v. Greene*, 197 Mass. 16, 83 N. E. 9; *C. W. Hunt Co. v. Boston Elevated Ry. Co.*, 199 Mass. 220, 85 N. E. 446; *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623.

Michigan. *Schwartz v. Woodruff*, 132 Mich. 513, 93 N. W. 1067.

Missouri. *McDonald v. Bankers' Life Association*, 154 Mo. 618, 55 S. W. 999.

New Hampshire. *Seely v. Manhattan Life Ins. Co.*, 72 N. H. 49, 55 Atl. 425.

Vermont. *Davis v. Bowers Granite Co.*, 75 Vt. 286, 54 Atl. 1084.

² *Phenix Ins. Co. v. Luce*, 123 Fed. 257; *Condon v. Hail Association*, 120 Ia. 80, 94 N. W. 477; *Seely v. Manhattan Life Ins. Co.*, 72 N. H. 49, 55 Atl. 425.

³ *McDonald v. Bankers' Life Association*, 154 Mo. 618, 55 S. W. 999.

⁴ *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. ed. 385.

⁵ *Bank of China, Japan and the Straits v. American Trading Co.* [1894], A. C. 266; *St. Louis Dressed Beef Co. v. Maryland Casualty Co.*, 201 U. S. 173, 50 L. ed. 712; *Cowdery v. Greenlee*, 126 Ga. 786, 8 L. R. A. (N. S.) 137, 55 S. E. 918; *Davis v. Bowers Granite Co.*, 75 Vt. 286, 54 Atl. 1084.

all.⁶ If one of the parties refuses to perform and assigns as the ground therefor some alleged breach by the adversary party, or some other defense, it has been held that such refusal operates as a waiver of any subsequent breach by the adversary party which he has committed because he has believed that further performance would be useless in view of such refusal.⁷ If a purchaser of realty refuses to perform, and alleges some specific breach on the part of the vendor as the ground for such refusal, such refusal is held to waive all other objections which the vendor could have remedied.⁸ Under a contract of indemnity insurance, the refusal of the insurer to pay the claim or to defend the suit, on the ground that the liability is not within the terms of the contract, operates as a waiver of a clause which forbids the insured to compromise without the consent of the insurer.⁹ If a carrier refuses to deliver certain goods on the ground that they are not in his possession, such refusal operates as a waiver of the duty of the consignee to tender the freight.¹⁰

§ 3058. Arbitrary refusal, or assignment of ground, held not to be waiver of breach not caused thereby. Whether the fact that the party who refuses performance assigns a specific ground as a

⁶ *Freeland v. Ritz*, 154 Mass. 257, 26 Am. St. Rep. 244, 12 L. R. A. 561, 28 N. E. 226.

⁷ *United States. Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. ed. 385; *St. Louis Dressed Beef Co. v. Maryland Casualty Co.*, 201 U. S. 173, 50 L. ed. 712; *Phenix Ins. Co. v. Luce*, 123 Fed. 257.

Georgia. Cowdery v. Greenlee, 126 Ga. 786, 8 L. R. A. (N.S.) 137, 55 S. E. 918.

Indiana. Adams Express Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340; *Millikan v. Hunter*, 180 Ind. 149, 100 N. E. 1041.

Iowa. Condon v. Des Moines Mutual Hail Association, 120 Ia. 80, 94 N. W. 477.

Massachusetts. Smith v. Greene, 197 Mass. 16, 83 N. E. 9; *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623.

Michigan. Schwartz v. Woodruff, 132 Mich. 513, 93 N. W. 1007.

Missouri. McDonald v. Bankers' Life Association, 154 Mo. 618, 55 S. W. 999.

New Hampshire. Seely v. Manhattan Life Ins. Co., 72 N. H. 49, 55 Atl. 425.

North Carolina. Kime v. Riddle, 174 N. Car. 442, 93 S. E. 946.

⁸ *Cowdery v. Greenlee*, 126 Ga. 786, 8 L. R. A. (N.S.) 137, 55 S. E. 918; *Millikan v. Hunter*, 180 Ind. 149, 100 N. E. 1041; *Smith v. Greene*, 197 Mass. 16, 83 N. E. 9; *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623; *Schwartz v. Woodruff*, 132 Mich. 513, 93 N. W. 1067.

⁹ *St. Louis Dressed Beef Co. v. Maryland Casualty Co.*, 201 U. S. 173, 50 L. ed. 712.

¹⁰ *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340.

reason therefor, should prevent him from relying upon some other ground where the other ground on which he seeks to rely is not due to his refusal, as in cases in which such ground was already in existence at the time of such refusal and could not have been remedied by the adversary party, is a question upon which there is a conflict of authority. It would appear that in cases in which the adversary party is not induced to act or to refrain from acting by such refusal upon such assigned ground, he is in no way prejudiced by the assignment of such improper reason; and if there is in fact some other valid defense to which the party who has refused performance would otherwise be entitled, his right to make use of such defense should not be forfeited by the fact that he has assigned, as a reason for his refusal, some ground upon which he can not rely at law. In a number of cases this view is taken; and it is held that assigning an unjustifiable ground for treating the contract as discharged does not waive other defenses which were not caused as a consequence of such refusal.¹ The fact that an employer assigns an improper ground for discharging his servant, does not prevent him from taking advantage of some valid ground which was then in existence,² even if he did not know of such ground at the time of such discharge.³ If the seller has failed to perform his contract,⁴ as where there is a substantial delay in

¹ **United States.** Connell Bros. Co. v. Diederichsen, 213 Fed. 737; Farmer v. First Trust Co., Re Milwaukee Motor Co., 246 Fed. 671, L. R. A. 1918C, 1027.

Illinois. Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.

Iowa. Bamberger v. Burrows, 145 Ia. 441, 124 N. W. 333.

Kansas. McCarter v. Rogers, 104 Kan. 204, 178 Pac. 621 (obiter, since no contract existed).

Louisiana. Crescent City Mfg. Co. v. Slattery, 132 La. 917, 61 So. 870.

Minnesota. Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

Nebraska. Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

Ohio. List & Son Co. v. Chase, 80 O. S. 42, 88 N. E. 120.

Rhode Island. Perry v. Mt. Hope Iron Co., 16 R. I. 318, 15 Atl. 87.

Texas. Strain v. Pauley Jail Bldg. & Mfg. Co., 80 Tex. 622, 16 S. W. 625.

² Farmer v. First Trust Co., Re Milwaukee Motor Co., 246 Fed. 671, L. R. A. 1918C, 1027; Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

³ Farmer v. First Trust Co., Re Milwaukee Motor Co., 246 Fed. 671, L. R. A. 1918C, 1027; Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901.

⁴ Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359; List & Son Co. v. Chase, 80 O. S. 42, 88 N. E. 120.

delivering the goods,⁵ or where he has delivered a different quantity and by a different route from that provided for in the contract,⁶ the fact that he has based his refusal to perform on some other reason, such as the defective quality of the goods,⁷ or his inability to resell such goods under existing conditions,⁸ does not operate as a waiver of such breach as a discharge. The act of the purchaser in objecting to a prior deed in the chain of title on one ground, does not waive a defect in such deed upon a different ground.⁹ That assigning an erroneous ground for refusal to perform is not a waiver of other defenses, is especially clear where the real defense is a failure to agree upon the terms of a contract.¹⁰

§ 3059. Arbitrary refusal, or assignment of ground, held to be waiver of breach not caused thereby. In other jurisdictions, however, language is used which seems to indicate that the courts held that the fact that the party who refuses to perform bases his refusal upon some specific ground, such as a specific breach by the adversary party, is a waiver of other defenses, such as other breaches by the adversary party, if such other defenses are known to him or are brought to his notice.¹ This is justified on the ground that a technical forfeiture will not be encouraged and that a party who attempts to rely thereon will be held to waive it if he does not assert his intention to take advantage thereof.² If the property owner denies liability on a building contract, such denial is said to waive a defense that the action was brought before the time fixed by the contract for bringing an action thereon.³ A

⁵ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

⁶ *List & Son Co. v. Chase*, 80 O. S. 42, 88 N. E. 120.

⁷ *List & Son Co. v. Chase*, 80 O. S. 42, 88 N. E. 120.

⁸ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

⁹ *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072.

¹⁰ *McCarter v. Rogers*, 104 Kan. 204, 178 Pac. 621.

¹ *Illinois. Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 71 N. E. 1084; *Andrew Lohr Bottling Co.*

v. Ferguson, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

Kentucky. Robert Mitchell Furniture Co. v. Monarch (Ky.), 39 S. W. 823.

Massachusetts. Marlborough Gaslight Co. v. Neal, 166 Mass. 217, 44 N. E. 139; *Goddard v. Morrissey*, 172 Mass. 594, 53 N. E. 207.

Nebraska. Hixson Map Co. v. Post Co., 5 Neb. (unoff.) 388, 98 N. W. 872.

Wisconsin. Wright v. C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000.

² *Bast v. Byrne*, 51 Wis. 531; *Wright v. C. S. Graves Land Co.*, 100 Wis. 269, 75 N. W. 1000.

³ *Andrew Lohr Bottling Co. v. Ferguson*, 223 Ill. 88, 114 Am. St. Rep. 305, 79 N. E. 35.

refusal to perform a contract to forward cattle, on the ground that the promisor did not have a sufficient number of cars, prevents the carrier from subsequently urging the objection that in that state it was illegal to forward on Sunday.⁴ A refusal of a tender of the purchase price made by an assignee of the vendee on the ground that the amount is insufficient, waives breach of a provision forbidding assignment.⁵ Refusal to accept goods tendered in performance of a contract of sale upon the sole ground that such delivery is too late, waives the objection that the entire amount of goods purchased must be delivered in one lot.⁶ If a vendor stops delivering goods upon the sole ground that he has fully performed his part of the contract, he waives breach on the part of vendee by his failure to pay for prior instalments when due.⁷ A refusal to accept goods on some other ground is said to waive the objection that the proper quantity of goods has not been tendered.⁸ A refusal to accept performance on the ground that the realty has been encumbered by a mortgage, has been said to operate as a waiver of a failure to tender rent for a given period of time.⁹ Refusal to pay an insurance policy on the ground that the insured has no title to the premises, waives objections which might have been urged against the proof of loss.¹⁰ A refusal to perform on the ground that the contract is for some reason unenforceable, as because of the Statute of Frauds,¹¹ waives objections to the performance actually tendered.

§ 3060. Effect of election to treat as in force. Election on the part of the party who is not in default, to treat the contract as in effect, operates as a waiver of his right to treat it as discharged for the same breach.¹ A party who has elected to treat a contract

⁴ *Ohio & Mississippi Ry. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

⁵ *Cheney v. Billy*, 74 Fed. 52, 20 C. C. A. 291.

⁶ *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503.

⁷ *Bean v. Bunker*, 68 Vt. 72, 33 Atl. 1068.

⁸ *Polson Logging Co. v. Neumeyer*, 229 Fed. 705; *Sutton v. Risser*, 104 Ia. 631, 74 N. W. 23.

In cases of this sort it is possible that tender of the proper amount might have been made if objection had been based on that ground.

⁹ *Jackson v. Rogers*, — S. Car. —, 96 S. E. 692.

¹⁰ *German Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112.

¹¹ *Meincke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785.

¹ *Canada. Sorette v. Development Co.*, 31 N. S. 427.

United States, District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948; *Graham v. United States*, 188 Fed. 651; *Northwest Auto Co. v. Harmon*, 250 Fed. 832; *Landes v. Klopstock*, 252 Fed. 89; *Stennick v. Jones*, 252 Fed. 345 [opinion modified, 256 Fed. 354].

as severable,² such as a contract for the transportation of a certain quantity of material each year until the entire quantity is transported,³ can not thereafter change his position and treat a breach by the adversary party as a discharge of the contract on the theory that it is entire. If the party not in default has elected to treat the contract as still in effect, and the party in default wishes to perform after such default, he may do so,⁴ and, upon performance, recover under the contract,⁵ less the amount of damages, if any, caused by delay.⁶ In such cases the contract is not discharged, but remains in full force. If the party who is not in default elects to act under the contract in spite of the breach, he can not prevent the party who is in default from treating the con-

Arkansas. Grand Lodge A. O. U. W. v. Davidson (Ark.), L. R. A. 1917C, 914, 191 S. W. 961.

California. Witmer Brothers Co. v. Weid, 108 Cal. 569, 41 Pac. 491; Smith v. Mathews Construction Co., 179 Cal. 797, 179 Pac. 205.

Florida. Roess Lumber Co. v. State Exchange Bank, 68 Fla. 324, L. R. A. 1918E, 297, 67 So. 188.

Georgia. Pitcher v. Lowe, 95 Ga. 423, 22 S. E. 678; McAuliffe v. Vaughan, 135 Ga. 852, 33 L. R. A. (N.S.) 255, 70 S. E. 322.

Illinois. Butterick Publishing Co. v. Whitcomb, 225 Ill. 605, 8 L. R. A. (N. S.) 1004, 80 N. E. 247; Hills v. McMunn, 232 Ill. 488, 83 N. E. 963.

Iowa. Dahl v. Thompson, 98 Ia. 599, 67 N. W. 579.

Kentucky. Louisville & Nashville Ry. v. Mason & Hoge Co. (Ky.), 104 S. W. 975.

Louisiana. Des Allemands Lumber Co. v. Morgan City Timber Co., 117 La. 1, 41 So. 332.

Massachusetts. Jones v. Brown, 171 Mass. 318, 50 N. E. 648.

Michigan. Robinson v. Lake Shore & Michigan Southern Ry., 103 Mich. 607, 61 N. W. 1014; Gates v. Detroit & Mackinac Ry., 147 Mich. 523, 111 N. W. 101.

Mississippi. Klein v. Buck, 73 Miss. 133, 18 So. 891.

Nebraska. Izard v. Kimmel, 26 Neb. 51, 41 N. W. 1068; Mundt v. Simpkins, 81 Neb. 1, 115 N. W. 325.

New York. Wolfert v. Caledonia Springs Ice Co., 195 N. Y. 118, 21 L. R. A. (N.S.) 864, 88 N. E. 24.

North Dakota. Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70.

Washington. Garrison v. Newton, 96 Wash. 284, 4 A. L. R. 804, 165 Pac. 90.

Wisconsin. Tickler v. Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292; Laycock v. Moon, 97 Wis. 59, 72 N. W. 372; Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1038.

²Gates v. Detroit & Mackinac Ry. Co., 147 Mich. 523, 111 N. W. 101.

³Gates v. Detroit & Mackinac Ry. Co., 147 Mich. 523, 111 N. W. 101.

⁴Orr v. Cooledge, 117 Ga. 195, 43 S. E. 527; Lapsley v. Howard, 119 Mo. 489, 24 S. W. 1020.

⁵Orr v. Cooledge, 117 Ga. 195, 43 S. E. 527; Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766.

⁶Whether waiver of breach, as discharge, is a waiver of a right of action for damages, see §§ 3063 et seq.

tract as the measure of the rights of the parties.⁷ If the party not in default elects to treat the contract as in force, he must show readiness and willingness to perform in order to keep the party in default from recovering the amount paid in by him in performance of the contract before his breach thereof.⁸

If the contract becomes impossible of performance before the party who is not in default has accepted the breach as discharging the contract it will be discharged.⁹ Accordingly, impossibility due to the destruction of the subject-matter,¹⁰ or due to war,¹¹ will operate as a discharge of the contract; and the party who is not in default and who has elected to treat the contract as in force can not change his position after the occurrence of the event which renders performance impossible, and treat the breach as a discharge. To operate as such discharge, however, the impossibility must be technical impossibility; that is, impossibility of the sort that would operate as a discharge without regard to the breach.¹²

If the party originally in default performs, before the adversary party elects to treat it as a breach, his rights under the contract stand as if the contract had never been broken,¹³ except as concerns his liability for damages. If the party who is not in default elects to grant an extension of time in which the adversary party acquiesces, the contract will be regarded as broken, for the purpose of fixing the measure of damages,¹⁴ by the failure of the party who was originally in default to perform by the end of such extension of time.¹⁵ Subsequent breach by the party not in default may prevent the latter from recovery, and in such case he can not revert to the original breach as a discharge.¹⁶ A was to manufacture certain cars for a railroad, using in part material furnished by the railroad. This material was not furnished when due, and A was delayed in commencing work. Instead of treating this as a

⁷ *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

⁸ *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

⁹ *Avery v. Bowden*, 5 E. & B. 714; *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

¹⁰ *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264.

¹¹ *Avery v. Bowden*, 5 E. & B. 714.

¹² See §§ 2607 et seq.

¹³ *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

¹⁴ See ch. LXXXVII.

¹⁵ *Fahey v. Updike Elevator Co.*, — Neb. —, 171 N. W. 50.

¹⁶ *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569; *McConihe v. New York & Erie Ry. Co.*, 20 N. Y. 495, 75 Am. Dec. 420.

discharge A performed when the material arrived. Before A had delivered the cars they were destroyed by fire. It was held that A could not recover from the railroad, since the fire was in no way caused by the delay in furnishing material, and such breach was waived as a ground of discharge by A's continuing performance.¹⁷ If a property owner makes default in paying instalments when due, and the contractor does not elect to treat such default as a discharge of the contract, but continues performance, he can not make use of such default on the part of the owner as a defense to an action for his own default in not completing the building at the time fixed by the contract, unless he is able to show that such default in payment was the cause of his own delay.¹⁸

§ 3061. Waiver as to third persons. Waiver by one of the parties to the contract is conclusive as to third parties, at least as to those who claim under the party who has waived his right to take advantage of breach.¹ A contract by a stepson to assist his stepfather,² or by a child to live with a man and his wife as their child,³ or a contract of subscription to a college,⁴ are each sufficiently performed where the promisee accepts such performance as satisfactory to himself. Third persons can not thereafter object that such contract was not performed. If a third person claims under a contract between two other parties, he may take advantage of waiver by one of such parties of provisions of such contract.⁵ If A, who is a mortgagee under a construction mortgage, agrees to make certain payments to a subcontractor when the principal contractor has completed the work, and A subsequently agrees with the principal contractor that certain items may be omitted, A can not resist making such payment to the subcontractor on the ground that the principal contractor did not com-

¹⁷ *McConihe v. New York & Erie Ry.*, 20 N. Y. 495, 75 Am. Dec. 420.

¹⁸ *Chamberlin v. Booth*, 135 Ga. 719, 35 L. R. A. (N.S.) 1223, 70 S. E. 569.

¹ *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L. R. A. 636, 44 S. W. 454; *Mills v. McCaustland*, 105 Ia. 187, 74 N. W. 930; *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 902.

² *Mills v. McCaustland*, 105 Ia. 187, 74 N. W. 930.

³ As consideration for a contract to make a will. *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

For a similar case, see *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 902.

⁴ *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L. R. A. 636, 44 S. W. 454.

⁵ *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022.

plete the work in accordance with the terms of the original contract.⁶

C. WAIVER OF BREACH AS RIGHT OF ACTION FOR DAMAGES

§ 3062. Waiver of damages by new contract. While the general principles of waiver, so-called, apply to waiver of breach as the basis of a right of action to recover damages, as well as to waiver of breach as a ground for treating the contract as discharged at the election of the party who is not in default, the facts which are involved in waiver of a right of action for damages are so different from those which are involved in waiver of breach as a ground for treating the contract as discharged that different results are frequently reached in two classes of cases.¹

Since a right of action may be discharged by a release under seal,² such a release prevents the party who has given it from recovering damages which he has thus released.

If the party who is in default claims that damages have been waived by a subsequent simple contract between the parties, the same question is presented which is presented in all cases of modification by a new contract not under seal.³ The new contract must possess the elements of a valid simple contract;⁴ and this, in most jurisdictions, includes consideration.⁵ A subsequent promise by the party in default to perform the original contract, and the agreement of the party who is not in default to accept such performance in spite of delay, is a promise by the party in default to do what he is bound to do, although at a later time; and such promise is accordingly without consideration for an agreement to waive damages arising out of the breach of the original contract.⁶ The fact that the buyer has agreed, after the seller is in default, to accept

⁶ *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022.

¹ See §§ 3037 et seq.

² See §§ 2447 et seq.

³ See §§ 2457 et seq.

⁴ See ch. V et seq., and also §§ 2457 et seq.

⁵ *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815.

See §§ 2461 et seq.

⁶ *United States. Frankfurt-Barnett*

Co. v. William Prym Co., 237 Fed. 21, L. R. A. 1918A, 602.

Illinois. Goldsborough v. Gable, 140 Ill. 269, 15 L. R. A. 294, 29 N. E. 722.

Iowa. Runkle v. Kettering, 127 Ia. 6, 102 N. W. 142.

Michigan. Widiman v. Brown, 83 Mich. 241, 47 N. W. 231.

New York. Vanderbilt v. Schreyer, 91 N. Y. 392; *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53.

such deliveries later, does not discharge his right of action for such delay in making delivery.⁷

If the elements of a valid contract are present, and the new contract shows the intention of the parties to discharge a right of action for damages which is based on the breach of the prior contract, full effect is given to such provision.⁸

If a new contract does not provide in express terms, either for a discharge of the right of action for damages which arose upon the breach of the former contract, or for the continued existence thereof, the question of the presumed intention of the parties arises; and on this there is a conflict of authority. In some jurisdictions it is held that, if there is no provision with reference to the right of action for damages for breach of the prior contract, such right of action is discharged by the new contract.⁹ If the buyer claims that goods are defective and that they do not comply with the warranty, his conduct in subsequently exchanging such goods for new ones furnished by the seller, and giving new notes for the balance due, is held to operate as a waiver of damages on the original contract.¹⁰ If the buyer claims that the goods are

⁷Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21, L. R. A. 1918A, 602.

⁸England. Davis v. Street, 1 Car. & P. 18.

United States. Badger Mfg. Co. v. United States, 49 Ct. Cl. 538.

Arkansas. Marker v. East Arkansas Lumber Co., 135 Ark. 435, 205 S. W. 818.

Florida. Dickerson v. Lankford, 69 Fla. 127, 67 So. 807.

Indiana. Ralya v. Atkins, 157 Ind. 331, 61 N. E. 726.

Kansas. Muenzenmayer v. Hood, 97 Kan. 565, 155 Pac. 917.

Michigan. Goebel v. Linn, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284.

Minnesota. Dieudonne v. Arco Co., 139 Minn. 441, 166 N. W. 1067.

North Dakota. Chesley v. Soo Lignite Coal Co., 19 N. D. 18, 121 N. W. 73.

Rhode Island. Swarts v. Narragansett Electric Lighting Co., 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111].

Vermont. Agel v. F. R. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792.

Washington. Dietrich v. Seattle, 95 Wash. 654, 164 Pac. 251.

⁹England. Davis v. Street, 1 Car. & P. 18.

Arkansas. Marker v. East Arkansas Lumber Co., 135 Ark. 435, 205 S. W. 818.

Florida. Dickerson v. Lankford, 69 Fla. 127, 67 So. 807.

Indiana. Ralya v. Atkins, 157 Ind. 331, 61 N. E. 726.

Kansas. Muenzenmayer v. Hood, 97 Kan. 565, 155 Pac. 917.

Minnesota. Dieudonne v. Arco Co., 139 Minn. 441, 166 N. W. 1067.

North Dakota. Chesley v. Soo Lignite Coal Co., 19 N. D. 18, 121 N. W. 73.

Rhode Island. Swarts v. Narragansett Electric Lighting Co., 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111].

¹⁰Muenzenmayer v. Hood, 97 Kan. 565, 155 Pac. 917.

defective, but subsequently he accepts additional goods and pays for the goods furnished under the original offer, such conduct operates as a waiver of his right of action for damages.¹¹ If A and B have entered into a contract by which A is to advance money to enable B to operate a manufacturing business, and A fails to advance such money, B's contract with A to close his manufacturing plant for a certain period of time prevents him from claiming damages by reason of A's breach in causing such plant to be closed during the time covered by such contract to close it.¹² The danger that this inference may be drawn if a new contract is made is said to justify the party who is not in default in refusing to mitigate damages by entering into a new contract with the adversary party on the same subject-matter.¹³

In other jurisdictions it is held that a new contract does not discharge a right of action for breach of a prior contract unless the terms of the new contract show affirmatively that the parties intended to discharge such right of action.¹⁴ A contract by which the property owner agrees to take possession of a building and to waive damages for failure to complete the building on time, does not necessarily waive other claims.¹⁵

If the original contract between the parties is broken and a new contract is thereupon made between the same parties, the question of the effect of such new contract as a waiver of damages arising because of breach of the original contract is a special form of the problem which has just been discussed; and in this case, too, there is a conflict of authority. In some jurisdictions it is said that such new contract operates as a discharge of the right of action for damages under the original contract.¹⁶ In other jurisdictions it is held that such new contract does not operate as

¹¹ *Dieudonne v. Arco Co.*, 139 Minn. 441, 106 N. W. 1067.

¹² *Marker v. East Arkansas Lumber Co.*, 135 Ark. 435, 205 S. W. 818.

¹³ *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, 118 Pac. 165.

¹⁴ *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Alabama Oil & Pipe Line Co. v. Sun Co.*, 99 Tex. 606, 92 S. W. 253.

¹⁵ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

¹⁶ *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284; *Agel v. F. R. Patch Mfg. Co.*, 77 Vt. 13, 58 Atl. 792.

Where A agreed to furnish B such silver-plated ware as he should order for the season of 1879 and A delivered some and received payment and refused to deliver the rest except at a higher price and B agreed to pay such price, B can not sue A for breach of the original contract. *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122.

a discharge of the original contract, at least as a matter of law.¹⁷ If the buyer refuses to perform a contract of sale, and the seller sells the goods to him at a reduced price as a means of mitigating damages, such new contract does not operate as a waiver of damages for breach of the original contract.¹⁸

§ 3063. Waiver of damages by acceptance of performance different in kind. If one of the parties to a contract tenders performance which is substantially different in kind, and not merely in degree, from the performance which is required by the contract, and the adversary party accepts such performance, apparently as satisfaction of the contract, it is generally held that the party who has accepted such performance can not maintain an action to recover damages for the difference between the value of the performance which was prescribed by the contract and the value of the performance which was actually tendered and received.¹ If A offers a quantity in excess of that fixed by a contract of sale, and B accepts such quantity with knowledge that it is in excess, it is held that B is liable for such excess quantity.² Acceptance of materials tendered in performance of a building or construction contract, subject to inspection by the owner or his agent, waives objection to such materials as being defective.³ If A permits B without objection from A to make side connections for a steam-heating plant instead of top connections as provided for by contract, A can not have deducted from the contract price the amount which it would cost to change such connections to make them con-

¹⁷ *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602; *Arkansas & Texas Grain Co. v. Young & Fresch Grain Co.*, 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142; *Graves v. Melio*, 81 Ark. 347, 99 S. W. 80; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Endriess v. Ice Co.*, 49 Mich. 279. (Such question was here held to be one of fact to be passed upon by the jury.)

¹⁸ *Arkansas & Texas Grain Co. v. Young & Fresch Grain Co.*, 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142; *Graves v. Melio*, 81 Ark. 347, 99 S. W. 80.

¹ *Iowa. Fitts v. Reinhart*, 102 Ia. 311, 71 N. W. 227.

Louisiana. Nix v. Johnson, — La. —, 82 So. 409.

Michigan. Taylor v. Lumber Co., 103 Mich. 1, 61 N. W. 5; *Ayer v. Devlin*, 179 Mich. 81, 146 N. W. 257.

Ohio. Goldsmith v. Hand, 26 O. S. 101.

Wisconsin. Laycock v. Moon, 97 Wis. 59, 72 N. W. 372.

² *Barton v. Kane*, 18 Wis. 202.

³ *Beck Coal & Lumber Co. v. H. A. Peterson Mfg. Co.*, 237 Ill. 250, 86 N. E. 715; *Owensboro City Ry. Co. v. Barber Asphalt Paving Co. (Ky.)*, 107 S. W. 244; *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372.

form to the contract.⁴ No damages for extra expenses in unloading lumber on account of alleged bad piling can be recovered by one who had the option to do such piling himself if the cost to the adversary party was not increased and who made no objection to the manner of piling until after suit was begun.⁵ If A has agreed to furnish certain street-car advertising for B, and such advertisements are to be placed in a specified position, it has been held that B must pay the full contract price for advertisements which were placed out of such position and in inferior position, without deduction for such breach, if B knew that such advertisements were out of position and acquiesced therein.⁶ If one party has acquiesced in delay on the part of the adversary party, the party who has thus acquiesced can not recover damages for failure to carry out the contract in accordance with its original terms.⁷

To waive damages, however, such acceptance and acquiescence must be absolute and unqualified.⁸ Acceptance after breach of performance of a specified part of the contract does not waive the right to recover damages for the breach of the remainder.⁹

Whether acceptance of performance, which is in some respects the performance of a thing substantially different from that provided for by the contract, prevents recovery of damages for failure to perform the contract itself, on the theory that the parties have entered into a new contract, or on the theory that the party who has acquiesced in such modified performance is estopped from recovering damages because of the variance between the performance in which he has acquiesced and the performance for which he originally stipulated, is a question upon which there appears to be a great divergence of opinion, if the language which is used by the courts in explaining the result which is reached can be relied upon. In most of these cases the result is the same, whether it is explained as a new contract or as estoppel; and accordingly the courts have not been over-particular as to which of the explanations was invoked. Most of these cases would seem to be justified on the theory of a new contract which is a genuine contract,

⁴ *Fitts v. Reinhart*, 102 Ia. 311, 71 N. W. 227.

⁵ *Taylor v. Lumber Co.*, 103 Mich. 1, 61 N. W. 5.

⁶ *Ayer v. Devlin*, 179 Mich. 81, 146 N. W. 257.

⁷ *Nix v. Johnson*, — La. —, 82 So. 409.

⁸ *Brownell Improvement Company v. Critchfield*, 197 Ill. 61, 64 N. E. 332 [affirming, 96 Ill. App. 84]; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

⁹ *Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450.

although not always a contract set forth in words. If the party who offers such performance, offers it in full satisfaction, and the party to whom it is offered accepts it in this way, it is a form of new contract which differs from ordinary new contract only in that the offer and the performance take place at the same time.¹⁰ It is analogous to accord and satisfaction, from which it differs only when the offer of a different kind of performance is made at the time fixed by the original contract for performance, instead of being offered after the original contract has been broken.¹¹

§ 3064. Waiver of damages by estoppel. If the party who is not in default has led the other party to believe that he will not insist upon performance in strict compliance with the terms of the contract,¹ or if he has requested performance which differs from that provided for by the original contract, and performance has been made in accordance with his request,² or if he makes strict performance impossible,³ he can not subsequently recover damages for departure from strict performance caused by such representations or conduct. One who accepts an unfinished boat before the time for its completion can not recover a fixed amount per day agreed upon as damages for delay in completion.⁴ If provision is made for a test, the party who has prevented such test from being made is regarded as having waived defects which would have been discovered thereby.⁵ In cases of this sort, this result may be justified on the theory that the rejection of goods which did not correspond to the test, was intended by the parties as the sole consequence of the failure of the performance to conform to the test.

If the person for whom work is done inspects it as it progresses, and accepts it after such inspection, as full performance of the contract, he can not thereafter recover damages for alleged breach which such inspection could have disclosed.⁶ The same principle

¹⁰ See §§ 2457 et seq.

¹¹ See §§ 2501 et seq.

¹ Delaware, Lackawanna & Western Ry. Co. v. Monroe County Water Power & Supply Co., 221 Pa. St. 387, 70 Atl. 797.

² District of Columbia v. Iron Works, 181 U. S. 453, 45 L. ed. 948; Young v. Glass Co., 187 Ill. 626, 58 N. E. 605.

³ Vandegrift v. Engineering Co., 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941; Slinger v. Totten, 38 S. D. 240, L. R. A. 1917C, 539, 160 N. W. 1008.

See §§ 2912 et seq.

⁴ Vandegrift v. Engineering Co., 161 N. Y. 435, 48 L. R. A. 685, 55 N. E. 941.

⁵ Slinger v. Totten, 38 S. D. 240, L. R. A. 1917C, 539, 160 N. W. 1008; Hurley-Mason Co. v. Stebbins, 79 Wash. 366, L. R. A. 1915B, 1131, 140 Pac. 381.

⁶ England. Parker v. Palmer, 4 Barn. & Ald. 387; Beverly v. Coke Co., 6 Ad. & El. 829.

applies where the contract provides for inspection by the architect and he inspects and accepts the work.⁷ The fact that the engineers of the property owner have inspected a tunnel which has been timbered, and have approved of such performance, prevents the property owner from recovering damages because of the subsequent caving in of the tunnel.⁸ If a contractor acquiesces in rejection of material by the inspector appointed by the adversary party and procures other material, he can not claim damages for such delay.⁹ Cases of this sort, however, may be explained on the theory that the contract has made the determination of the architect or engineer final and conclusive as between the parties, and that the real meaning of the contract is that the contractor shall perform to the satisfaction of the engineer, as long as the latter is acting in good faith, whether the engineer demands more or accepts less than the remaining provisions of the contract require.

§ 3065. Knowledge of breach necessary. Whether the discharge of a right of action for damages is explained on the theory of a new contract, or on the theory of estoppel, or whether it is explained as a waiver without reference to the reasons for regarding the right of action as waived, the right of action is not discharged in any of these ways unless the party who is not in default knew of the breach, or at least unless he had the means of knowing of such breach.¹ If the seller delivers less than the quantity

United States. Carleton v. Jenks, 80 Fed. 937; United States v. Walsh, 108 Fed. 502.

Colorado. Gillette v. Young, 45 Colo. 562, 101 Pac. 766.

Illinois. Beck Coal & Lumber Co. v. H. A. Peterson Mfg. Co., 237 Ill. 250, 86 N. E. 715.

Iowa. Hirshhorn v. Stewart, 49 Ia. 418; Houlette v. Arntz, 148 Ia. 407, 126 N. W. 796.

New York. Dounce v. Dow, 57 N. Y. 16; Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358; Dounce v. Dow, 64 N. Y. 411; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Studer v. Bleistein, 115 N. Y. 316, 5 L. R. A. 702, 22 N. E. 243; Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349.

⁷ **McConnell v. Corona City Water Co.**, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 920; **Whitehead v. Brothers' Lodge (Ky.)**, 62 S. W. 873; **Siebert v. Roth**, 118 Wis. 250, 95 N. W. 118.

⁸ **McConnell v. Corona City Water Co.**, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 920.

⁹ **Montgomery v. New York**, 151 N. Y. 249, 45 N. E. 550.

¹ **California.** **Leonard v. Home Builders**, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

Iowa. **Brent v. Head**, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; **Schillinger Bros. Co. v. Bosch-Ryan Grain Co. (Ia.)**, 116 N. W. 132.

Kentucky. **Ludlow Lumber Co. v. Kuhling**, 119 Ky. 251, 115 Am. St. Rep. 254, 83 S. W. 634.

agreed upon, and the buyer resells the goods before discovering such deficiency, the buyer may maintain an action against the seller to recover damages for such deficiency, and he is not limited to his right of avoiding the sale and returning the goods.² Acceptance of goods delivered under a contract of sale does not waive a claim for damages for latent defects which are not known to the buyer and which can not be discovered with reasonable diligence.³ Acceptance of an article which is sold under a warranty, is not a waiver of defects which were not known to the buyer when he accepted such article.⁴ Acceptance of a building does not prevent the owner from recovering for defects which were not known to him at the time of such acceptance.⁵ Taking possession of a building does not waive defects which can not be detected by inspection at the time, but will develop by use,⁶ such as defects in plastering, by reason of which the plaster subsequently falls,⁷ or defects in varnish.⁸ If the property owner knows of certain defects when he accepts the building, such knowledge does not prevent him from recovering damages for other defects of which he did not know at the time,⁹ especially if demand is made for correcting such defects,¹⁰ or if provision is made for the adjustment

Maryland. *Denton v. Gill*, 102 Md. 386, 3 L. R. A. (N.S.) 465, 62 Atl. 627.

Missouri. *Haysler v. Owen*, 61 Mo. 270.

New York. *Oswego Falls Pulp & Paper Co. v. Stecher Lithographic Co.*, 215 N. Y. 98, L. R. A. 1916B, 1257, 109 N. E. 92 (obiter).

Washington. *Elkstrand v. Barth*, 41 Wash. 321, 83 Pac. 305.

² *Denton v. Gill*, 102 Md. 386, 3 L. R. A. (N.S.) 465, 62 Atl. 627.

³ *John A. Roebling's Sons Co. v. Southern Power Co.*, 142 Ga. 464, L. R. A. 1915B, 900, 83 S. E. 138.

⁴ *W. F. Main Co. v. Field*, 144 N. Car. 307, 119 Am. St. Rep. 956, 11 L. R. A. (N.S.) 245, 56 S. E. 943; *Fairbanks Steam Shovel Co. v. Holt*, 79 Wash. 361, L. R. A. 1915B, 477, 140 Pac. 394.

⁵ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Elkstrand v. Barth*, 41 Wash. 321, 83 Pac. 305.

⁶ **Illinois.** *Monahan v. Fitzgerald*, 164 Ill. 525, 45 N. E. 1013.

Iowa. *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Kentucky. *Ludlow Lumber Co. v. Kuhling*, 119 Ky. 251, 115 Am. St. Rep. 254, 83 S. W. 634 (defect not discovered for eight months after taking possession).

Missouri. *Spink v. Mueller*, 77 Mo. App. 85.

Washington. *Elkstrand v. Barth*, 41 Wash. 321, 83 Pac. 305.

⁷ *Monahan v. Fitzgerald*, 164 Ill. 525, 45 N. E. 1013.

⁸ *Spink v. Mueller*, 77 Mo. App. 85.

⁹ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106; *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

¹⁰ *Schillinger v. Bosch-Ryan Grain Co.*, 145 Ia. 750, 122 N. W. 961 [affirming, 116 N. W. 132].

thereof.¹¹ A payment for machinery, made before it is completed, does not waive a claim for damages for defects in machinery or for delay in completing it.¹² The use of finishing material does not waive a claim for damages for defects not then discoverable which develop as it seasons.¹³ Payment may, however, be evidence of such waiver.¹⁴

§ 3066. Acceptance of performance defective in quality held not to waive damages. If the thing which is tendered in performance is not of a substantially different character from that which is prescribed by the terms of the contract, but there is a substantial deficiency in quantity, or in quality, or in time of delivery and the like, the question is presented as to the effect of the acceptance of such performance by the party to whom it is offered, upon his right to recover damages for such breach. In such cases, no consideration for waiving damages exists and the defective performance has not been induced by the previous acts or representations of the party not in default. The question, therefore, is whether the mere fact of accepting defective performance waives the right to maintain an action for damages. Such acceptance waives the right to treat such breach as a discharge of contract liability, on principles of election, but from the nature of the case no such reasons exist for treating such acceptance as a waiver of the right to maintain an action for damages and the weight of authority is that it is not such a waiver.¹ Waiver of the right to

¹¹ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

¹² *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25.

¹³ *Utah Lumber Co. v. James*, 25 Utah 434, 71 Pac. 986.

¹⁴ *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36.

¹ *United States, Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602.

Arkansas. State v. Arkansas Brick & Mfg. Co., 98 Ark. 125, 33 L. R. A. (N.S.) 376, 135 S. W. 843.

California. North Alaska Salmon Co. v. Hobbs, 159 Cal. 380, 35 L. R. A. (N.S.) 501, 113 Pac. 870.

Connecticut. Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36.

Georgia. Cannon v. Hunt, 116 Ga. 452, 42 S. E. 734; *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 24 L. R. A. (N.S.) 235, 60 N. E. 258.

Illinois. Underwood v. Wolf, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 598.

Iowa. Rice v. Friend Bros. Co., 179 Ia. 355, 161 N. W. 310 [reversing judgment on rehearing, 146 N. W. 748]; *Rhynas v. Keck*, 179 Ia. 422, 161 N. W. 486.

Massachusetts. Dondis v. Borden, 230 Mass. 73, 119 N. E. 184.

Minnesota. Gray v. New Paynesville, 89 Minn. 258, 94 N. W. 721.

Mississippi. Bowers v. Southern Automatic Music Co., 114 Miss. 25, 74 So. 774.

New York. Brady v. Cassidy, 145 N. Y. 171, 39 N. E. 814.

treat the contract as discharged and waiver of a right of action for

Oklahoma. *Wallace v. Clark*, -- Okla. —, 174 Pac. 557.

Oregon. *Feeney & Bremer Co. v. Stone*, 89 Or. 360, 171 Pac. 569; *McDonald v. Supple*, — Or. —, 190 Pac. 315.

Pennsylvania. *Otis Elevator Co. v. Flanders Realty Co.*, 244 Pa. St. 186, 90 Atl. 624.

South Dakota. *Avery Co. v. Peterson*, — S. D. —, 171 N. W. 204.

Washington. *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 35 L. R. A. (N.S.) 258, 101 Pac. 233.

West Virginia. *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815.

"The main proposition, underlying the whole argument of the defense on the general merits, is, that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs that they can recover nothing, because they completed nothing within the specified time.

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other.

"There is no doubt that, in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he can not re-

cover in an action at law for non-performance by the other party.

"But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law.

"If A contract to deliver a horse to B on Monday next, for which B agrees to pay \$100, A can not recover by an offer to deliver on Tuesday; but if A agree to deliver a horse, buggy and harness on Monday, and B accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A's right to recover the agreed sum is concerned. If B have suffered any damage by the delay, he can recover it by an action on A's covenant to deliver on Monday; or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract.

"Such we understand to be especially the law applicable to building contracts.

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such fail-

damages are two different rights which should not be confused because each is called "waiver."²

After one of the parties has broken the contract, the subsequent acts of the party who is not in default should not affect his right of action to recover damages, unless such subsequent transaction is an accord and satisfaction,³ or other recognized form of discharge.⁴ The act of a lessor in forfeiting a lease for non-payment of rent, does not discharge his prior claim for damages for breach of a bond to erect a building upon such realty.⁵ Payment in full with knowledge of defects,⁶ or taking possession of a building,⁷ does not of itself waive a right of action for damages. Use of a building before final acceptance does not waive the right to recover liquidated damages for delay.⁸ If the contract provides that payment is not an acceptance of defective work,⁹ or if the owner gives notice, when he takes possession, that he will claim damages for defective work,¹⁰ taking

ure, or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor can not recover on the covenant, because he can not make or prove the necessary allegation of performance on his own part. What remedy he may have in assumption for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

"For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work." *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

² "The difficulty in this case has grown out of the failure to distinguish between a waiver of the right to treat a breach of a contract as a discharge of the contract, and a waiver of the right to recover the damages occasioned by the breach. The two rights are distinct and must not be con-

fused." *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602.

³ *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602; *White v. Lumiere North American Co.*, 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121.

⁴ See §§ 2446 et seq.

⁵ *Rock v. Monarch Building Co.*, 87 O. S. 244, 100 N. E. 887.

⁶ *Leonard v. Home Builders*, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36.

The act of the party not in default in accepting partial payment and continuing performance after delay by the adversary party, which could have been treated as a discharge, does not waive damages for such delay, especially if the party in default had promised to make it right. *McDonald v. Supple*, — Or. —, 190 Pac. 315.

⁷ *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059; *Leonard v. Home Builders*, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151; *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734.

⁸ *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059.

⁹ *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

¹⁰ *Leonard v. Home Builders*, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

possession of the building does not waive his right of action for damages. Failure to take advantage of a forfeiture clause, giving to the property owner the right to take possession of the building and to continue performance, does not waive his right of action for damages for defective performance.¹¹ Permitting¹² or requiring¹³ contractors to complete a building after the time limited for performance, or accepting goods delivered after the time fixed for performance,¹⁴ does not waive damages for such delay. Accepting property delivered after the time fixed for testing has expired does not waive a right of action for damages for breach of warranty.¹⁵

Accepting chattels offered as performance of a contract of sale with warranty,¹⁶ either express¹⁷ or implied,¹⁸ does not waive the

¹¹ *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

¹² *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *Brent v. Head*, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

¹³ *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Johnson v. Henry*, 127 Mich. 548, 86 N. W. 1027.

¹⁴ *Redlands Orange Growers' Association v. Gorman*, 161 Mo. 203, 54 L. R. A. 718, 61 S. W. 820.

¹⁵ *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 598.

¹⁶ *California*, *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380, 35 L. R. A. (N.S.) 501, 113 Pac. 870.

Iowa, *Rice v. Friend Bros. Co.*, 179 Ia. 355, 161 N. W. 310 [reversing judgment on rehearing, 146 N. W. 748].

Kansas, *Weybrich v. Harris*, 31 Kan. 92, 1 Pac. 271; *McCormick v. Roberts*, 32 Kan. 68, 3 Pac. 753; *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95; *Graff v. Osborne*, 56 Kan. 162, 42 Pac. 704; *International Filter Co. v. Caney Ice & Cold Storage Co.*, 84 Kan. 705, 115 Pac. 635; *Lyman v. Wederski*, 95 Kan. 438, 148 Pac. 642.

Michigan, *Brown v. Pendergast*, 193 Mich. 313, 159 N. W. 541.

Mississippi, *Hall Commission Co. v. Crook*, 87 Miss. 445, 40 So. 20, 1006; *Mobile Auto Co. v. Sturges*, 107 Miss. 848, 66 So. 205; *Rosenbaum's Sons v.*

Davis & Andrews Co., 111 Miss. 278, 71 So. 388; *National Cash Register Co. v. Hude*, 119 Miss. 36, 80 So. 378; *Sharp v. Brookhaven Pressed Brick & Mfg. Co.*, 120 Miss. 850, 83 So. 274.

Montana, *St. Paul Machinery Mfg. Co. v. Bruce*, 54 Mont. 549, 172 Pac. 330.

Oregon, *Feeney & Bremer Co. v. Stone*, 89 Or. 360, 171 Pac. 569.

Pennsylvania, *Samuel v. Delaware River Steel Co.*, — Pa. St. —, 107 Atl. 700.

South Dakota, *Avery Co. v. Peterson*, — S. D. —, 171 N. W. 204.

Washington, *Fairbanks Steam Shovel Co. v. Holt*, 79 Wash. 361, L. R. A. 1915B, 477, 140 Pac. 394.

¹⁷ *California*, *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380, 35 L. R. A. (N.S.) 501, 113 Pac. 870.

Georgia, *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 24 L. R. A. (N.S.) 235, 60 N. E. 258.

Maine, *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783, 13 L. R. A. 224, 22 Atl. 362.

Mississippi, *Bowers v. Southern Automatic Music Co.*, 114 Miss. 25, 74 So. 774.

New York, *Heath Dry Gas Co. v. Hurd*, 103 N. Y. 255, 25 L. R. A. (N.S.) 160, 86 N. E. 18.

¹⁸ *Alabama*, *Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54, 32 So. 494.

right of action for damages if the chattels do not correspond to the warranty.¹⁹ If the seller has delayed the delivery of the goods sold, the acceptance of such goods by the buyer after the time fixed for performance is not a waiver of the buyer's right of action for such delay.²⁰ The fact that the buyer signs a written statement to the effect that a machine which he has bought is properly installed, is not a waiver of damages for breach of warranty as to capacity.²¹

In the absence of warranty, either express or implied, no liability remains after acceptance of the goods which are delivered as performance of the contract.²²

§ 3067. Acceptance of performance defective in quantity held not to waive damages. If the defect in performance is a defect in the quantity of the performance, the acceptance of such performance by the party who is not in default is not a waiver of his right to recover damages for such deficiency.¹ One who has agreed to buy a certain quantity of goods, may recover damages due to a deficiency in such quantity.² The fact that one for whom certain work is to be done, has paid monthly statements as rendered, does not prevent him from recovering damages for a failure to furnish the number of workmen agreed upon.³

Iowa. *Rhynas v. Keck*, 179 Ia. 422, 161 N. W. 486.

Oklahoma. *Wallace v. Clark*, — Okla. —, 174 Pac. 537.

Pennsylvania. *Samuel v. Delaware River Steel Co.*, — Pa. St. —, 107 Atl. 700.

Washington. *Springfield Shingle Co. v. Edgcomb Mill Co.*, 52 Wash. 620, 35 L. R. A. (N.S.) 258, 101 Pac. 233.

¹⁹ For the theory that acceptance of the goods waives the right of action for damages, see § 3070.

²⁰ **England.** *Clydebank Co. v. Yzquierdo y Castanedo* [1905], A. C. 6.

United States. *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 640, 23 L. ed. 341.

Kansas. *Johnson v. North Baltimore Bottle Glass Co.*, 74 Kan. 762, 7 L. R. A. (N.S.) 1114, 88 Pac. 52.

Michigan. *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 501.

Missouri. *Redlands Orange Growers' Association v. Gorman*, 161 Mo. 203, 54 L. R. A. 718, 61 S. W. 820.

²¹ *Brown v. Pendergast*, 193 Mich. 313, 159 N. W. 541.

²² *Cement. Hurley-Mason Co. v. Stebbins*, 79 Wash. 360, L. R. A. 1915B, 1131, 140 Pac. 381.

Brick used in building. Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 64 Am. St. Rep. 418, 60 N. W. 1091.

¹ *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 33 L. R. A. (N.S.) 376, 135 S. W. 843; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676; *Denton v. Gill*, 102 Md. 386, 3 L. R. A. (N.S.) 465, 62 Atl. 627; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503.

² *Harber v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676; *Denton v. Gill*, 102 Md. 386, 3 L. R. A. (N.S.) 465, 62 Atl. 627; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503.

³ *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 33 L. R. A. (N.S.) 376, 135 S. W. 843.

§ 3068. Acceptance under practical compulsion. The justice of the rule that acceptance after breach, even though a waiver of the right to treat such breach as discharge,¹ is not a waiver of a right of action for damages, is especially clear in cases in which the party who is not in default is constrained by his necessities to take what he can get under his contract when he can get it.² Such conduct does not and should not operate as a waiver of the right of action for damages.³ The owner of realty upon whose land a building has been constructed, has, in many cases, no practical choice between making use of such building with all its defects, and abandoning his realty; and in cases of this sort it is held that his taking possession of the building is not a waiver of his right to recover damages for breach of the building contract,⁴ in the absence of conduct on his part, inducing the contractor to perform in the manner in which

¹ *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

² *California. Leonard v. Home Builders*, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 69 Atl. 417.

Massachusetts. Garfield & Proctor Coal Co. v. Fitchburg Ry., 166 Mass. 119, 44 N. E. 119.

Michigan. Johnson v. Toledo, Saginaw & Muskegon Ry. Co., 133 Mich. 596, 103 Am. St. Rep. 404, 95 N. W. 724.

Minnesota. Sargent v. Mason, 101 Minn. 319, 112 N. W. 255.

³ *United States. Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602.

Arkansas. Lawrence County v. Stewart, 72 Ark. 525, 81 S. W. 1059; *East Arkansas Lumber Co. v. Swink*, 128 Ark. 240, 194 S. W. 5.

California. Leonard v. Home Builders, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 69 Atl. 417.

Michigan. Johnson v. Toledo Ry. Co., 133 Mich. 596, 103 Am. St. Rep. 404, 95 N. W. 724.

Minnesota. Sargent v. Mason, 101 Minn. 319, 112 N. W. 255.

Pennsylvania. Bucklin v. Davidson, 155 Pa. St. 362, 26 Atl. 643.

Wisconsin. Ketchum v. Wells, 19 Wis. 26.

For the opposite theory, see § 3070.

⁴ *Alabama. Wakstrom v. Oliver-Watts Construction Co.*, 161 Ala. 608, 50 So. 46.

Arkansas. Lawrence County v. Stewart, 72 Ark. 525, 81 S. W. 1059.

California. Leonard v. Home Builders, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

Iowa. Brent v. Head, 138 Ia. 146, 16 L. R. A. (N.S.) 801, 115 N. W. 1106.

Maryland. Pope v. King, 108 Md. 37, 16 L. R. A. (N.S.) 480, 69 Atl. 417.

Michigan. Hanley v. Walker, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57; *Gier v. Daiber*, 148 Mich. 190, 111 N. W. 773; *Frolich v. Klein*, 160 Mich. 142, 125 N. W. 14; *Japes v. Harmon*, 176 Mich. 1, 141 N. W. 595.

Oklahoma. National Surety Co. v. Board of Education, — Okla. —, 162 Pac. 1108.

he has performed. This is especially clear if the owner gives notice when he takes possession, that he will claim damages,⁶ or if he takes possession under a clause in the contract which permits him to take possession of the building and to complete the construction thereof.⁷ The fact that the occupant of a building makes regular payments under a contract to furnish heat therefor, does not prevent him from recovering damages for failure to furnish the heat in accordance with the terms of the contract.⁸ While a purchaser of goods acts at his peril in surrendering them to one who claims to be a true owner thereof, his act in surrendering such goods to one who is in fact the true owner, is not a waiver of his right to recover damages on an implied warranty of title.⁹ The fact that a shipper permits the carrier to transport perishable goods on a car which is not properly iced, does not waive his right of action to recover damages if he has no available means of transporting such goods in any other way,¹⁰ and especially if he believes in good faith that the shipper will perform.¹¹ A sold timber to B and by the same contract gave to B the right to use A's sawmill. B made contracts to sell and deliver timber to others. A subsequently took possession of the mill and refused to surrender it to B. In order to fill his contracts, B furnished timber to the mill and received lumber therefor. Such conduct did not waive B's right to sue for breach of contract.¹² So if defective machinery is erected under a contract for first-class machinery, and the vendee can do nothing better than accept it and use it, he does not waive his claim for damages.¹³ If A has engaged a theatrical company to give a performance in his theater, has sold tickets and invested the proceeds in advertising, his acceptance of the performance does not waive his right to claim damages.¹⁴

⁵ See § 3064.

⁶ *Leonard v. Home Builders*, 174 Cal. 65, L. R. A. 1917C, 322, 161 Pac. 1151.

⁷ *East Arkansas Lumber Co. v. Swink*, 128 Ark. 240, 194 S. W. 5.

⁸ *Sargent v. Mason*, 101 Minn. 319, 112 N. W. 255.

⁹ *Alabama. Hafer v. Cole*, 176 Ala. 242, 57 So. 757.

Minnesota. Jordan v. Van Duzee, 139 Minn. 103, L. R. A. 1918B, 1136, 165 N. W. 877.

New York. Cahill v. Smith, 101 N. Y. 355, 4 N. E. 739.

North Carolina. Hodges v. Wilkinson, 111 N. Car. 56, 17 L. R. A. 545, 15 S. E. 941.

Oklahoma. Clevenger v. Lewis, 20 Okla. 837, 16 L. R. A. (N.S.) 410, 95 Pac. 230.

¹⁰ *Johnson v. Toledo Ry. Co.*, 133 Mich. 506, 103 Am. St. Rep. 464, 95 N. W. 724.

¹¹ *Johnson v. Toledo Ry. Co.*, 133 Mich. 506, 103 Am. St. Rep. 464, 95 N. W. 724.

¹² *Bucklin v. Davidson*, 155 Pa. St. 362, 26 Atl. 643.

¹³ *Payne v. Lumber Co.*, 110 Ia. 750, 34 So. 763.

¹⁴ *Charley v. Potthoff*, 118 Wis. 258, 95 N. W. 124.

As it is the duty of the party who is not in default to take proper steps to mitigate damages, such conduct does not amount to a waiver of damages.¹⁵ If A has agreed to refine B's sugar, and A, being unable to perform, contracts with X to refine it, B's conduct in acquiescing in such agreement is not a waiver of a claim for damages.¹⁶

Surrender of property by a purchaser to the true owner is not a waiver of his right against the seller on an implied warranty of title,¹⁷ although he surrenders such property without waiting for judicial process to issue.¹⁸

§ 3069. Waiver of damages treated as question of fact. In a number of cases in which the party who is not in default has elected to continue performance, the courts have said that such conduct on his part was not, as a matter of law, a waiver of his right to recover damages because of such breach.¹ It is said that acceptance of goods is not, as a matter of law, a waiver of a right of action for damages because of breach of warranty;² and it is said that paying for the goods, or delivering a note therefor, and the like, is not of itself a waiver of a right of action for breach of warranty.³ This

¹⁵ *Graves v. Mello*, 81 Ark. 347, 99 S. W. 80; *Avery v. Segura Sugar Co.*, 111 La. 891, 35 So. 967.

¹⁶ *Avery v. Segura Sugar Co.*, 111 La. 891, 35 So. 967.

¹⁷ *Jordan v. Van Duzee*, 139 Minn. 103, 165 N. W. 877.

¹⁸ *Jordan v. Van Duzee*, 139 Minn. 103, 165 N. W. 877.

¹ *Arizona. Brought v. Redewill Music Co.*, 17 Ariz. 393, 153 Pac. 285.

Illinois. Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987.

Kansas. Cooper v. Ragsdale, 96 Kan. 772, 153 Pac. 516.

Massachusetts. Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976.

Michigan. Brown v. Pendergast, 193 Mich. 313, 159 N. W. 541.

Ohio. Dayton v. Hooglund, 39 O. S. 671.

Oklahoma. International Harvester Co. v. Lawyer, 56 Okla. 207, 155 Pac. 617.

Oregon. Morse v. Union Stock Yards, 21 Or. 289, 14 L. R. A. 157, 28 Pac. 2.

Wisconsin. Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572.

² *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987; *Dayton v. Hooglund*, 39 O. S. 671; *Morse v. Union Stock Yards*, 21 Or. 289, 14 L. R. A. 157, 28 Pac. 2.

³ *Arizona. Brought v. Redewill Music Co.*, 17 Ariz. 393, 153 Pac. 285.

Kansas. Cooper v. Ragsdale, 96 Kan. 772, 153 Pac. 516.

Massachusetts. Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976.

Michigan. Brown v. Pendergast, 193 Mich. 313, 159 N. W. 541.

Oklahoma. International Harvester Co. v. Lawyer, 56 Okla. 207, 155 Pac. 617.

Wisconsin. Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572.

method of stating the effect of such conduct on the part of the party who is not in default, implies that such conduct might have amounted to a waiver if he had intended to waive his right; and, accordingly, it is frequently said that the question whether acceptance and the like on the part of the party who is not in default operate as a waiver of his right of action for damages, is a question for the jury.⁴ It is said that it is a question for the jury whether the acceptance of a deficient quantity amounts to a waiver of damages.⁵

If there is evidence tending to show that the party who is not in default has received value as a consideration for his act in giving up his right of action for damages, or if there is evidence tending to show that he has acquiesced in the performance tendered to him and has thus induced the adversary party to continue performance of that sort in the belief that it will be accepted as full satisfaction, it is, of course, proper to submit to the jury in a case which is a proper case for a jury trial, questions as to the existence of the facts which such evidence tends to show, and as to the inferences of fact to be drawn from the evidence. If, on the other hand, there is no evidence of this sort, the statement that the question of waiver is a question for the jury would seem to imply that, if the party who is not in default has renounced his claim for damages without any element of consideration or of estoppel, the jury should give effect to such renunciation.

§ 3070. Theory that gratuitous waiver of breach as discharge is waiver of damages. In a number of jurisdictions, the courts have held that if the party who is not in default has intended to renounce his right of action for damages, and if he has made such intention clear, either by his words or by his conduct, full effect will be given to such intention although there may be neither consideration, as the term is ordinarily understood, nor estoppel in the ordinary sense of the term.¹ The only consideration that seems

⁴ *Smith v. Wall*, 12 Colo. 363, 21 Pac. 42; *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

⁵ *Smith v. Wall*, 12 Colo. 363, 21 Pac. 42.

¹ *England. Chanter v. Hopkins*, 4 M. & W. 399.

United States. Marmet Coal Co. v. People's Coal Co., 220 Fed. 646.

Georgia. Miller v. Moore, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360.

Illinois. American Theatre Co. v. Siegel, 221 Ill. 145, 4 L. R. A. (N.S.) 1167, 77 N. E. 588.

Iowa. Keniston v. Todd, 139 Ia. 287, 117 N. W. 674.

Kentucky. Jones v. McEwan, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81.

to be presented in many of these cases is the performance, by the party who is in default, of a part of the contractual obligation which he has undertaken; and, in most jurisdictions, such performance on his part does not amount to a consideration.² In many of these cases, the party who is in default has done no further act in reliance upon the renunciation of the right of damages by the party who is not in default; and if effect is not given to such renunciation, the party who is in default will suffer disappointment of his expectations in being compelled to pay damages which have been caused by his breach of contract. Nevertheless, as has been indicated, a number of jurisdictions seem to give effect to renunciation in cases of this sort.³ The acceptance of goods,⁴ or paying for them, either in money or by giving a note and the like,⁵ has been held to amount to a waiver of a right of action for damages for breach of warranty, if such was the intention of the

Maryland. *Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md 107, 86 Atl. 38.

Nebraska. *Patrick v. Norfolk Lumber Co.*, 81 Neb. 267, 115 N. W. 780.

New Mexico. *Cadwell v. Higginbotham*, 20 N. M. 482, 151 Pac. 315.

New York. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; *Waeber v. Talbot*, 107 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288.

Ohio. *Bowman Lumber Co. v. Anderson*, 70 O. S. 16, 70 N. E. 503.

South Dakota. *Schmidt v. Jutting*, 31 S. D. 69, 139 N. W. 769.

Washington. *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557.

Wisconsin. *Northfield National Bank v. Arndt*, 132 Wis. 383, 12 L. R. A. (N. S.) 82, 112 N. W. 451.

² See §§ 595 and 643.

³ **England.** *Chanter v. Hopkins*, 4 M. & W. 399.

Illinois. *American Theatre Co. v. Siegel*, 221 Ill. 145, 4 L. R. A. (N. S.) 1167, 77 N. E. 588.

Kentucky. *Jones v. McEwan*, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81.

New York. *Pierson v. Crooks*, 115

N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349.

Ohio. *Bowman Lumber Co. v. Anderson*, 70 O. S. 16, 70 N. E. 503.

⁴ **Georgia.** *Miller v. Moore*, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360.

Iowa. *Keniston v. Todd*, 139 Ia. 287, 117 N. W. 674.

Kentucky. *Jones v. McEwan*, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81.

Nebraska. *Patrick v. Norfolk Lumber Co.*, 81 Neb. 267, 115 N. W. 780.

New York. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Waeber v. Talbot*, 107 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288.

Wisconsin. *Northfield National Bank v. Arndt*, 132 Wis. 383, 12 L. R. A. (N. S.) 82, 112 N. W. 451.

⁵ **United States.** *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646.

Maryland. *Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38.

New Mexico. *Cadwell v. Higginbotham*, 20 N. M. 482, 151 Pac. 315.

South Dakota. *Schmidt v. Jutting*, 31 S. D. 69, 139 N. W. 769.

Washington. *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557.

buyer. The fact that the buyer has paid the greater part of the purchase price and has given a note for the small balance remaining, has been held to waive a right of action for damages.⁶ Whether a purchaser of machinery under a warranty has waived such warranty so as to render himself personally liable for parts of such machine which he has accepted to replace defective parts, has been held to be a question of fact where the evidence of such waiver consisted in the fact that the buyer had continued to make use of such machine, and where it was claimed that he had done so in reliance on the assurance of the seller that the defects were not serious and could be remedied easily.⁷ The act of the buyer in accepting goods is held to discharge a right of action which arises on an implied warranty,⁸ whether such warranty is implied from the description of the goods,⁹ or whether it is implied from a sale by sample.¹⁰ The act of the buyer in paying the purchase price, with knowledge of a delay in delivering the goods, is held to be a waiver of damages arising from such delay.¹¹ It is sought to justify this result on the theory that there is no independent collateral warranty in these cases, but the so-called warranty is a condition of the contract, rather than a covenant; and that accordingly the acceptance of the articles which are offered, in the absence of fraud, operates as a complete discharge of obligation of the seller.¹² If the agreement in contracts of this sort required

⁶ *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557.

⁷ *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

⁸ *England. Chanter v. Hopkins*, 4 M. & W. 399.

Florida. American Mfg. Co. v. McLeod, — Fla. —, 82 So. 802 (obiter).

Illinois. American Theatre Co. v. Siegel, 221 Ill. 145, 4 L. R. A. (N.S.) 1167, 77 N. E. 588.

Kentucky. Jones v. McEwan, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81.

New York. Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349.

Ohio. Bowman Lumber Co. v. Anderson, 70 O. S. 16, 70 N. E. 503.

Oklahoma. Marks v. Stein, — Okla. —, 160 Pac. 318.

⁹ *England. Chanter v. Hopkins*, 4 M. & W. 399.

Illinois. American Theatre Co. v. Siegel, 221 Ill. 145, 4 L. R. A. (N.S.) 1167, 77 N. E. 588.

Kentucky. Jones v. McEwan, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81.

New York. Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349.

Ohio. Bowman Lumber Co. v. Anderson, 70 O. S. 16, 70 N. E. 503.

¹⁰ *Remy v. Healy*, 161 Mich. 266, 29 L. R. A. (N.S.) 139, 126 N. W. 202 (obiter); *Marks v. Stein*, — Okla. —, 160 Pac. 318.

¹¹ *Medart Pulley Co. v. Dubuque Turbine & Roller Mill Co.*, 121 Ia. 244, 96 N. W. 770.

¹² *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, L. R. A. 1915B, 1131, 140 Pac. 381.

the seller to offer certain goods which the buyer was free to accept or reject at his election, this result could be justified, since neither party would be bound until the seller's offer, which would consist of tender of the goods, was accepted by the buyer's act in accepting them. The contract, in these cases, however, is of a very different nature. The buyer is bound to deliver goods of certain quality or make, and the seller is bound to accept goods of this sort if thus delivered. To say that the quality is a condition of performance, and not a covenant on the part of the seller, is a misuse of language; and this appears from the fact that the buyer who has rejected goods because of a breach of implied warranty, is finally free to recover the actual damages which he has suffered by reason of the failure of the seller to deliver goods in accordance with the terms of the contract. By a somewhat similar reasoning, it is sought to justify this result on the theory that the buyer, by accepting the goods, is "deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it."¹³ This reasoning seems to assume that there is no valid obligation before the goods are tendered; and that the acceptance of the goods is rather the acceptance of an offer than the acceptance of performance of a prior valid contract. Even if the offer of goods must be regarded as implying a demand that the seller renounce his right of action for damages, and even if the seller assents to such an offer by accepting the goods, no consideration for such modification of his rights under the prior contract is suggested. It has been suggested, however, that a waiver of damages by the act of the buyer in retaining goods after he has discovered that they did not comply with the warranty, may in turn be waived by the act of the seller in failing to demand the return of the goods; and that in such case, the buyer may set off damages against the breach, although if the seller had demanded the goods, the buyer would have had to elect between returning the goods and renouncing his claim for damages.¹⁴ If the contract contains an express provision to the effect that the buyer must reject the goods or waive all claim for damages, full effect will be given to such provision.¹⁵ Taking possession of a

¹³ *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349 [quoted in *Bowman Lumber Co. v. Anderson*, 70 O. S. 16, 70 N. E. 503].

¹⁴ *American Mfg. Co. v. McLeod*, — Fla. —, 82 So. 802.

¹⁵ *Victor Chemical Works v. Hill Clutch Co.*, 152 Fed. 393, 10 L. R. A. (N.S.) 814.

building with intent to accept it, has been said to be a waiver of a claim for damages.¹⁶ While it is difficult to justify a result of this sort in the ordinary building contract, it can be justified where the acceptance of the building or other construction operates as a mutual waiver of rights arising out of the contract.¹⁷ If a power company has agreed with a railway company to build a wall and to make a fill behind the wall, as a part of an improvement which it contemplates, and subsequently the power company sublets to the railway company the contract for making the fill, the act of the railway company in accepting the entire work as full performance of its contract, prevents the power company from recovering from the railway company for its omission to fill in the quantity of earth.¹⁸ A waiver as to the time of performing a construction contract has been held to be a waiver of damages which have accrued down to the time of such waiver and during a reasonable time thereafter,¹⁹ leaving the contractor liable for failure to complete the contract within a reasonable time after such waiver.²⁰ A contract of employment is held to be waived by accepting a smaller compensation than that provided for in the original contract.²¹ An employe who has a contract with a railroad company for employment for life, if able and willing to work at specified wages, and who has accepted employment for fifteen years at less wages, waives his right to recover the amount specified in the contract.²² If a water company has agreed to furnish "a wholesome, clear, potable water," and the water which it furnishes during one season is not in accordance with the terms of such contract, it is held that if the city has made use of such water it is bound to pay the full contract price therefor.²³ If a railway has transported mail, knowing that the post office department intends to pay less than the amount fixed by statute, it can not recover the difference between the amount which the post office

¹⁶ *Dean v. Connecticut Tobacco Corporation*, 88 Conn. 619, 92 Atl. 408.

¹⁷ *Delaware, Lackawanna & Western R. R. Co. v. Monroe County Water Power & Supply Co.*, 221 Pa. St. 387, 70 Atl. 707.

¹⁸ *Delaware, Lackawanna & Western Ry. Co. v. Monroe County Water Power & Supply Co.*, 221 Pa. St. 387, 70 Atl. 707.

¹⁹ *Louisville & Nashville Ry. v. Ma-*

son & Hoge Co. (Ky.), 104 S. W. 975.

²⁰ *Louisville & Nashville Ry. v. Ma-son & Hoge Co. (Ky.)*, 104 S. W. 975.

²¹ *Brighton v. Lake Shore & Michigan Southern Ry.*, 103 Mich. 420, 61 N. W. 550.

²² *Brighton v. Lake Shore & Michigan Southern Ry.*, 103 Mich. 420, 61 N. W. 550.

²³ *Creston Water Works v. Creston*, 101 Ia. 687, 70 N. W. 739.

department has declared that it will pay, and the amount which the post office department is required by statute to pay.²⁴

§ 3071. Gratuitous waiver of right of action. The question of the effect of a renunciation of damages which have arisen out of a breach of a contract, without release under seal, or an accord and satisfaction, or other valuable consideration, and without any element of estoppel, is analogous to the general question of the effect of a gratuitous unsealed release of an existing right of action; if it is not, indeed, merely another form of the same question, since on principle there would seem to be no difference between an unsealed gratuitous release of a right of action for the contract price, given by one who has himself performed in full, and an unsealed gratuitous release of a right of action for damages, given by one who has himself been excused from performance of the covenants on his part to be performed.

It has generally been held that if the holder of a negotiable instrument surrenders it for cancellation to a party who is liable thereon, with the intention of renouncing his rights upon such instrument, full effect will be given to such transaction, and no action can be maintained upon such instrument by the party who has thus surrendered it.¹ In some jurisdictions, a gift of a debt by a creditor to a debtor is treated as a discharge, although such debt is not evidenced by a negotiable instrument.² Under some statutes, a written acknowledgment of satisfaction operates as a discharge, although without consideration.³

In England it was apparently assumed without discussion that a gratuitous waiver by the holder of a bill of exchange would dis-

²⁴ *New York, New Haven & Hartford Ry. v. United States*, 251 U. S. 123, — L. ed. —. (In this case, however, it is possible that the United States had performed in full the contract between itself and the railway company. It also appears that the railway company had protested against the amount thus specified.)

¹ See § 601.

² See § 603.

³ This is the effect of Compiled Laws of North Dakota, §§ 5827, 5828 and

5833. *Strobeck v. Blackmore*, 38 N. D. 593, 165 N. W. 989.

Section 1177 of the Civil Code of South Dakota (Compiled Laws of South Dakota, 1913) has been amended by eliminating the words "or less than" the amount actually due, so that as it now stands a consideration is necessary for a promise to accept less than the amount due in full satisfaction. *Eggland v. South*, 22 S. D. 467, 118 N. W. 719.

charge his rights thereon.⁴ This rule was laid down as a charge by Lord Ellenborough in a case in which the holder recovered;⁵ and, accordingly, the correctness of such charge was not carried beyond the trial-court. The same rule was also assumed in a case in which the real question decided was that if the first bill were cancelled with the consent of the drawer, and he took an unstamped bill in place of the original bill, it was error to submit the unstamped and invalid bill to the jury as evidence of the assent of the drawer to the cancellation of the first bill.⁶ This rule was also laid down in a case in which the real holding was that the gratuitous discharge must be express and that no effect could be given to an implied discharge.⁷ In a case in which the drawer had paid the holder a part of the amount of the bill and had promised to pay the balance in three months, the court held at the trial that such facts amounted to a discharge, as a matter of law, and non-suited the holder; and a new trial was denied, apparently on the theory that the amount involved was small, although the action of the trial-court was probably erroneous.⁸ It was assumed in a case in which the party who attempted to waive rights under the instrument was not shown to be the holder at that time;⁹ in cases in which there was an attempt, at least, to make a new contract;¹⁰ and in a case in which there was a technical consideration for the waiver.¹¹ As a result of the earlier cases which have already been cited,¹² it was said in a English text-book of great authority:¹³ "It is a general rule of law, that a simple contract may before breach be waived or discharged without a deed or consideration; but, after breach, there can be no discharge except by deed or upon sufficient consideration. To this rule it is said that contracts on bills, which are regulated by the custom of merchants, form an exception, and the liability of the acceptor, though complete, may be discharged

⁴ *Whatley v. Tricker*, 1 Campb. 35; *Sweeting v. Halse*, 9 Barn. & C. 365; *Dingwall v. Dunster*, 1 Dougl. 247.

⁵ *Whatley v. Tricker*, 1 Campb. 35.

⁶ *Sweeting v. Halse*, 9 Barn. & C. 365. (This case was brought by the drawer.)

⁷ *Dingwall v. Dunster*, 1 Dougl. 247. See to the same effect, *Farquhar v. Southey*, *Moody & M.* 14, 2 Car. & P. 497; *Adams v. Gregg*, 2 Stark. 531.

⁸ *Ellis v. Galindo*, 1 Dougl. 250.

⁹ *Steele v. Benham*, 14 M. & W. 831, 3 Dowl. & L. 506.

¹⁰ *Delatorre v. Barclay*, 1 Stark. 7; *Cartwright v. Williams*, 2 Stark. 340.

¹¹ *Stevens v. Thacker, Peake*, 187 (an affidavit that the signature was forged).

¹² *Whatley v. Tricker*, 1 Camp. 35; *Dingwall v. Dunster*, 1 Dougl. 235.

¹³ *Byles on Bills* (5th edition) 145. See also, 6th edition, 153.

by an express renunciation of his claim on the part of the holder."¹⁴ Relying on this quotation from Byles on Bills, in spite of the fact that the author qualified his statement by the words "it is said," it was finally held in the exchequer in a case in which the point was presented squarely for adjudication, that a promissory note could be discharged by an oral gratuitous renunciation thereof by the holder.¹⁵ At about the same time, the cancellation of an acceptance by the mutual assent of the parties was held to be binding.¹⁶ In a subsequent case, however, it was said that ordinarily the holder of a bill could give up his rights thereunder, only by a sealed release or by accord and satisfaction; but that if the bill were accepted as an accommodation for the drawer, and the holder knew of such fact when he received the bill, payment by the drawer would operate as a discharge thereof.¹⁷

While this rule has been disapproved by American writers, as well as by American decisions,¹⁸ it has been carried into the Negotiable Instruments Law.¹⁹ The writing must, however, be the record of the renunciation and not merely the memorandum thereof.²⁰

The result of these inconsistent decisions is that we have two lines of authority in this country: the one holding that the rights arising out of a contract, whether for the contract price, or rights of action for damages, may be discharged by an oral gratuitous renunciation; and the other line of authority holding that a consideration or a sealed release is necessary. The courts which give effect to an oral gratuitous renunciation are not always consistent. In many of the courts in which this view is taken, it is necessary to establish a consideration which is sufficient in law, if the parties

¹⁴ The earlier as well as the later editions of Byles on Bills state this rule more positively by omitting the words, "it is said"; and in the later editions "it has been held repeatedly" is substituted for "it is said."

The later editions do not limit the rule to the discharge of the acceptor, but apply to all parties; and give, as a reason for the rule, the necessity of making English law conform, on questions of negotiability, to the civil law, which does not recognize consideration.

¹⁵ *Foster v. Dawber*, 6 Exch. 839.

¹⁶ *Ralli v. Denistown*, 6 Exch. 483.

¹⁷ *Cook v. Lister*, 13 C. B. (N.S.) 543.

¹⁸ *Bragg v. Danielson*, 141 Mass. 105, 4 N. E. 622; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380.

¹⁹ See § 122, Negotiable Instruments Law.

For a discussion of the effect of this section of the Negotiable Instruments Law on the necessity of consideration, see § 541.

²⁰ *In re George*, 44 Ch. D. 627.

attempt to make a compromise,²¹ or if they attempt to enter into an accord and satisfaction.²²

As in other cases in which the same general question is presented,²³ it may well be that our law would have made a wiser choice if it had recognized and enforced all deliberate promises intended to induce the other party to act thereon, whether supported by a consideration or not. As long, however, as our law insists on consideration as a requisite of a simple contract, it seems unfortunate that a plain requirement should be evaded by the device of calling the transaction a renunciation or a waiver.

²¹ See §§ 612 et seq.

²³ See § 656.

²² See §§ 2506 et seq.

CHAPTER LXXXV

ALTERATION

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I

NATURE

§ 3072. Nature of alteration. Alteration, as the term is generally used in contract law, is a change in the language of a written instrument after the execution thereof, which is made intentionally by one of the parties thereto without the consent of the other.¹ Alteration in this sense must be distinguished from other

¹Arkansas. *Robertson v. Southwestern Co.*, 136 Ark. 417, 206 S. W. 755.

Georgia. *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

Illinois. *Ryan v. First National Bank of Springfield*, 148 Ill. 349, 35 N. E. 1120.

Massachusetts. *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764.

changes in the wording of a written instrument which do not amount to an alteration and have none of its effects.²

§ 3073. Alteration distinguished from modification before execution—As to parties assenting thereto. A written instrument has no legal effect until execution, and therefore, until it is executed, its language may be changed at the pleasure of the party drafting it, subject, of course, to the qualification in case of contracts that the adversary party must assent to the instrument in its final form to give it validity. Alteration before delivery makes the contract as delivered the true contract as between the parties thereto, prior negotiations, including the contract as drafted, being merged by the delivery of the contract as ultimately agreed upon.¹ On the

Minnesota. *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N.S.) 519, 124 N. W. 20.

North Dakota. *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313.

Oregon. *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

Pennsylvania. *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541.

"In legal contemplation, an alteration of a written instrument consists in the erasure, interlineation, addition, or substitution of material matter affecting the identity of such instrument or the rights or obligations of the parties arising therefrom, made by a party thereto, or one entitled thereunder, or one in privity with such person, without the consent of the other party, and after the instrument has been fully executed." *Edwards v. Thompson*, 90 Wash. 188, 160 Pac. 327.

"A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect." *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N.S.) 519, 124 N. W. 20.

For a discussion of the nature of alteration, see *Holland v. Hatch*, 11

Ind. 497, 71 Am. Dec. 363, and *Holland v. Hatch*, 15 O. S. 464.

See on this subject in general, *Alteration of Negotiable Instruments*, by Melville M. Bigelow, 7 *Harvard Law Review*, 1; *Discharge of Contracts by Alteration*, by Samuel Williston, 18 *Harvard Law Review*, 105, 165; *Forged and Altered Negotiable Paper*, 9 *American Law Review*, 411, and *Explaining Alterations*, by Austin Abbott, 23 *American Law Review*, 859.

² See §§ 3075 et seq. and §§ 3119 et seq.

¹ **Arkansas.** *Powell v. Fowler*, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827.

California. *Pelton v. Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

Florida. *Bucki v. Seitz*, 39 Fla. 55, 21 So. 576.

Georgia. *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

Indiana. *Prather v. Zulauf*, 38 Ind. 155.

Iowa. *Tharp v. Jamison*, 154 Ia. 77, 39 L. R. A. (N.S.) 100, 134 N. W. 583.

North Carolina. *Wicker v. Jones*, 159 N. Car. 102, 40 L. R. A. (N.S.) 69, 74 S. E. 801.

Oregon. *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

same principle, alteration of a deed with the consent of the parties and before delivery,² or alteration after delivery if followed by redelivery,³ does not affect its validity. Putting revenue stamps on a shipping receipt is not in law an erasure of the provisions covered by such stamps, so as to prevent them from being a part of the contract.⁴ The act of the agent of the promisor, in filling blanks before execution in excess of his authority, is not alteration.⁵

In the absence of evidence to the contrary, it will be presumed that changes which are made before execution are duly authorized and that the parties have assented thereto; and accordingly such changes will not be regarded as alterations.⁶ If a surety has consented to a modification of the original contract before he has entered into his contract of suretyship, he can not treat such modification as an alteration;⁷ and he can not take advantage of it as a discharge.⁸ If the date at which a mortgage debt is to become due is modified before the delivery of a deed conveying the mortgaged realty to a grantee who is to take it subject to such mortgage, and such grantee knows of such modification, he can not take advantage of it as an alteration.⁹

§ 3074. As to parties who do not assent thereto. Alteration before final delivery is not binding on parties to the altered instrument who did not consent to such alteration, if the alteration affects their rights in any substantial way.¹ If the date of a note is altered by one of the joint makers thereof before delivery, but after the other joint makers have signed, and without their assent, such

² *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740; *Wilhite v. Mason*, 102 Kan. 461, 170 Pac. 814; *Wicker v. Jones*, 159 N. Car. 102, 40 L. R. A. (N.S.) 69, 74 S. E. 801.

³ *Eadie v. Chambers*, 172 Fed. 73, 24 L. R. A. (N.S.) 879 [reversed in *Wasky v. Chambers*, 224 U. S. 564, 56 L. ed. 885, on the theory that the deed, having but one witness and being altered after acknowledgment, was not entitled to registration]; *Abbott v. Abbott*, 139 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958; *Huffman v. Hatcher*, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236.

⁴ *Sloman v. Express Co.*, 134 Mich. 16, 95 N. W. 999.

⁵ *Holland v. Hatch*, 15 O. S. 464.

⁶ *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

⁷ *Powell v. Fowler*, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827.

⁸ *Powell v. Fowler*, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827.

⁹ *Wilhite v. Mason*, 102 Kan. 461, 170 Pac. 814.

¹ *Smith v. United States*, 69 U. S. (2 Wall.) 219, 17 L. ed. 788; *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735n, 13 S. W. 758; *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639; *Herahman v. Stafford*, 58 W. Va. 450, 52 S. E. 533.

alteration discharges the joint makers who did not assent,² although such result is explained on the theory that such alteration prevents the existence of a contract, instead of discharging an existing contract.³ If A is the maker of a note, B a payee, and X a party to the note for the accommodation of A, a change made before final delivery by A, by the consent of A and B, but without X's consent, will discharge X.⁴ Indorsers of a note given by a corporation may set up an alteration made by the president of the corporation after indorsement but before delivery.⁵

§ 3075. Alteration distinguished from modification after execution by mutual consent—As to parties assenting thereto. A change in the language of a written instrument after execution with the assent of all the parties thereto, operates as a discharge of the original contract and the substitution of a new contract therefor.¹ One who has assented to an alteration can not take advantage thereof as a discharge of the instrument.² If the parties have agreed upon a modification of the contract, a written contract is not discharged by the fact that the physical act of inserting such modification upon the written instrument is made by one of the parties in the absence of the other.³

² *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

³ *Blakey v. Johnson*, 76 Ky. (13 Bush.) 197, 26 Am. Rep. 254; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

⁴ *California. Pelton v. Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

Connecticut. Aetna National Bank v. Winchester, 43 Conn. 391.

Massachusetts. Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92.

Michigan. Aldrich v. Smith, 37 Mich. 468, 26 Am. Rep. 536.

New Mexico. Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72.

West Virginia. Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

⁵ *Pelton v. Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

¹ *Arkansas. Powell v. Fowler*, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827.

Iowa. Mathias v. Leathers, 99 Ia. 18, 68 N. W. 449; *Phillips v. Crips*, 108 Ia. 605, 79 N. W. 373.

Kentucky. Huffman v. Hatcher, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236 (deed).

Massachusetts. Boston v. Benson, 66 Mass. (12 Cush.) 61.

Ohio. Wardlow v. List, 41 O. S. 414; *Hecker v. Mahler*, 64 O. S. 398, 60 N. E. 555.

Tennessee. Bryant v. Bank, 107 Tenn. 560, 64 S. W. 895.

Virginia. Schmelz v. Rix, 95 Va. 500, 28 S. E. 890.

Wisconsin. Kane v. Herman, 109 Wis. 33, 85 N. W. 140.

² *Hecker v. Mahler*, 64 O. S. 398, 60 N. E. 555.

³ *Wardlow v. List*, 41 O. S. 414.

An alteration changing the amount of indebtedness with the consent of the parties,⁴ changing the rate of interest,⁵ or adding an agreement to a deed that a lien is retained to secure the purchase money notes,⁶ does not discharge the instrument.

Authority to make such alteration may be implied. An agreement to release certain guarantors gives implied authority to cancel their names from negotiable notes which might be transferred to bona fide holders.⁷

Assent to modification of one sort is not assent to other or further modification.⁸ A provision which authorizes a party to detach a certain non-negotiable contract from the original instrument, does not authorize him to detach a part thereof so as to leave a negotiable instrument.⁹

While the effect of the alteration of a deed with the assent of the parties thereto is not covered by the ordinary principles of contract law, since such instrument has created a property right, it may be observed that the effect of such alteration depends in part on the question of the effect of the surrender of the deed by the grantee to the grantor with the intention of reconveying such interest in land. Where such a transaction does not affect the title to the land, the act of the grantor in making the change with the consent of the grantee has no effect at law.¹⁰ The fact that the instrument is recorded thereafter does not affect the title.¹¹ In some jurisdictions such a transaction is regarded as at least an agreement for the execution and delivery of the deed in its altered form, to which effect will be given in equity.¹² The difficulties which arise where an attempt is made to give relief of this sort are difficulties which arise under the Statute of Frauds,¹³ rather than difficulties which arise out of alteration in the proper sense of the term.

⁴ *Mathias v. Leathers*, 99 Ia. 18, 68 N. W. 449.

⁵ *Phillips v. Crips*, 108 Ia. 605, 79 N. W. 373; *Wardlow v. List*, 41 O. S. 414.

⁶ *Bryant v. Bank*, 107 Tenn. 560, 64 S. W. 895.

⁷ *Kane v. Herman*, 100 Wis. 33, 35 N. W. 140.

⁸ *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31.

⁹ *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31.

¹⁰ *Moelle v. Sherwood*, 148 U. S. 21, 37 L. ed. 350 (at least as against a bona fide grantee without actual notice); *Carr v. Frye*, 225 Mass. 531, L. R. A. 1917E, 814, 114 N. E. 745.

¹¹ *Carr v. Frye*, 225 Mass. 531, L. R. A. 1917E, 814, 114 N. E. 745.

¹² *Ely v. Brewer*, 182 Ala. 396, 62 So. 712; *Huffman v. Hatcher*, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236; *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067.

¹³ See §§ 1251 et seq.

An alteration of a deed, followed by redelivery, has been held to be operative;¹⁴ but, as is indicated, such altered deed has been held to be ineffective, in the absence of re-execution, as against a subsequent bona fide grantee.¹⁵ As between the original parties, full effect has been given to such alteration, on the theory that the parties have avoided the first deed by mutual agreement and that the grantor has redelivered the deed in its altered form.¹⁶ Some of the cases may be reconciled by noting that if the alteration increases the interest of the grantee, a greater effect may be given to the redelivery than can be given in cases in which the alteration diminishes the interest of the grantee, since in the latter case the transaction by which a part of the original estate reverted in the grantor, rests upon the oral agreement between the two parties.

§ 3076. As to non-assenting parties. The rule that a modification in the contract or instrument which is made with the assent of the parties thereto, does not operate as an alteration, is limited to the parties who actually assent. If a modification is made with the consent of some of the parties to the contract, but without the consent of all of the parties thereto, the parties who do not consent may treat such written modification as an alteration; and if such alteration is material, they are discharged.¹ An interlineation made after some of the parties have executed an instrument, and without their assent, renders it invalid as to them, although it is made with the assent of the remaining parties.² The act of one of the makers of an instrument in changing its date, discharges other makers who do not assent thereto.³ If the addition of the name of a witness amounts to a material alteration,⁴ the addition of a witness with the consent of one of the obligors, discharges such instrument as to the obligors who did not consent thereto.⁵

¹⁴ *Eadie v. Chambers*, 172 Fed. 73, 24 L. R. A. (N.S.) 879 [reversed in *Waskey v. Chambers*, 224 U. S. 564, 56 L. ed. 885, on the theory that the deed, having but one witness and being altered after acknowledgment, was not entitled to registration].

¹⁵ See, also, discussion in *Moelle v. Sherwood*, 148 U. S. 21, 37 L. ed. 350.

¹⁶ *Huffman v. Hatcher*, 178 Ky. 8, L. R. A. 1918B, 484, 198 S. W. 236.

¹ *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283; *Shiffer v.*

Mosier, 225 Pa. St. 552, 24 L. R. A. (N. S.) 1155, 74 Atl. 426; *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

See § 3095 and §§ 3121 et seq.

² *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283.

³ *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

⁴ See § 3098.

⁵ *Shiffer v. Mosier*, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426.

§ 3077. Alteration distinguished from spoliation. A change which is made in the language of a written instrument by one who is not a party thereto and who does not act under the authority of a party thereto, is technically a spoliation,¹ and not an alteration, although it is frequently spoken of as an alteration. This confusion in terms arose at a time at which spoliation by a stranger and alteration by a party had the same legal consequences;² and, accordingly, it was not necessary to distinguish between the two. Since the consequences of spoliation are different, in most jurisdictions, from alteration, the two should be distinguished by using different names to express different ideas, and to distinguish between transactions which have different legal consequences.

¹ *United States*. *United States v. Spalding*, 2 *Mason* (U. S.) 482, 27 *Fed. Cases*, 1278; *Clyde Steamship Co. v. Whaley*, 231 *Fed. 76*, *L. R. A.* 1916F, 289.

Alabama. *Forbes v. Taylor*, 139 *Ala.* 286, 35 *So.* 855.

Arkansas. *Andrews v. Calloway*, 50 *Ark.* 358, 7 *S. W.* 449; *Faulkner v. Feazel*, 113 *Ark.* 289, 168 *S. W.* 569; *Robertson v. Southwestern Co.*, 136 *Ark.* 417, 206 *S. W.* 755.

California. *Walsh v. Hunt*, 120 *Cal.* 46, 39 *L. R. A.* 697, 52 *Pac.* 115.

Connecticut. *Nichols v. Johnson*, 10 *Conn.* 102.

Florida. *Orlando v. Gooding*, 34 *Fla.* 244, 15 *So.* 770.

Georgia. *Shirley v. Swafford*, 119 *Ga.* 43, 45 *S. E.* 722.

Illinois. *Fry v. Jenkins*, 173 *Ill.* App. 486.

Indiana. *Cochran v. Nebeker*, 48 *Ind.* 459.

Kentucky. *Lee v. Alexander*, 48 *Ky.* (9 *B. Mon.*) 25, 48 *Am. Dec.* 412.

Massachusetts. *Chessman v. Whittemore*, 40 *Mass.* (23 *Pick.*) 231.

Minnesota. *Ames v. Brown*, 22 *Minn.* 257.

Mississippi. *Bridges v. Winters*, 42

Miss. 135, 97 *Am. Dec.* 443, 2 *Am. Rep.* 598.

New Jersey. *Hunt v. Gray*, 35 *N. J.* L. 227, 10 *Am. Rep.* 232.

New York. *Rees v. Overbaugh*, 6 *Cow. (N. Y.)* 746; *Jackson v. Malin*, 15 *Johns. (N. Y.)* 203.

Ohio. *Fullerton v. Sturges*, 4 *O. S.* 530.

Pennsylvania. *Robertson v. Hay*, 91 *Pa. St.* 242; *Bowman v. Berkey*, 259 *Pa. St.* 327, 103 *Atl.* 49.

South Carolina. *White v. Harris*, 69 *S. Car.* 65, 104 *Am. St. Rep.* 791, 48 *S. E.* 41.

Tennessee. *Boyd v. McConnell*, 29 *Tenn.* (10 *Humph.*) 68.

Vermont. *Bigelow v. Stilphen*, 35 *Vt.* 521.

Washington. *Murray v. Peterson*, 6 *Wash.* 418, 33 *Pac.* 969; *Edwards v. Thompson*, 99 *Wash.* 188, 169 *Pac.* 327.

Wisconsin. *Union National Bank v. Roberts*, 45 *Wis.* 373.

"Any change made by a stranger to the instrument, without the connivance or consent of the parties, is, strictly speaking, a spoliation." *Edwards v. Thompson*, 99 *Wash.* 188, 169 *Pac.* 327.

² See § 3119.

II

PARTIES TO ALTERATION

§ 3078. Party by whom alteration may be committed—Agent.

Since the distinction between alteration and spoliation turns on the relation to the contract borne by the party who makes the change in the instrument, it is in this connection all important to determine this relation. (Change in a written contract may be made by: (1) a party to the contract; (2) an agent of a party to the contract; (3) a person not an agent but in whose custody a contract has been placed; or (4) a person having no relation to the contract.

If the change is made by a party to the contract, it is a case of alteration.¹ A change made by a mere stranger to the contract, who has no relation thereto, is, as has been said, a spoliation.²

If the change is made by an agent of a party to the contract, the question whether this is an alteration or a spoliation as far as the principal's rights are concerned, turns on the question of the agent's authority. If the agent is one having no authority which could include the making of such change, he is for this purpose a stranger to the contract, and the change is a spoliation if not ratified by the principal.³ If an agent has taken warehouse receipts in

¹ *Ryan v. Springfield First National Bank*, 148 Ill. 349, 35 N. E. 1120; *Check v. Nall*, 112 N. Car. 370, 17 S. E. 80; *Bank of Commerce v. Webster*, — Okla. —, L. R. A. 1918F, 696, 172 Pac. 942.

See §§ 3093 et seq.

² See § 3077.

³ *United States. Clyde Steamship Co. v. Whaley*, 231 Fed. 76, L. R. A. 1916F, 289.

Alabama. *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855.

Arkansas. *Robertson v. Southwestern Co.*, 136 Ark. 417, 206 S. W. 755.

California. *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 607, 52 Pac. 115.

Connecticut. *Aetna National Bank v. Winchester*, 43 Conn. 301.

Illinois. *Lanum v. Patterson*, 143 Ill. App. 244.

Indiana. *Brooks v. Allen*, 62 Ind. 401; *Ballard v. Ins. Co.*, 81 Ind. 239;

Kingan v. Silvers, 13 Ind. App. 80, 37 N. E. 413.

Massachusetts. *Nickerson v. Swett*, 135 Mass. 514.

Michigan. *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583.

Minnesota. *Ames v. Brown*, 22 Minn. 257.

Missouri. *Lubbering v. Kohlbrecher*, 22 Mo. 596.

New Jersey. *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

New York. *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Gleason v. Hamilton*, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 283.

Ohio. *Fullerton v. Sturges*, 4 O. S. 529.

Pennsylvania. *Robertson v. Hay*, 91 Pa. St. 242.

South Dakota. *Port Huron, etc., Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008.

his own name instead of in the name of his principal, his act in erasing his own name from such receipts and in inserting his principal's name, does not amount to an alteration if it is done without the authority of the principal.⁴ An unauthorized change as to the place of payment of a note, made by payee's clerk and subsequently erased, leaving the note as originally written, does not avoid it.⁵ Accordingly, the removal of a memorandum written by an unauthorized agent extending the time of payment eight months, is an immaterial alteration.⁶ An authorized alteration by the agent of the maker does not avoid the note⁷ or contract.⁸ Even if one of the makers may be regarded for some purposes as the agent of the other, the act of a joint maker in adding seals to the signatures of the other joint makers without their knowledge and before delivery, does not operate as a discharge of such joint makers,⁹ although, of course, they are not liable as on a sealed instrument.¹⁰

On the other hand, a change in a written contract made by an agent within whose general authority the power to make such change is included, is in legal effect an alteration made by the principal.¹¹ The act of a purchaser of a note, through his authorized agent, the original payee, in entering an extension of time upon a note and attaching forged interest notes to the original note, operates as an alteration.¹² A modification of a deed which is made with the authority of the grantee, has the same effect upon the deed as if the grantee himself had made it.¹³

Tennessee. *Deering Harvester Co. v. White*, 110 Tenn. 132, 72 S. W. 962.

Vermont. *Bigelow v. Stilphen*, 35 Vt. 521; *Equitable Manufacturing Co. v. Allen*, 76 Vt. 22, 104 Am. St. Rep. 915, 56 Atl. 87.

Washington. *Edwards v. Thompson*, 99 Wash. 188, 169 Pac. 327.

Wisconsin. *Jesup v. City Bank*, 14 Wis. 331.

⁴ *Clyde Steamship Co. v. Whaley*, 231 Fed. 76, L. R. A. 1916F, 289.

⁵ *Acme Harvester Co. v. Butterfield*, 12 S. D. 91, 80 N. W. 170.

⁶ *Mater v. Bank*, 8 Colo. App. 325, 46 Pac. 221.

⁷ *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 607, 52 Pac. 115; *Fullerton v. Sturges*, 4 O. S. 529.

⁸ *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303.

⁹ *Fullerton v. Sturges*, 4 O. S. 529.

¹⁰ *Fullerton v. Sturges*, 4 O. S. 529.

¹¹ *Arkansas. Robertson v. Southwestern Co.*, 136 Ark. 417, 206 S. W. 755.

Iowa. Hollingsworth v. Holbrook, 80 Ia. 151, 20 Am. St. Rep. 411, 45 N. W. 561.

Kansas. Hurt v. Stout, 105 Kan. 54, 181 Pac. 623.

Missouri. Bacon v. Theiss, — Mo. —, 208 S. W. 254.

Pennsylvania. Gettysburg National Bank v. Chisolm, 169 Pa. St. 564, 47 Am. St. Rep. 929, 32 Atl. 730.

Washington. Edwards v. Thompson, 99 Wash. 188, 169 Pac. 327 (obiter).

¹² *Bacon v. Theiss*, — Mo. —, 208 S. W. 254.

¹³ *Hurt v. Stout*, 105 Kan. 54, 181 Pac. 623.

§ 3079. Depository. A change in the language of a written contract, made by one in whose custody a contract is placed, but who is not the agent of either party, is a spoliation.¹ If a public bond is placed in the custody of a public officer, a change therein made by him is a spoliation.² Alteration of a note by a justice of the peace with whom it has been left for collection, does not destroy its validity where the payee disavows such alteration as soon as he learns of it.³ The cases can be explained on the theory that the depository—even if in one sense the agent of one of the parties to the instrument—had no authority to make such alteration.⁴

Accordingly, any act done by the depository within his general authority, which effects a change in the language of the written instrument, is an alteration.⁵ A change made by an administrator in a note payable to himself in that capacity is an alteration and not a spoliation.⁶ A public official authorized to approve a bond, who changes it after execution at the time that he approves it, commits an alteration and not a spoliation.⁷

§ 3080. Who can take advantage of alteration as discharge. Only the party who is apparently liable on the contract, as altered, can complain of the alteration.¹ The party who makes the alteration can not treat the contract as discharged if the adversary party seeks to enforce it.² Third persons can not complain of such alteration if both parties to the contract acquiesce therein.³ If an insurance company does not raise objection to an alteration in an insurance policy, changing the beneficiary from the insured's "estate" to his "wife and children," his creditors can not complain.⁴

¹ *State v. Berg*, 50 Ind. 496; *Hays v. Odom*, 79 Mo. App. 425.

² *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46, 4 L. R. A. 680, 6 So. 82; *State v. Berg*, 50 Ind. 496; *Schlageck v. Widhalm*, 59 Neb. 541, 81 N. W. 448.

³ *Hays v. Odom*, 79 Mo. App. 425.

⁴ *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735, 13 S. W. 758; *McMurtrey v. Sparks*, 71 Mo. App. 126.

⁵ *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735, 13 S. W. 758.

⁶ *McMurtrey v. Sparks*, 71 Mo. App. 126.

⁷ *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735, 13 S. W. 758.

¹ *Holyfield v. Harrington*, 84 Kan. 760, 39 L. R. A. (N.S.) 131, 115 Pac. 546; *Bodine v. Berg*, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

² *Lane v. Pacific & I. N. Ry.*, 8 Ida. 230, 67 Pac. 656; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, 5 N. E. 338.

³ *Steeley's Creditors v. Steeley* (Ky.), 64 S. W. 642.

⁴ *Steeley's Creditors v. Steeley* (Ky.), 64 S. W. 642.

III

METHOD OF MAKING ALTERATION

§ 3081. Method of making alteration—Cancellation and erasure.

While the manner in which a written instrument is altered may be of practical importance as indicating the intention of the party who made the alteration, or as giving notice to the subsequent holders of such instrument, the legal effect of an intentional material change in the written instrument is the same, no matter what means may be employed to effect such change.¹ While most of the cases of alteration of the body of a written instrument are cases in which a provision was interlined, or in which a provision was marked out and another was substituted therefor,² the act of a party in drawing lines or cross-marks through a material part of a written instrument without substituting anything therefor, amounts to a material alteration,³ since such act, if operative, would show that such words were not a part of the contract and had no legal effect. At the same time, the means by which the alleged alteration is made, may be of the utmost importance in ascertaining the intention with which it was done,⁴ which may be of the utmost

¹ "It is the effect of the act upon the instrument, and not the particular manner in which it is done, which is material, whether it be by interlineation, addition, substitution, change of words, detaching material memoranda therefrom, erasure, or by cancellation of some material provision thereof. The drawing of cross-lines over a written instrument, or any part thereof, is a common mode of expressing an intent to erase or cancel it. The inference to be drawn from such an act is ordinarily a question of fact for the jury. It was so in this case, and upon the whole evidence we hold that the court properly submitted the question to the jury. *Wilson v. Hayes*, 40 Minn. 531, 4 L. R. A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Warder, B. & G. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300. The charge of the court was as favorable to the plaintiff as it was entitled to have it. The evidence is sufficient

to sustain a finding by the jury that the cross-marks were placed upon the clause of the contract in question by the plaintiff after its delivery, with the intention of canceling or erasing it, without the knowledge or consent of the defendants. Such an act constitutes an alteration of the instrument." *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N. S.) 519, 124 N. W. 20.

² See §§ 3089 et seq.

³ *Illinois*. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107.

Indiana. *Tate v. Fletcher*, 77 Ind. 102.

Iowa. *Laub v. Paine*, 46 Ia. 550, 26 Am. Rep. 163.

Minnesota. *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N. S.) 519, 124 N. W. 20.

Wisconsin. *Page v. Danaher*, 43 Wis. 221; *Hecht v. Shenners*, 126 Wis. 27, 105 N. W. 309.

⁴ See §§ 3089 et seq.

importance in determining whether the modification in question was an alteration or not.⁵

§ 3082. Filling blank as alteration. In the absence of statute, the rule has always been that one who executed an instrument, leaving blanks therein to be filled in later, and who delivered it to one who was to deliver it in turn to the adversary party, was bound by the act of the person to whom he delivered such instrument, in filling in the blanks, so as to mislead the adversary party.¹ The act of the person to whom such instrument was intrusted, in filling in such blanks, was therefore not an alteration.²

This result was sometimes explained on the theory of agency, sometimes on the theory of estoppel; but in either case the result was the same, and it was not necessary to invoke the protection which the law gave to the bona fide holder of a negotiable instrument, in order to protect the party who was thus misled. The party to whom such instrument was eventually delivered was protected if he relied upon the conduct or statements of the person to whom it was delivered in the first instance, even though the party to whom it was ultimately delivered knew that it was executed in blank;³ and in reliance upon the statements of the party to whom

⁵ See § 3092.

¹ *United States*. *Pittsburg Bank v. Neal*, 63 U. S. (22 How.) 96, 16 L. ed. 323; *Angle v. Northwestern Mutual Life Ins. Co.*, 92 U. S. 330, 23 L. ed. 556.

Alabama. *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006.

Indiana. *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Gothrapt v. Williamson*, 61 Ind. 509.

Kentucky. *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 31 L. R. A. (N. S.) 643, 126 S. W. 131.

Nebraska. *Humphrey Hardware Co. v. Herrick*, 72 Neb. 878, 101 N. W. 1010, 102 N. W. 1010; *Montgomery v. Drescher*, 90 Neb. 632, 38 L. R. A. (N. S.) 423, 134 N. W. 251.

North Dakota. *Merchants' National Bank v. Brastrup*, — N. D. —, 168 N. W. 42.

New York. *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573.

Ohio. *Fullerton v. Sturges*, 4 O. S. 529; *Schryver v. Hawkes*, 22 O. S. 308.

Pennsylvania. *Johnston v. Knipe*, 260 Pa. St. 504, L. R. A. 1918E, 1042, 103 Atl. 957.

South Carolina. *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

Wisconsin. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.

² Filling blanks which are left in an instrument is said to be "not strictly an alteration." *Holland v. Hatch*, 11 Ind. 497, 71 Am. Dec. 363.

³ *United States*. *Michigan (Insurance) Bank v. Eldred*, 76 U. S. (9 Wall.) 544, 19 L. ed. 763.

Delaware. *Townsend v. France*, 2 Howst. (Del.) 441.

Indiana. *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56; *Rich v. Starbuck*, 51 Ind. 87.

it was originally delivered, the party to whom it was eventually delivered might insert his own name as promisee.⁴

§ 3083. Filling blanks—Effect of Negotiable Instruments Law.

This rule has been modified in some respects as to negotiable instruments by the Negotiable Instruments Law, which provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."¹ Under this section, a bona fide holder is protected if the blanks in the instrument were filled before the instrument was transferred to him, and if he does not know that the authority given by the maker of the instrument was exceeded when such blanks were filled.² If the holder knows that the instrument, as originally exe-

Maryland. *Boyd v. McCann*, 10 Md. 118; *Dunham v. Clogg*, 30 Md. 284.

Missouri. *Schooler v. Tilden*, 71 Mo. 580.

Nebraska. *Montgomery v. Dresher*, 90 Neb. 632, 38 L. R. A. (N.S.) 423, 134 N. W. 251.

New York. *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573.

Tennessee. *Seay v. Bank*, 35 Tenn. (3 Sneed.) 558, 67 Am. Dec. 579.

Texas. *Close v. Fields*, 2 Tex. 232.

⁴**Delaware.** *Townsend v. France*, 2 Houst. (Del.) 441.

Indiana. *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56; *Rich v. Starbuck*, 51 Ind. 87.

Maryland. *Boyd v. McCann*, 10 Md. 118; *Dunham v. Clogg*, 30 Md. 284.

Missouri. *Schooler v. Tilden*, 71 Mo. 580.

Nebraska. *Montgomery v. Dresher*, 90 Neb. 632, 38 L. R. A. (N.S.) 423, 134 N. W. 251.

New York. *Hardy v. Norton*, 66 Barb. (N. Y.) 527.

Tennessee. *Seay v. Bank*, 35 Tenn. (3 Sneed.) 558, 67 Am. Dec. 579.

Texas. *Close v. Fields*, 2 Tex. 232.

¹ § 14, Uniform Negotiable Instruments Act.

²*Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 31 L. R. A. (N.S.) 643, 126 S. W. 131; *Merchants' National Bank v. Brastrup*, — N. D. —, 168 N.

cut by the maker, contained blanks, or if for other reasons he can not claim the protection of a bona fide holder, he can not enforce such instrument against the maker unless the blanks were filled up in strict accordance with the authority which was given.³ Under this section, a party who knew that the instrument was executed in blank can not invoke the doctrine of estoppel, to enable him to enforce an instrument which was filled up by the maker's agent in excess of his authority.⁴ Even if one of two joint makers has possession of the note, in which there is a blank for the name of the payee, one to whom he negotiates such note can not rely upon his statement as to his authority to fill in such blank.⁵

§ 3084. What constitutes a blank—Negligence of promisor. The term "blank," as used with reference to the effect of filling in blanks, is used in two senses, which need not be distinguished in some jurisdictions, since the legal effect is the same in each case, but which must be distinguished in some jurisdictions, since the legal effect is different in the two cases. In the sense in which it has been used,¹ the term "blank" is used to indicate a space which is left in the instrument for the purpose of being filled in later by the party to whom the maker has intrusted the instrument. If the maker of a negotiable instrument has executed it in such form as to make it easy to alter it so that the alteration can not be detected by a transferee, some courts hold that in such cases the maker is estopped from setting up such alteration as a discharge or from denying that he executed the instrument in its altered form. This principle applies most clearly when blanks are left which the maker does not fill out at all,² such as a blank for the date,³ or for

W. 42; *Johnston v. Knipe*, 260 Pa. St. 504, L. R. A. 1918E, 1042, 103 Atl. 957.

An accommodation indorser is not liable for an amount for which an incidental space on the note is filled in. *National Exchange Bank v. Lester*, 194 N. Y. 461 21 L. R. A. (N.S.) 402, 87 N. E. 779.

³ *Lloyd's Bank v. Coake* [1907], 1 K. B. 704; *Smith v. Prosser* [1907], 2 K. B. 735; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646; *Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010; *Hart-*

ington Nat. Bank v. Wiebelhaus, 88 Neb. 47, 31 L. R. A. (N.S.) 130, 128 N. W. 659.

⁴ *Smith v. Prosser* [1907], 2 K. B. 735.

⁵ *Hartington National Bank v. Wiebelhaus*, 88 Neb. 47, 31 L. R. A. (N.S.) 130, 128 N. W. 659.

¹ See §§ 3082 et seq.

² *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458.

See § 3084.

³ *First State Savings Bank v. Webster*, 121 Mich. 149, 79 N. W. 1068.

the place of payment,⁴ or a blank for the interest,⁵ even if in a non-negotiable note.⁶ In such cases it is possible to explain the decision on the theory that whatever the secret intention of the maker as to such blank, he must be presumed, as to a holder in due course, to have given authority to fill in such blanks. This presumption is usually a sheer fiction, since the holder in due course usually knows nothing of the condition of the instrument when it is delivered; and accordingly he has not, in fact, relied on any apparent authority to fill such blanks. The term "blank" is also used to indicate a space which is left, usually by the negligence of the maker, which the maker does not intend to be filled in, since the instrument which he delivers is a complete instrument, but which nevertheless gives an opportunity to alter the instrument, without erasing any part thereof, in such a way as to deceive a reasonably prudent man.

Whether the maker of an instrument of this sort is bound by the instrument as he delivered it, or whether he is bound by the instrument in its altered form, as in the hands of a bona fide holder, is a question upon which there has been a conflict of authority. The original English theory was that the maker of such an instrument was bound by the instrument in its altered form, if in the hands of a bona fide holder,⁷ at least if the instrument was negotiable. This theory has been adopted by a number of the courts of the United States, and the maker has been held liable on the instrument in its altered condition where he has inserted some appropriate words in the blank in question, but has done it so negligently that it is possible to add words in the residue of the blank, materially changing the legal effect of the instrument.⁸ The courts

⁴ *Cason v. Bank*, 97 Ky. 487, 53 Am. St. Rep. 418, 31 S. W. 40.

⁵ *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894.

⁶ *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

⁷ *Young v. Grote*, 4 Bing. 253.

⁸ *Alabama*. *Holmes v. Ft. Gaines Bank*, 120 Ala. 493, 24 So. 959.

Illinois. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907.

Indiana. *Bowen v. Laird*, 106 Ind. 421, 77 N. E. 852.

Kansas. *Lowden v. Bank*, 38 Kan. 533, 16 Pac. 748.

Kentucky. *Blakey v. Johnson*, 76 Ky. (13 Bush.) 197, 26 Am. Rep. 254.

Missouri. *Scotland County National Bank v. O'Connel*, 23 Mo. App. 165.

Pennsylvania. *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75. *Wisconsin*. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.

This principle does not operate as against an accommodation indorser. *National Exchange Bank v. Lester*, 194 N. Y. 461, 21 L. R. A. (N.S.) 402, 87 N. E. 779.

which reach this result generally base it on the theory that the maker is estopped, by reason of his negligence, from denying that the instrument in the hands of the bona fide holder is the instrument which he executed.

The English courts have abandoned the original rule; and they have held that the maker is not liable, even to a holder in due course, where he has inserted words in blanks so negligently that an opportunity is given to insert other words.⁹ In many of the American jurisdictions the same result was reached, often before the English courts had abandoned their original rule; and the maker was held not to be liable on the instrument in its altered condition,¹⁰ on the theory that the maker has done nothing to mislead subsequent holders, and that the doctrine of estoppel should not apply, since the maker ought not to be held to anticipate unauthorized alteration of the instrument, which is usually criminal.

Other cases of alteration have been considered by the courts with the same difference of opinion. In some courts the maker is held though the contract has been materially altered, if he made such alteration possible by his negligence.¹¹ If the maker signs a note written in part in lead pencil so that it can be easily erased, and it is found as a fact that he was negligent in so signing such contract, he is liable to a bona fide holder.¹² Even if the maker

⁹ *Imperial Bank v. Hamilton Bank* [1903], A. C. 49; *Scholfield v. Londesborough* [1896], A. C. 514 [affirming (1895), 1 Q. B. 536, which affirmed (1894), 2 Q. B. 660] (referring in the opinion in the lower court to *Young v. Grote*, 4 Bing. 253, as a "fount of bad argument").

¹⁰ *Arkansas*, *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892.

California, *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115.

Iowa, *Knoxville Nat. Bank v. Clark*, 51 Ia. 264, 33 Am. Rep. 129, 1 N. W. 491; *Conger v. Crabtree*, 88 Ia. 436, 45 Am. St. Rep. 249, 55 N. W. 335.

Kansas, *Herington Bank v. Wangerin*, 65 Kan. 423, 59 L. R. A. 717, 70 Pac. 330.

Maryland, *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378.

Massachusetts, *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

Michigan, *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

Mississippi, *Simmons v. Atkinson, etc., Co.*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Missouri, *Middaugh v. Elliott*, 61 Mo. App. 601.

Nebraska, *Bothell v. Schweitzer*, 84 Neb. 271, 133 Am. St. Rep. 623, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

New York, *Albany National Exchange Bank v. Lester*, 194 N. Y. 461, 21 L. R. A. (N.S.) 402, 87 N. E. 779.

South Dakota, *Rochford v. McGee*, 16 S. D. 606, 61 L. R. A. 335, 94 N. W. 695.

¹¹ *Phelan v. Ross*, 67 Pa. St. 59; *Garrard v. Haddan*, 67 Pa. St. 82.

¹² *Harvey v. Smith*, 55 Ill. 224.

signs a note separated by a perforated line from the rest of the contract it is held that he is not necessarily negligent.¹³

In some of the American states, a distinction has been made between a blank in which nothing was written, in which the maker meant to have nothing written, and a blank in which something is written although the blank is not completely filled. In the former case, the maker is held to be bound by the instrument in its altered state, although he did not intend the blank to be filled;¹⁴ and in the latter case, it is held that the maker is not bound by the instrument in its altered condition, although he left sufficient space for the addition of words which might vary the legal effect of the instrument.¹⁵

Even where the theory of estoppel is invoked, it is limited to cases in which a reasonably prudent man who received the instrument would be misled thereby; and if the alteration is made by defacing the instrument in such a manner as to be readily apparent on its face, the doctrine of estoppel can not be invoked.¹⁶ The doctrine is, furthermore, apparently something different from the pure doctrine of estoppel, since it does not seem to apply to non-negotiable instruments.¹⁷ If the only basis for holding the maker liable were that of estoppel alone, no distinction ought to be made between the negotiable and the non-negotiable instrument, since the basis of estoppel is the same in either case. It is evident that considerations of negotiability, as well as considerations of estoppel, enter into the result.

§ 3085. Change in memoranda on instrument. A question sometimes presented for adjudication is whether an alteration of a memorandum in writing on the same piece of paper as the written contract, but not in the body thereof, is a material alteration. If the writing thus altered is in legal effect a part of the contract a change therein is a material alteration.¹ The fact that a memoran-

¹³ *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F, 1145, 168 N. W. 531; *Rochford v. McGee*, 16 S. D. 606, 61 L. R. A. 335, 102 Am. St. Rep. 719, 94 N. W. 695.

See § 3085.

¹⁴ *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 31 L. R. A. (N.S.) 643, 126 S. W. 131 (under the Negotiable Instruments Law).

¹⁵ *Commercial Bank v. Arden*, 177

Ky. 520, 197 S. W. 951 (under the Negotiable Instruments Law).

¹⁶ *Holbart v. Lauritson*, 34 S. D. 267, L. R. A. 1915A, 166, 148 N. W. 19.

¹⁷ *Smith v. Holzhauer*, 67 N. J. L. 202, 50 Atl. 683.

Contra, *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

¹ *Alabama*. *Payne v. Long*, 121 Ala. 385, 25 So. 780.

dum appears on the back of the instrument does not prevent the alteration of such memorandum from being treated as an alteration of the entire instrument if such memorandum is intended to be a part of the instrument.² Cutting off an application for insurance from the top of a promissory note to secure assessments, even if a perforated line was originally upon the paper between the application and the note,³ or cutting off from the bottom of a note, "subject to a settlement between us,"⁴ are each material alterations. On the other hand, an indorsement on the back of a note, added after delivery,⁵ such as an indorsement of partial payment,⁶ is no part of the note; and adding a date to such indorsement,⁷ or erasing it, even if done fraudulently,⁸ is not a material alteration. If, however, one claims title through an indorsement, it is as to him a material part of the contract. Hence, if an indorsement "for collection"⁹ is canceled, this is a material change, and a subsequent purchaser of the note from such indorsee is put on inquiry.

§ 3086. Addition of memoranda. A memorandum made upon the same piece of paper as a written contract, but not, in legal effect, a part thereof, is not a material alteration,¹ such as a pencil

Arkansas. *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111.

Indiana. *Cochran v. Nebeker*, 48 Ind. 459.

Iowa. *Scofield v. Ford*, 56 Ia. 370, 9 N. W. 309.

Kansas. *Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 15 L. R. A. (N.S.) 612, 94 Pac. 798.

Michigan. *Cassopolis First National Bank v. Carter*, 138 Mich. 421, 101 N. W. 585; *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F, 1145, 168 N. W. 531.

New York. *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382.

South Dakota. *Rochford v. McGee*, 16 S. D. 606, 61 L. R. A. 335, 94 N. W. 695.

Texas. *Baldwin v. Haskell National Bank*, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178.

²*Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 15 L. R. A. (N.S.) 612, 94 Pac. 798.

³*Rochford v. McGee*, 16 S. D. 606, 61 L. R. A. 335, 94 N. W. 695.
See § 3087.

⁴*Payne v. Long*, 121 Ala. 385, 25 So. 780.

⁵*Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193.

⁶*Howe v. Thompson*, 11 Me. 152; *Theopold Mercantile Co. v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977.

⁷*Howe v. Thompson*, 11 Me. 152.

⁸*Theopold Mercantile Co. v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977.

⁹*Cussen v. Brandt*, 97 Va. 1, 75 Am. St. Rep. 762, 32 S. E. 791.

¹*Arkansas. Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41.

Florida. *State Solicitors' Co. v. Savage*, 39 Fla. 703, 23 So. 413.

Illinois. *Carr v. Welch*, 46 Ill. 88.

Indiana. *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760.

memorandum which on its face does not purport to be a part of the instrument, noting the bank where payment is to be made,² or otherwise noting the place of payment;³ or a memorandum added to an assignment of an insurance policy to the effect that the loan for which the assignment was given was to be repaid on notice of thirty or sixty days by the assignee;⁴ or a memorandum written across the face of a fifteen hundred dollar note that it was to be paid to another, amount reduced to one thousand dollars.⁵ A memorandum concerning interest written upon the instrument,⁶ as a memorandum by the payee, "I hereby agree to accept five (5) per cent. annual interest on the within bond from June 1, 1890,"⁷ or an indorsement made by one who has purchased realty encumbered by mortgage, made on the note evidencing the mortgage debt, whereby he agrees to pay seven per cent. interest instead of six per cent.,⁸ is not a material alteration.

If the memorandum is, in legal effect, a part of the contract, the addition thereof is as much an alteration as a similar interlineation in the body of the instrument would have been.⁹ A change of the date which the instrument bears can not be regarded as a mere memorandum of the time at which it is to begin to bear interest.¹⁰

Kansas. *Reed v. Culp*, 63 Kan 595, 66 Pac. 616.

Massachusetts. *Boutelle v. Carpenter*, 182 Mass. 417, 65 N. E. 799.

Minnesota. *White v. Johns*, 24 Minn. 387.

Such addition is not a part of the contract as against one who does not assent thereto. *Jones v. Wixom*, — Wis. —, 174 N. W. 895.

² *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760.

Apparently contra, *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; a memorandum of payment being treated as prima facie a part of the contract and hence a material alteration.

³ *American National Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349.

⁴ *Mente v. Townsend*, 68 Ark 391, 59 S. W. 41.

⁵ *State Solicitors' Co. v. Savage*, 39 Fla. 703, 23 So. 413.

⁶ *Carr v. Welch*, 46 Ill. 88, Little-

field v. Coombs, 71 Me. 110; *Edward Thompson Co. v. Baldwin*, 62 Neb. 530, 87 N. W. 307; *Tremper v. Hemphill*, 35 Va. (8 Leigh) 623, 31 Am. Dec. 673.

⁷ *Reed v. Culp*, 63 Kan. 595, 66 Pac. 616.

⁸ *Boutelle v. Carpenter*, 182 Mass. 417, 65 N. E. 799.

See also, *In re Baker's Estate*, — Kan. —, 187 Pac. 870.

⁹ *Kentucky. Warren v. Fant*, 79 Ky 1.

Nebraska. *Edward Thompson Co. v. Baldwin*, 62 Neb. 530, 87 N. W. 307.

South Carolina. *Sanders v. Bagwell*, 32 S. Car. 238, 7 L. R. A. 743, 10 S. E. 946.

Vermont. *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

Wisconsin. *Kilkelly v. Martin*, 34 Wis. 525.

¹⁰ *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

§ 3087. Detachment of memoranda and mutilation of instrument. The alteration of a written instrument by detaching memoranda which form a material part of the original contract, or by mutilating the instrument so as to remove material provisions, is a material alteration.¹

The purpose of such mutilation is generally to cut what appears to be a negotiable instrument from the rest of the contract, the terms of which would prevent the instrument from being negotiable. Outside of questions of negotiability when the instrument is in the hands of a bona fide holder, the general principles of alteration apply. If the instrument is in the hands of one who is not a bona fide holder,² or where the instrument is in the hands of one who has actual or conclusive knowledge of such alteration,³ the promisor may show the fact of such alteration. In cases of this sort the fact that a provision authorizes the detachment of the note, will not prevent the maker from showing the facts of the transaction as a defense against such note in the hands of such party.⁴

If the instrument is in the hands of a bona fide holder, and the maker has not been negligent, he may show the fact of such alteration,⁵ even if the note was separated from the rest of the contract by a perforated line.⁶ The fact that the contract refers to a "detachable agreement" does not prevent the maker from showing that the detachable agreement, which was separated from the rest of the contract by a perforated line, was itself mutilated by cutting

¹Alabama. *Payne v. Long*, 121 Ala. 385, 25 So. 780.

Arkansas. *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111.

Illinois. *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474.

Kentucky. *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31.

Massachusetts. *Wheelock v. Freeman*, 30 Mass. (13 Pick.) 165, 23 Am. Dec. 674.

Michigan. *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *First National Bank v. Carter*, 138 Mich. 421, 101 N. W. 535; *Toledo Scales Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046; *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F. 1145, 168 N. W. 531.

North Dakota. *Stevens v. Barnes*, — N. D. —, 175 N. W. 709.

South Dakota. *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695.

²*Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F. 1145, 168 N. W. 531.

³*Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F. 1145, 168 N. W. 531.

⁴*Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046; *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F. 1145, 168 N. W. 531.

⁵*Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31; *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695.

⁶*Stevens v. Barnes*, — N. D. —, 175 N. W. 709; *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695.

it along a dotted line which was not perforated, and that if the entire agreement below the perforated line had been detached, it would have been non-negotiable.⁷

The difficulties which arise in cases of this sort are found where the maker has been guilty of negligence, but where he did not know of the possibility of such alteration and did not assent thereto, and the note is in the hands of a bona fide holder for value. In some jurisdictions the maker is held to be liable to a bona fide holder, because of his negligence.⁸ If the maker signs a contract with a part thereof written on the margin so that it can be removed without apparently changing the note,⁹ or if he signs a contract so drawn that part of it can be cut off and a promissory note left by such removal,¹⁰ he is liable to a bona fide holder if he was negligent in executing the instrument in such form.

In other jurisdictions the maker is not liable upon such altered instrument, even though he was negligent in executing it originally and though it is in the hands of a bona fide holder for value.¹¹ The maker's negligence in writing a condition of a note on a stub, which was afterwards removed,¹² or in writing part of the contract below the maker's signature so that it can readily be removed,¹³ or in accepting a bill of exchange with a copy of the contract under which it was given and which showed the consideration for such bill, glued upon such bill securely,¹⁴ does not make him liable upon the instrument as thus altered.¹⁵ If the agent of the adversary party accepts an order from the adversary party with certain provisions attached thereto, the principal is bound by such provisions, even though the agent detached them before he forwarded the order.

⁷ *Harrison v. Union Store Co.*, 170 Ky. 672, 201 S. W. 31.

It has even been held that detaching a note from an order is an alteration, although the order expressly authorizes the detaching of such note, and although the note is detached on the perforated line, which is placed there to permit such detaching. *Stevens v. Barnes*, — N. D. —, 175 N. W. 709.

⁸ *Cornell v. Nebeker*, 58 Ind. 425; *Woollen v. Ulrich*, 64 Ind. 120; *Pratt v. Rounds*, 160 Ky. 358; *Zimmerman v. Rote*, 75 Pa. St. 188; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75.

⁹ *Cornell v. Nebeker*, 58 Ind. 425; *Zimmerman v. Rote*, 75 Pa. St. 188.

¹⁰ *Woollen v. Ulrich*, 64 Ind. 120; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75.

¹¹ *Bothell v. Schweitzer*, 84 Neb. 271, 133 Am. St. Rep. 623, 22 L. R. A. (N. S.) 263, 120 N. W. 1129; *Stevens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

¹² *Stevens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

¹³ *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395.

¹⁴ *Bothell v. Schweitzer*, 84 Neb. 271, 133 Am. St. Rep. 623, 22 L. R. A. (N. S.) 263, 120 N. W. 1129.

¹⁵ *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111.

§ 3088. Retracing words of original instrument. The act of the holder of an instrument in retracing words therein which have become defaced or illegible, does not amount to an alteration,¹ since such retracing is not done with the intention to alter the instrument,² and since the legal effect is not altered if the prior words are correctly retraced. The act of the holder in retracing the signature of the maker, is not an alteration,³ even if in such retracing a name is spelled incorrectly,⁴ at least if the name, as erroneously spelled, is substantially the same as the true name of the party.⁵

IV

INTENT TO MAKE ALTERATION

§ 3089. Correction of mistake—Theory that correction is not alteration. To constitute alteration the contract must be so changed physically as to express an intention different from the real agreement of the parties.¹

The effect of alteration of a contract containing mistake in expression, by which alteration such contract is made to conform to the real agreement of the parties, presents some questions for consideration. If the parties agree to such informal reformation there is no question as to its validity.² If the parties have not agreed to such correction, the right of one party to constitute him-

¹ *Tutwiler v. Burns*, 160 Ala. 386, 49 So. 455; *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8; *Dunn v. Clements*, 52 N. Car. 58.

² See §§ 3089 et seq.

³ *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8; *Dunn v. Clements*, 52 N. Car. 58.

⁴ *Dunn v. Clements*, 52 N. Car. 58.

⁵ *Dunn v. Clements*, 52 N. Car. 58.

¹ *California*. *Sill v. Reese*, 47 Cal. 294.

Illinois. *Ryan v. First National Bank*, 148 Ill. 349 [sub nomine, *Reilly v. First National Bank*, 35 N. E. 1120].

Iowa. *McLaughlin v. American Fire Insurance Co.*, 126 Ia. 149, 106 Am. St. Rep. 344, 101 N. W. 765.

Kansas. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Kentucky. *Duker v. Franz*, 70 Ky. (7 Bush.) 273, 3 Am. Rep. 314.

Massachusetts. *Ames v. Colburn*, 77 Mass. (11 Gray) 390, 71 Am. Dec. 723; *Nickerson v. Swett*, 135 Mass. 514.

Michigan. *Goodenow v. Curtis*, 33 Mich. 505; *First National Bank v. Carson*, 60 Mich. 432, 27 N. W. 589.

Mississippi. *McRaven v. Crisler*, 53 Miss. 542.

Nebraska. *Blenkiron Brothers v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

Oregon. *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

Pennsylvania. *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541.

Wyoming. *McLaughlin v. Venine*, 2 Wyo. 1.

² *Bryant v. Bank*, 107 Tenn. 560, 64 S. W. 895.

self chancellor and to decree reformation in an *ex parte* proceeding on his own evidence, without notice to the adversary party, and to execute his decree forthwith, is more questionable. It has been held, however, that as between the parties to the contract who knew of the mistake, such alteration does not avoid the contract.³ In some jurisdictions a modification of this sort is not regarded as technical alteration, while in other jurisdictions the courts reach the same result and uphold the contract on the theory that while it may be an alteration, it is not a material alteration.⁴ An instrument is not avoided in equity by such alteration.⁵

The agent of the insurer may modify the policy so as to conform to the agreement of the parties, even after loss,⁶ at least if such modification will increase the liability of the insurer. If, by mistake, the policy does not express on its face all of the risks which the insurer assumes, the agent may attach a slip which makes the written contract conform to the actual agreement, even after loss.⁷ If the parties intend to provide that a note

³ **England.** *Byrom v. Thompson*, 11 Ad. & El. 31.

United States. *Hamrick v. Patrick*, 119 U. S. 156, 30 L. ed. 306 (deed).

Alabama. *Yarbough Turpentine Co. v. Taylor*, — Ala. —, 73 So. 458.

California. *Sill v. Reese*, 47 Cal. 294; *Bank v. Spaulding*, — Cal. —, 170 Pac. 407.

Illinois. *Merritt v. Dewey*, 218 Ill. 500, 2 L. R. A. (N.S.) 217, 75 N. E. 1066.

Iowa. *McLaughlin v. American Fire Insurance Co.*, 126 Ia. 149, 106 Am. St. Rep. 344, 101 N. W. 765.

Kansas. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Kentucky. *Duker v. Franz*, 70 Ky. (7 Bush.) 273, 3 Am. Rep. 314.

Massachusetts. *Ames v. Colburn*, 77 Mass. (11 Gray) 390, 71 Am. Dec. 723; *Nickerson v. Swett*, 135 Mass. 514; *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162.

Michigan. *Goodenow v. Curtis*, 33 Mich. 505; *First National Bank v. Carson*, 60 Mich. 432, 27 N. W. 589.

Minnesota. *Spiering v. Spiering*, 178 Minn. 119, 164 N. W. 583.

Mississippi. *McRaven v. Crisler*, 53 Miss. 542.

Nebraska. *Blenkiron Brothers v. Rogers*, 87 Neb. 716, 31 L. R. A. (N. S.) 127, 127 N. W. 1062.

Pennsylvania. *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541.

Wyoming. *McLaughlin v. Venine*, 2 Wyom. 1.

⁴ *Blenkiron Bros. v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

See, for a case in which the alteration affected the liability of an assenting guarantor, and was therefore immaterial as to the principal, *Ryan v. First National Bank*, 148 Ill. 349 [sub nomine, *Reilly v. First National Bank*, 35 N. E. 1120].

⁵ *McClure v. Little*, 15 Utah 379, 62 Am. St. Rep. 938, 49 Pac. 298.

⁶ *McLaughlin v. American Fire Ins. Co.*, 126 Ia. 149, 106 Am. St. Rep. 344, 101 N. W. 765.

⁷ *McLaughlin v. American Fire Ins. Co.*, 126 Ia. 149, 106 Am. St. Rep. 344, 101 N. W. 765.

bears interest from date, and by mistake the word "annum" is written instead of the word "date," the act of the holder in changing the word "annum" to "date" is not a material alteration.⁸ If a written contract through inadvertence uses, for the name of the promisee, the corporate name which the promisee had once had, the alteration of the contract by the promisee so as to set forth its present corporate name, in accordance with the actual intention of the parties, is not a material alteration.⁹ An alteration in the rate of interest, as a change from eight per cent. as printed to seven and a half per cent. as the parties had agreed upon;¹⁰ or a change in words importing liability, as a change from words importing individual liability to words importing corporate liability incurred through the individuals signing the notes as agents for the corporation, to conform to the real intention of the parties;¹¹ a change in the name of the payee,¹² or a change in the date,¹³ does not avoid the contract if made to correct a mistake in expression.

§ 3090. Defective attempt to correct mistake. This principle has been extended to cases where the party sought in good faith to modify the instrument so as to conform to the intention of the parties, but for some reason failed in his alteration to express the real intention of the parties. Thus an innocent alteration of the date of the note, made in good faith, to correspond to the date of delivery under the belief that the parties intended such date, does not avoid the contract.¹ A bona fide alteration in a memorandum of guaranty, made by guarantee without the knowledge of the guarantor, intended to correct an error in the amount of the debt, but which did not state the correct amount, does not avoid the memorandum, the debt being otherwise identified.² Such an alteration will, however, discharge a party to the written instrument

⁸ *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

⁹ *Blenkiron Brothers v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

¹⁰ *Osborn v. Hall*, 100 Ind. 153, 66 N. E. 457.

¹¹ *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162.

¹² *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389.

See also, *Blenkiron Brothers v. Rog-*

ers, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

¹³ *Ames v. Colburn*, 77 Mass. (11 Gray) 390, 71 Am. Dec. 723.

See also, *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

¹ *Booth v. Powers*, 56 N. Y. 22; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733 [citing, *Bowers v. Jewell*, 2 N. H. 543]; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541.

² *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 62.

who did not know of the real contract between the parties and was not a party thereto. Thus a change in the date to conform to the agreement of the maker and payee releases an accommodation indorser.³ A change after indorsement but before delivery, changing the place of payment to another state, releases an accommodation party.⁴

§ 3091. Theory that correction of mistake is alteration. In some jurisdictions, however, it is held that a mistake in expression can not be corrected by the action of one party alone, and that such a correction is an alteration, avoiding the contract if otherwise material,¹ though ordinarily not fraudulent. If a note is given to renew a former note, but three of the makers were not parties to the original note, a change in the date of such note is a material alteration as to such new parties, even if it was made so as to conform to the real intention of all the parties to the original note.² An alteration in a note, which increases the rate of interest, is held to avoid the note, although such alteration was made innocently in order to make the note express the real agreement into which the parties had entered.³

§ 3092. Unintentional change not alteration. To constitute an alteration the change in the language of the written instrument

³ *McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 540.

⁴ *Pelton v. Lumber Co.*, 113 Cal. 21, 45 Pac. 12.

¹ *Illinois. Merritt v. Dewey*, 213 Ill. 599, 2 L. R. A. (N.S.) 217, 75 N. E. 1066 [distinguishing, *Ryan v. First National Bank*, 148 Ill. 349 (sub nomine, *Reilly v. First National Bank*, 35 N. E. 1120), as a case in which the alteration affected the liability of an assenting guarantor, and was, therefore, immaterial as to the principal debtor].

Iowa. Murray v. Graham, 29 Ia. 520.

Kansas. Edington v. McLeod, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Kentucky. Letcher v. Bates, 29 Ky. (6 J. J. Mar.) 524, 22 Am. Dec. 92;

Citizens' State Bank v. Johnson County, 182 Ky. 531, 207 S. W. 8.

Missouri. Evans v. Foreman, 60 Mo. 449; *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49.

New Jersey. Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

South Carolina. Smith v. Smith, 27 S. Car. 166, 13 Am. St. Rep. 633, 3 S. E. 78.

Vermont. Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639; *Gray v. Williams*, 91 Vt. 111, 99 Atl. 735.

² *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

³ *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

must have been made intentionally. If not intentional, it is not an alteration.¹ Placing internal revenue stamps on the face of a shipping receipt is not the erasure or alteration of any part of such receipt or contract covered thereby.² If a waiver of demand and notice and a guaranty of payment is affixed with a stamp, and by mistake is placed above the signature of an indorser who did not waive or guarantee, instead of over the signature of the one who did, this does not discharge such indorser.³ If by mistake an indorsement is canceled on the wrong note,⁴ or one who means to sign as surety signs in the place appropriate for a witness,⁵ the contract is not thereby discharged.

In the foregoing cases there was no intent to make the alteration in question at all. The mistake was analogous to a mistake in execution.⁶ The principle has been extended to alterations which the party making them intended to make, but such intention was caused by mistake of fact as to some collateral material fact.⁷ If a holder, believing that an instrument is to be paid,⁸ or has been paid,⁹ cancels it, such cancellation is not such alteration as discharges it.

An alteration made through a mistake of law while attempting to accomplish some lawful purposes, has been held not to discharge the contract. An example of this is found where one wishes to transfer a negotiable instrument and attempts to do so by substituting the name of the indorsee for that of the original payee.¹⁰ If a guarantor by inadvertence signs his name in such a way as to indicate prima facie that he is an original promisor, the contract is not discharged thereby.¹¹

¹ *Shaw v. Probasco*, 130 Ga. 481, 77 S. E. 577; *Murray v. Graham*, 29 Ia. 520; *Sloman v. Express Co.*, 134 Mich. 16, 95 N. W. 999; *Rhoads v. Frederick*, 8 Watts (Pa.) 448.

² *Sloman v. Express Co.*, 134 Mich. 16, 95 N. W. 999.

³ *Gordon v. Bank*, 144 U. S. 97, 36 L. ed. 360.

⁴ *Brett v. Marsten*, 45 Me. 401.

⁵ *Fisher v. King*, 153 Pa. St. 3, 25 Atl. 1029.

⁶ See §§ 251 et seq.

⁷ This is analogous in nature to mistake in inducement (§ 384), though its effects are different.

⁸ *Novelli v. Rossi*, 2 B. & Ad. 757.

⁹ *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Boulware v. State Bank*, 12 Mo. 542.

¹⁰ *Horst v. Wagner*, 43 Ia. 373, 22 Am. Rep. 255.

¹¹ *Wallace v. Jewell*, 21 O. S. 163, 8 Am. Rep. 48.

V

MATERIALITY OF ALTERATIONS

§ 3093. Classes of alterations—Material alterations. Alterations are to be classified upon two different bases: they may as to their effect upon the instrument be material or immaterial; and as to the purpose with which they are made they may be fraudulent or innocent. A material alteration is one which in some way changes the legal effect of the instrument.¹

Precedents for determining whether specific changes are material or immaterial must be used with great caution, since it is only by determining the legal effect of the instrument before the alteration and after the alteration that it is possible to decide whether the change is material or not. As will be seen from comparing examples of material and immaterial alterations, a specific change may be a material alteration in one contract and an immaterial alteration in another. The rules here given are merely general statements, subject to the exception of particular forms of contract.

§ 3094. What constitute material alterations—Change in parties. A change in the parties to the instrument is generally a material alteration.¹ A change in the name of the promisor is a material alteration.² Thus adding "& Co." to the maker's signature is a

¹ Illinois. *Ryan v. First National Bank*, 148 Ill. 349 [sub nomine, *Reilly v. First National Bank*, 35 N. E. 1120]; *Keller v. State Bank*, — Ill. —, 127 N. E. 94.

Iowa. *Hall v. McHenry*, 19 Ia. 521, 87 Am. Dec. 451.

Minnesota. *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N.S.) 519, 124 N. W. 20.

Oklahoma. *Bank of Commerce v. Webster*, — Okla. —, L. R. A. 1918F, 696, 172 Pac. 942.

Pennsylvania. *Craighead v. McLoney*, 99 Pa. 211; *Hartley v. Corboy*, 150 Pa. 23, 24 Atl. 295.

Vermont. *Bigelow v. Stilphen*, 35 Vt. 521; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389.

Virginia. *Hoffman v. Bank*, 99 Va. 480, 39 S. E. 134.

Washington. *Washington Finance*

Corporation v. Glass, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

¹ Alabama. *Montgomery v. Crosthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 So. 498.

Missouri. *State v. McGonigle*, 191 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735, 13 S. W. 758.

North Dakota. *Eaton v. Delay*, 32 N. D. 328, L. R. A. 1916D, 528, 155 N. W. 644.

Ohio. *Davis v. Bauer*, 41 O. S. 257.

Oklahoma. *Cox v. Kirkwood*, 59 Okla. 133, 158 Pac. 930.

South Dakota. *Holbart v. Lauritsen*, 34 S. D. 267, 53 L. R. A. (N.S.) 166, 148 N. W. 19.

Wisconsin. *Donkle v. Milem*, 88 Wis. 33, 59 N. W. 586.

² *Vincent v. People*, 25 Ill. 412; *Davis v. Coleman*, 29 N. Car. (7 Ired. L.) 424; *North v. Henneberry*, 44 Wis. 306 (deed).

material alteration.³ Erasure of the name of the maker of the instrument releases a co-maker who does not assent thereto.⁴ Where one surety's name was erased and another one was added, a surety who did not consent thereto is released from the bond⁵ or note⁶ which he had signed. A signed a note after delivery. His name was subsequently erased. As parties to the note would be entitled to hold A, the erasure avoids the note.⁷

A change in the name of the promisee is a material alteration,⁸ such as the substitution of the name of the husband for that of his wife as payee;⁹ or the addition of words which make the note payable to payee or bearer, the note being payable to payee only in its original form;¹⁰ or a change by the party for whose benefit a note was given, of the name of the payee, from the name of the bank to which it was made payable, to his own name;¹¹ or the addition of "junior" to the name of the payee in a note, making it thereby payable to a different person.¹²

Even though the addition of words which operate as a descriptio personae do not alter the identity of the party, it has been held

³ *Montgomery v. Crosthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 So. 498.

See *Wilde v. Armsby*, 60 Mass. (6 Cush.) 314, that such a change in the name of the principal debtor avoids the contract as to a guarantor.

⁴ *Martin v. Thomas*, 65 U. S. (24 How.) 315, 16 L. ed. 689; *Smith v. United States*, 69 U. S. (2 Wall.) 219, 17 L. ed. 788.

⁵ *Smith v. United States*, 69 U. S. (2 Wall.) 219, 17 L. ed. 788; *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 8 L. R. A. 735, 13 S. W. 758. (As the substituted surety signed, meaning only to be one of several sureties, he, too, is released.)

⁶ *Davis v. Coleman*, 29 N. Car. (7 Ired. L.) 424.

⁷ *Bank v. Weidenbeck*, 87 Fed. 271. (Hence it releases directors from personal liability for not filing a corporate report.)

⁸ *Indiana. Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Iowa. Bell v. Mahin, 69 Ia. 408, 29 N. W. 331.

Nebraska. Erickson v. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 28 L. R. A. 577, 62 N. W. 1078.

Ohio. Davis v. Bauer, 41 O. S. 257.

Oklahoma. International Bank v. Mullen, 30 Okla. 547, 120 Pac. 257; *Cox v. Kirkwood*, 59 Okla. 183, 158 Pac. 930.

South Dakota. Holbart v. Lauritson, 34 S. D. 267, L. R. A. 1915A, 166, 148 N. W. 19.

Vermont. Holden v. Rutland Ry., 73 Vt. 317, 50 Atl. 1096 (mileage book).

Virginia. Hoffman v. Bank, 99 Va. 480, 39 S. E. 134.

⁹ *Sneed v. Sabinal Mining & Milling Co.*, 71 Fed. 493, 18 C. C. A. 213 [affirmed on rehearing, 73 Fed. 925].

¹⁰ *Cox v. Kirkwood*, 59 Okla. 183, 158 Pac. 930.

¹¹ *Holbart v. Lauritson*, 34 S. D. 267, L. R. A. 1915A, 166, 148 N. W. 19.

¹² *Broughton v. Fuller*, 9 Vt. 373.

that they may change the legal effect of the instrument; and accordingly such modifications are regarded as material alterations.¹³

However, where the indorsee of a note drew a line through the name of the payees, inserted his own name and had the payees indorse it over to him, it was held that there was no material alteration.¹⁴ The erasure of the name of a surety is not such a material alteration as to discharge the principal.¹⁵

§ 3095. Addition of new party. The addition of the name of a joint promisor or maker is generally held to be such a material alteration as to discharge the parties who have not assented thereto.¹ While it is not necessary to prove that an alteration is prejudicial to the party discharged thereby in order to show that it is material, the possibility of prejudice in case of such addition of a new party has been suggested to be that such alteration, if valid, might change the jurisdiction before which the original obligor could be brought.²

The courts are nearly unanimous in their application of this principle to the case of sureties. If A executes an instrument as principal and B executes it as a co-obligor, as surety for A, the addition of a new party to the instrument as co-obligor without B's consent discharges B.³ Some exceptions exist to this rule. If the

¹³ *Tyler v. First National Bank*, 150 Ky. 515, 150 S. W. 665; *York v. James*, 43 N. J. L. 332.

¹⁴ Hence recovery could be had thereon after it was restored to its original form. *James v. Tilton*, 183 Mass. 275, 67 N. E. 326.

¹⁵ *Huntington v. Finch*, 3 O. S. 445.

¹ *England. Gardner v. Walsh*, 5 El. & Bl. 83.

Canada. Reid v. Humphrey, 6 Ont. App. 403.

Alabama. Brown v. Johnson, 127 Ala. 292, 85 Am. St. Rep. 134, 51 L. R. A. 403, 28 So. 579.

Colorado. Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818.

Indiana. Houck v. Graham, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 504.

Iowa. Hamilton v. Hooper, 46 Ia. 515, 26 Am. Rep. 161; *Sullivan v. Rudisill*, 63 Ia. 158, 18 N. W. 856; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W.

340; *Beem v. Farrell (Ia.)*, 108 N. W. 1044.

Missouri. Bank v. Myers, 50 Mo. App. 157; *Allen v. Dornan*, 57 Mo. App. 288.

Ohio. Wallace v. Jewell, 21 O. S. 163, 8 Am. Rep. 48.

Oklahoma. Oklahoma Sash & Door Co. v. American Bonding Co., — Okla. —, 170 Pac. 511 [denying rehearing, 153 Pac. 1151]; *Bank of Commerce v. Webster*, — Okla. —, L. R. A. 1918F, 606, 172 Pac. 942.

Texas. Harper v. Stroud, 41 Tex. 367.

Washington. Handsaker v. Peterson, 71 Wash. 218, 128 Pac. 230.

² *Shipp v. Suggett*, 48 Ky. (9 B. Mon.) 155; *Wallace v. Jewell*, 21 O. S. 163, 8 Am. Rep. 48.

³ *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 504; *Hall v. McHenry*, 19 Ia. 521, 87 Am. Dec. 451;

law provides for additional sureties, the prior sureties are presumed to contract with full knowledge that subsequent sureties may be added, and they are therefore not discharged by such addition. Thus where the statute authorized the county board to require either an additional bond or additional sureties on the original bond of the county treasurer, and additional sureties are required and sign their names, the original sureties are not released.⁴ In some cases the fact that the additional sureties signed as sureties for all prior parties and not as co-sureties with the original sureties,⁵ or that they signed as guarantors,⁶ has been held not to discharge a prior surety.

§ 3096. Addition of surety as affecting primary debtor. Whether the addition of a surety or co-obligor without the consent of the principal avoids the contract as to him is a question upon which the courts have divided. The weight of authority is that such alteration discharges the principal.¹ The party signing last is, of course, bound even if the principal resists liability successfully, provided such party understood the circumstances under which he signed.² Still less does such addition release the party last signing if the principal does not resist the enforcement of liability against himself.³ Other authorities hold that the addition of a surety without the principal's consent does not discharge the principal.⁴ The

Browning v. Gosnell, 91 Ia. 448, 59 N. W. 340; *Wallace v. Jewell*, 21 O. S. 163, 8 Am. Rep. 48.

Contra, *Brey v. Hagan*, 110 Ky. 566, 96 Am. St. Rep. 464, 62 S. W. 1.

⁴ *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681 (especially where the later sureties are rejected).

⁵ *Bowser v. Rendell*, 31 Ind. 128.

⁶ *McCaughy v. Smith*, 27 N. Y. 39. (Held by a divided court, a majority of which did not agree on any legal proposition not to discharge an indorser.) *Hecker v. Mahler*, 64 O. S. 398, 60 N. E. 555.

¹ *Alabama*. *Brown v. Johnson*, 127 Ala. 292, 85 Am. St. Rep. 134, 51 L. R. A. 403, 28 So. 579 [overruling *Montgomery Railroad Co. v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314].

Illinois. *Soaps v. Eichberg*, 42 Ill. App. 375.

Indiana. *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229.

Kentucky. *Shipp v. Suggett*, 48 Ky. (9 B. Mon.) 5; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652.

Missouri. *Lunt v. Silver*, 5 Mo. App. 186.

Texas. *Harper v. Stroud*, 41 Tex. 367; *Ford v. Bank* (Tex. Civ. App.), 34 S. W. 684.

² *Favorite v. Stidham*, 84 Ind. 423; *Hamilton v. Hooper*, 46 Ia. 515, 26 Am. Rep. 161; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340.

³ *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314.

⁴ *Alabama*. *Montgomery Railroad Co. v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314.

Kentucky. *Evans v. Partin* (Ky.), 56 S. W. 648.

Michigan. *Union Banking Co. v. Martin*, 113 Mich. 521, 71 N. W. 867.

Nebraska. *Bank v. Job*, 48 Neb. 774, 67 N. W. 781; *Royse v. Bank*, 50 Neb. 16, 69 N. W. 301.

Ohio. *Hecker v. Mahler*, 64 O. S. 398, 60 N. E. 555.

English courts at first held that such addition did not discharge the original maker;⁵ but this case was subsequently overruled and the view that the principal was discharged was adhered to.⁶ The supreme court of the United States has laid down the rule that the addition of the name of a surety does not discharge the principal.⁷ The real question involved was whether such alteration discharged a mortgage given to secure such altered note, and it was held that the mortgage was not discharged. Accordingly, the holding in *Mersman v. Werges* has subsequently been treated as an obiter by the circuit court;⁸ but this case was reversed by the circuit court of appeals.⁹ The additional signature in this case was, however, that of a guarantor, which is not a material alteration.

§ 3097. Addition or mutilation of seal. The fundamental classification of contracts at common law was into formal contracts, which included the contracts under seal and simple contracts. The addition or the mutilation of a seal has always been regarded as a material alteration where the seal had its common-law effect, or where by statute a sealed instrument was in any way different from an instrument not under seal.¹ The addition of a seal to an instrument which was executed as a simple instrument is a material alteration,² as where such addition, if operative, would render the instrument subject to a different statute of limitations from that which was applicable to a sealed instrument.³

⁵ *Catton v. Simpson*, 8 Ad. & El. 136.

⁶ *Gardner v. Walsh*, 5 El. & Bl. 83.

⁷ *Mersman v. Werges*, 112 U. S. 139, 28 L. ed. 641. (The added signature was a forgery of the name of the maker's wife.)

⁸ *Bank v. Weidenbeck*, 87 Fed. 271.

⁹ *Bank v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131.

¹ *England. Mathewson's Case*, 5 Coke 22b (except as to seal of obligor under a several contract). *Seaton v. Henson*, 2 Show. 29.

² *United States. United States v. Linn*, 42 U. S. (1 How.) 104, 11 L. ed. 64.

³ *Massachusetts. Warring v. Williams*, 25 Mass. (8 Pick.) 322.

⁴ *Michigan. Rawson v. Davidson*, 49 Mich. 607, 14 N. W. 565.

⁵ *New York. Farmers' Loan & Trust Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358.

Pennsylvania. Rittenhouse v. Levering, 6 Watts. & S. (Pa.) 190; *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49; *Bowman v. Berkey*, 262 Pa. St. 411, 105 Atl. 557.

West Virginia. Piercy v. Piercy, 5 W. Va. 199.

² *United States. United States v. Linn*, 42 U. S. (1 How.) 104, 11 L. ed. 64.

Massachusetts. Warring v. Williams, 25 Mass. (8 Pick.) 322.

Michigan. Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565.

New York. Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358.

Pennsylvania. Bowman v. Berkey, 259 Pa. St. 327, 103 Atl. 49; *Bowman v. Berkey*, 262 Pa. St. 411, 105 Atl. 557.

³ *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49.

Since the accidental mutilation of a seal without the fault of any of the parties to the instrument operated as a discharge thereof by the original common-law rule,⁴ the intentional act of a party in tearing off the seal operated as a material alteration.⁵

§ 3098. Change in attesting witnesses. Adding the names of attesting witnesses, where such addition may in any way change the legal effect of the instrument,¹ as where execution may be proved by such witness or by proof of his signature if he is dead or beyond seas,² or such addition may prolong the period of limitations,³ or removing the name of a subscribing witness placed there originally,⁴ is a material alteration.

§ 3099. Change in date. Changes in the date of the instrument,¹ either antedating² or postdating³ it; or a change in the

⁴ See § 1164.

⁵ Mathewson's Case, 5 Coke 22b (except as to mutilation of seal of several obligor); Seaton v. Henson, 2 Show. 29; Rittenhouse v. Levering, 6 Watts & S. (Pa.) 190; Piercy v. Piercy, 5 W. Va. 199.

¹ White Sewing Machine Co. v. Saxon, 121 Ala. 399, 25 So. 784; Brackett v. Mountfort, 11 Me. 115; Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169; Adams v. Frye, 41 Mass. (3 Met.) 103.

Contra, Blackwell v. Lane, 20 N. Car. (4 Dev. & B. L.) 113, 32 Am. Dec. 675; Foust v. Renno, 8 Pa. St. 378; Henning v. Werkheiser, 8 Pa. St. 518; Marshall v. Gougler, 10 Serg. & R. (Pa.) 164; Shiffer v. Mosier, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426; Swank v. Kaufman, 255 Pa. St. 316, L. R. A. 1917D, 826, 99 Atl. 1000; Fuller v. Green, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907.

² White Sewing Machine Co. v. Saxon, 121 Ala. 399, 25 So. 784; Swank v. Kaufman, 255 Pa. St. 316, L. R. A. 1917D, 826, 99 Atl. 1000.

³ Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169.

⁴ Sharpe v. Bagwell, 16 N. Car. (1 Dev. Eq.) 115.

¹ United States. Wood v. Steele, 73 U. S. (6 Wall.) 80, 18 L. ed. 725.

Alabama. Lesser v. Scholze, 93 Ala. 338, 9 So. 273.

Maryland. Mitchell v. Ringgold, 3 Harr. & J. (Md.) 159, 5 Am. Dec. 433.

Michigan. Johnson v. Johnson, 66 Mich. 525.

Missouri. McMurtrey v. Sparks, 71 Mo. App. 126.

Montana. McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548.

Nebraska. Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369.

New Jersey. Bodine v. Berg, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

New York. Rogers v. Vosburgh, 81 N. Y. 228.

Ohio. Newman v. King, 51 O. S. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683.

Pennsylvania. Stephens v. Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.

Texas. Bell v. Boyd, 76 Tex. 133, 13 S. W. 232.

Vermont. Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

² Seebold v. Tatlie, 76 Minn. 131, 78 N. W. 967.

³ Boulton v. Langmuir, 24 Ont. App. 618; Wood v. Steele, 73 U. S. (6 Wall.) 80, 18 L. ed. 725; Newman v.

period of maturity, making maturity come earlier⁴ or later⁵ than that fixed by the original contract; changing the period for which interest is to run, either making it begin earlier,⁶ as by changing the period of interest from "from maturity" to "from date,"⁷ or by delaying it,⁸ adding "fixed," which excludes days of grace;⁹ or adding that certain orders should be filled in thirty days,¹⁰ are all material alterations. A change of the time of performance from a certain number of days to "a reasonable time," is a material alteration,¹¹ apparently without regard to the question of the actual change in the time for performance.¹² Inasmuch as the original contract was to be performed according to its terms in a certain time, and the question of a reasonable time is a question of fact, such an alteration should be regarded as material, even if in the particular case the two different periods of time happened to coincide.

If a date is marked out, and another date is written above it, it will be presumed that such change is intended as an alteration of the instrument, and not merely as a memorandum showing the time from which interest is to be computed.¹³

Change of a date in a renewal instrument is material as to the parties who do not assent thereto, at least if they were not liable on the original instrument, although such date is changed for the purpose of making the new instrument bear interest from the time to which interest had been paid on the original instrument.¹⁴

King, 54 O. S. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683.

⁴ Hartley v. Corboy, 150 Pa. St. 23, 24 Atl. 295; Crockett v. Thomason, 37 Tenn. (5 Sneed) 342.

⁵ Stayner v. Joice, 82 Ind. 35; Bank v. Payne (Ky.), 42 S. W. 736; Flanagan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Bacon v. Theiss, — Mo.—, 208 S. W. 254.

⁶ Brooks v. Allen, 62 Ind. 401.

⁷ Sheley v. Sampson, 5 Kan. App. 465, 46 Pac. 994.

⁸ Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15.

⁹ Steinau v. Moody, 100 Ga. 136, 28 S. E. 30.

¹⁰ United States Glass Co. v. Bottle Co., 81 Fed. 993.

¹¹ Robertson v. Southwestern Co., 136 Ark. 417, 206 S. W. 755.

¹² Robertson v. Southwestern Co., 136 Ark. 417, 206 S. W. 755.

¹³ Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

¹⁴ Barton Savings Bank & Trust Co. v. Stephenson, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

§ 3100. Change in subject-matter. A change in the amount of the instrument,¹ either increasing the amount of the note,² or decreasing it,³ changing a recital in a note that it was given for the purchase price of buildings "on" lot one so as to read, "and" lot one;⁴ adding to an insurance policy after loss that it covers "shelving counters and drawers," even though the loss on the building alone exceeds the face of the policy;⁵ or adding property to a bill of

¹ **England.** Scholfield v. Londesborough [1895], 1 Q. B. 536.

Alabama. Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277.

Arkansas. Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892.

Illinois. Keller v. State Bank, — Ill. —, 127 N. E. 94.

Indiana. Johnston v. May, 76 Ind. 293.

Iowa. Knoxville National Bank v. Clark, 51 Ia. 264, 33 Am. Rep. 129, 1 N. W. 491.

Kansas. Herington Bank v. Wangerin, 65 Kan. 423, 50 L. R. A. 717, 70 Pac. 330.

Maryland. Burrows v. Klunk, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378.

Massachusetts. Doane v. Eldridge, 82 Mass. (16 Gray) 254; Wade v. Withington, 83 Mass. (1 All.) 561; Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Cape Ann National Bank v. Burns, 129 Mass. 596.

Minnesota. Warder, Bushnell & Glessner Co. v. Willyard, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300.

Missouri. Highland Investment Co. v. Kansas City Computing Scales Co., 277 Mo. 365, 209 S. W. 895.

New Mexico. Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72.

Ohio. Merrick v. Bourry, 4 O. S. 60; Portage County Branch Bank v. Lane, 8 O. S. 405.

South Dakota. Searles v. Seipp, 6 S. D. 472, 61 N. W. 804.

Washington. Washington Finance Corporation v. Glass, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

Wisconsin. Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

² **England.** Scholfield v. Londesborough [1895], 1 Q. B. 536.

Alabama. Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277.

Arkansas. Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892.

Iowa. Knoxville National Bank v. Clark, 51 Ia. 264, 33 Am. Rep. 129, 1 N. W. 491.

Kansas. Herington Bank v. Wangerin, 65 Kan. 423, 59 L. R. A. 717, 70 Pac. 330.

Maryland. Burrows v. Klunk, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378.

Massachusetts. Wade v. Withington, 83 Mass. (1 All.) 561; Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Cape Ann National Bank v. Burns, 129 Mass. 596.

Minnesota. Warder, Bushnell & Glessner Co. v. Willyard, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300.

Missouri. Highland Investment Co. v. Kansas City Computing Scales Co., 277 Mo. 365, 209 S. W. 895.

New Mexico. Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72.

South Dakota. Searles v. Seipp, 6 S. D. 472, 61 N. W. 804.

Wisconsin. Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

³ **Keller v. State Bank, — Ill. —, 127 N. E. 94; Johnston v. May, 76 Ind. 293; Doane v. Eldridge, 82 Mass. (16 Gray) 254; Portage County Branch Bank v. Lane, 8 O. S. 405.**

⁴ **Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270.**

⁵ **Phoenix Insurance Co. v. McKernan, 100 Ky. 97, 37 S. W. 490.**

sale⁶ or chattel mortgage⁷ are all material alterations. Inserting the word "gold" before "dollars" in a promise to pay money, is a material alteration.⁸ So adding over a blank indorsement: "For value received we hereby guarantee the payment of the within note and waive presentment for payment, demand, and notice of protest," and "to be exchanged for railroad bonds," are both material alterations.⁹ The act of the grantee in causing a change in a deed, which reduces the amount of a mortgage indebtedness which the grantee assumes and agrees to pay, is a material alteration.¹⁰ The act of the holder of a note and mortgage, in forging the maker's name to interest notes and in attaching them to the principal note, is a material alteration of such note.¹¹ After a mortgage has been executed and delivered, the addition of a clause providing for insurance without the consent of the mortgagor, is a material alteration.¹² The indorsement of a fictitious credit upon a note, so as to reduce the amount which appears to be due thereon, is a material alteration.¹³

§ 3101. Change in rate of interest. A change in the rate of interest,¹ increasing² or diminishing³ the rate; or inserting the

⁶ *Babb v. Clewson*, 10 Serg. & R. (Pa.) 419, 13 Am. Dec. 681.

⁷ *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078.

⁸ *Foxworthy v. Colby*, 64 Neb. 216, 62 L. R. A. 393, 89 N. W. 800.

⁹ *Hartnett v. Holdrege* (Neb.), 97 N. W. 443.

¹⁰ *Hurt v. Stout*, 105 Kan. 54, 131 Pac. 623.

¹¹ *Bacon v. Theiss*, — Mo. —, 208 S. W. 254 (time of maturity was also altered).

¹² *Frazier v. Crook*, — Mo. —, 204 S. W. 392.

¹³ *Highland Investment Co. v. Kansas City Computing Scales Co.*, 277 Mo. 365, 209 S. W. 895; *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

¹ *Illinois*. *Merritt v. Dewey*, 218 Ill. 509, 2 L. R. A. (N.S.) 217, 75 N. E. 1066.

Indiana. *Shanks v. Albert*, 47 Ind. 361; *Schnewind v. Hackett*, 54 Ind. 248; *Bowman v. Mitchell*, 79 Ind. 84.

Kansas. *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1945, 88 Pac. 559; *Eddington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Michigan. *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

Ohio. *Harsh v. Klepper*, 28 O. S. 200.

Pennsylvania. *Boustead v. Cuyler*, 116 Pa. St. 551, 8 Atl. 548; *Citizens' National Bank v. Williams*, 174 Pa. St. 66, 35 L. R. A. 464, 34 Atl. 303; *Schroyer v. Thompson*, 262 Pa. St. 282, 105 Atl. 274.

² *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 460, 22 N. E. 984; *Harsh v. Klepper*, 28 O. S. 200; *Sanders v. Bagwell*, 32 S. Car. 238, 7 L. R. A. 743, 10 S. E. 946.

³ *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446.

rate of interest which had been left blank, if the rate inserted is different from the legal rate;⁴ or adding a clause increasing the interest rate after maturity;⁵ adding an interest clause where there was none before,⁶ or erasing an interest clause that was originally inserted,⁷ is a material alteration. The insertion of a provision for the payment of interest on overdue interest, is a material alteration.⁸ If the rate of interest which is fixed by the original note is altered so as to increase such rate, the alteration is material, even though the rate as altered is in excess of the statutory rate, and although only the original amount of interest can be recovered, even on the instrument as thus modified.⁹ If an instrument is executed and the rate of interest is left blank therein, the insertion of a rate in such blank is a material alteration, even if the amount inserted is less than the amount which the instrument would bear if such blank had been left.¹⁰ If the original instrument provides that it shall bear interest at "ten per cent. annually," the insertion of the word "paid" between the words "per cent." and "annually," is a material alteration.¹¹ On the other hand, in a case in which the original note provided that it bore "interest at the rate of ten per cent.," the addition of the word "annually" was held not to be a material alteration, since it did not, in its altered form, mean that interest was payable annually, and since the percentage named would have been regarded as the annual rate of interest without such modification.¹²

§ 3102. Change in negotiability. Any modification of the terms of a written instrument which affects its negotiability, amounts to a material alteration.¹ The most common form of alteration

⁴ *Hoopes v. Collingwood*, 10 Colo. 107, 3 Am. St. Rep. 565, 13 Pac. 909; *Derr v. Keaough*, 96 Ia. 397, 65 N. W. 339; *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

⁵ *Farmers' & Merchants' National Bank v. Novich*, 89 Tex. 381, 34 S. W. 914.

⁶ *Bowman v. Mitche'll*, 79 Ind. 84; *Jones v. Bangs*, 40 O. S. 139, 48 Am. Rep. 664; *Gettysburg National Bank v. Chisolm*, 160 Pa. St. 564, 47 Am. St.

Rep. 929, 32 Atl. 799; *McVey v. Ely*, 73 Tenn. (5 Lea) 433.

⁷ *Moore v. Hutchinson*, 69 Mo. 429.

⁸ *Schroyer v. Thompson*, 262 Pa. St. 282, 105 Atl. 274.

⁹ *Harsh v. Klepper*, 28 O. S. 290.

¹⁰ *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

¹¹ *Patterson v. McNeely*, 16 O. S. 348.

¹² *Leonard v. Phillips*, 39 Mich. 182.

¹ *Canada Bank v. Wharton*, 27 N. S. 67.

Delaware. *Hollis v. Vandegrift*, 5 *Houst. (Del.)* 521.

of this sort is the alteration which changes a non-negotiable contract into a negotiable contract. Alteration of this sort is always regarded as material.² Adding the words "or order"³ or the words "or bearer"⁴ to the name of the payee of an instrument which

Georgia. *Scott v. Walker, Dudley* (Ga.) 243; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68; *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622.

Iowa. *Needles v. Shaffer*, 60 Ia. 65; *Builders' Lime & Cement Co. v. Weimer*, 170 Ia. 444, 151 N. W. 100.

Kentucky. *Johnson v. Bank*, 41 Ky. (2 B. Mon.) 310; *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31.

Maine. *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331.

Massachusetts. *Belknap v. Bank*, 100 Mass. 376, 97 Am. Dec. 105.

Michigan. *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. 565; *Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046.

Mississippi. *Simmons v. Atkinson*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Nebraska. *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883.

New Hampshire. *Haines v. Dennett*, 11 N. H. 180.

New York. *Booth v. Powers*, 56 N. Y. 22.

Ohio. *Marshall v. Wilhite*, 4 O. C. C. 203, 2 O. C. D. 500.

South Carolina. *Pepoon v. Stagg*, 1 Nott. & McC. (S. Car.) 102; *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

Tennessee. *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

Texas. *Taylor v. Moore* (Tex.), 20 S. W. 53.

Wisconsin. *Union National Bank v. Roberts*, 45 Wis. 373.

²**Delaware.** *Hollis v. Vandegrift*, 5 Houst. (Del.) 521.

Georgia. *Scott v. Walker, Dudley* (Ga.) 243; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68; *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622.

Iowa. *Builders' Lime & Cement Co. v. Weimer*, 170 Ia. 444, 151 N. W. 100.

Kentucky. *Johnson v. Bank*, 41 Ky. (2 B. Mon.) 310; *Harrison v. Union Store Co.*, 179 Ky. 672, 201 S. W. 31.

Maine. *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331.

Michigan. *Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046.

Mississippi. *Simmons v. Atkinson*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Nebraska. *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883.

New Hampshire. *Haines v. Dennett*, 11 N. H. 180.

South Carolina. *Pepoon v. Stagg*, 1 Nott. & McC. (S. Car.) 102; *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

Tennessee. *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

Texas. *Taylor v. Moore* (Tex.), 20 S. W. 53.

Wisconsin. *Union National Bank v. Roberts*, 45 Wis. 373.

³**Delaware.** *Hollis v. Vandegrift*, 5 Houst. (Del.) 521.

Georgia. *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622.

Kentucky. *Johnson v. Bank*, 41 Ky. (2 B. Mon.) 310.

New Hampshire. *Haines v. Dennett*, 11 N. H. 180.

South Carolina. *Pepoon v. Stagg*, 1 Nott. & McC. (S. Car.) 102.

Texas. *Taylor v. Moore* (Tex.), 20 S. W. 53.

⁴**Georgia.** *Scott v. Walker, Dudley* (Ga.) 243; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68.

Iowa. *Builders' Lime & Cement Co. v. Weimer*, 170 Ia. 444, 151 N. W. 100.

Kentucky. *Johnson v. Bank*, 41 Ky. (2 B. Mon.) 310.

thereby is made negotiable, or changing the words "or order" to "or bearer,"⁵ or inserting "jointly and severally"⁶ are material alterations.

From the nature of the case, alteration which changes a negotiable instrument into a non-negotiable instrument, is much rarer; but alteration of this sort has been held to be material.⁷

§ 3103. Change in place of performance. A change as to the place of performance,¹ such as the addition of a specific place of performance to an instrument which had contained no such provision,² or such as making a note payable at a certain bank,³ or adding a provision that delivery of goods sold should be made to a common carrier,⁴ is a material alteration.

Maine. *Croswell v. Labrec*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331.

Mississippi. *Simmons v. Atkinson*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Nebraska. *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883.

South Carolina. *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

Tennessee. *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

⁵**Iowa.** *Needles v. Shaffer*, 60 Ia. 65.

Massachusetts. *Belknap v. Bank*, 100 Mass. 376, 97 Am. Dec. 105.

New York. *Booth v. Powers*, 56 N. Y. 22.

Ohio. *Marshall v. Wilhite*, 4 O. C. C. 203, 2 O. C. D. 500.

Wisconsin. *Union National Bank v. Roberts*, 45 Wis. 373.

⁶**Bank v. Wharton, 27 N. S. 67.**

⁷**Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565.**

In this case, however, the alteration which rendered the instrument non-negotiable consisted in the addition of a seal; and, apart from questions of negotiability, an alteration of this sort is held to be material.

See § 3097.

¹**Alabama.** *Winter v. Pool*, 100 Ala. 503, 14 So. 411.

Illinois. *Pahlman v. Taylor*, 75 Ill. 629.

Indiana. *McCoy v. Lockwood*, 71 Ind. 319.

Iowa. *Charlton v. Reed*, 61 Ia. 166, 47 Am. Rep. 808, 16 N. W. 64.

North Dakota. *Eaton v. Delay*, 32 N. D. 328, L. R. A. 1916D, 528, 155 N. W. 644 (obiter).

Ohio. *Sturges v. Williams*, 9 O. S. 443, 75 Am. Dec. 473.

²**Pelton v. San Jacinto Lumber Co.**, 113 Cal. 21, 45 Pac. 12; *Simmons v. Atkinson*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Sturges v. Williams*, 9 O. S. 443, 75 Am. Dec. 473.

³**Pope v. Bank**, 23 Ind. App. 210, 54 N. E. 835; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Sturges v. Williams*, 9 O. S. 443.

⁴**Brady v. Coal Mining Co.**, 106 Fed. 824, 45 C. C. A. 662. (By interlining "f. o. b. cars at mine" to show the place of delivery.)

See also, *Brady v. Coal Mining Co.*, 94 Fed. 28.

§ 3104. Other changes in written contracts. Other changes in written contracts which modify the legal effect thereof may be material alterations. Thus a waiver of exemptions written over a blank indorsement,¹ adding "protest waived" to an indorsement,² or striking out a provision for the payment of attorneys' fees for collection in case of default,³ or striking out a condition so as to leave the promise absolute,⁴ or adding "with difference of exchange,"⁵ are all material alterations. The addition of a word, such as "his,"⁶ which may make the subject-matter specific instead of general, is a material alteration. An interlineation in a note to the effect that a vendor's lien is reserved on the land for which the note is given is not an immaterial alteration as a matter of law, since the deed may have waived the lien.⁷

§ 3105. Immaterial alterations—Body of instrument and memoranda. An immaterial alteration is one which does not change the legal effect of the written instrument.¹ The fact that the party

¹ *Jordan v. Long*, 109 Ala. 414, 13 So. 843.

² *Davis v. Eppler*, 38 Kan. 620, 16 Pac. 793; *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059.

³ *White v. Harris*, 69 S. Car. 65, 104 Am. St. Rep. 791, 48 S. E. 41.

⁴ *Tate v. Fletcher*, 77 Ind. 102.

⁵ *Merrick v. Bourry*, 4 O. S. 60.

⁶ *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879.

⁷ *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

¹ *United States v. Gordon v. Chattanooga Third National Bank*, 144 U. S. 97, 36 L. ed. 360.

Alabama. *Carlisle v. Bank*, 122 Ala. 446, 26 So. 115.

Idaho. *Exchange State Bank v. Taber*, 26 Ida. 723, 145 Pac. 1090.

Indiana. *Huff v. Cole*, 45 Ind. 300; *Bucklen v. Huff*, 53 Ind. 474.

Iowa. *Laub v. Rudd*, 37 Ia. 617.

Kentucky. *Bowling v. Bowling*, 172 Ky. 32, 188 S. W. 1070; *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

Massachusetts. *Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193.

Michigan. *Leonard v. Phillips*, 39 Mich. 182.

Minnesota. *Spiering v. Spiering*, 138 Minn. 119, 164 N. W. 583.

Missouri. *Moore v. Bank*, 22 Mo. App. 684.

Nebraska. *Blenkiron v. Rogers*, 97 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

New York. *Davin v. Isman*, 228 N. Y. 1, 126 N. E. 257.

North Dakota. *Eaton v. Delay*, 32 N. D. 328, L. R. A. 1916D, 528, 155 N. W. 644; *Merchants' National Bank v. Brastrup*, — N. D. —, 168 N. W. 42.

Ohio. *Huntington v. Finch*, 3 O. S. 445; *Holland v. Hatch*, 15 O. S. 464.

Oregon. *First National Bank v. Mack*, 35 Or. 122, 57 Pac. 326; *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

Washington. *Lombardo v. Lombardini*, 57 Wash. 352, 32 L. R. A. (N.S.) 515, 106 Pac. 907.

West Virginia. *Bank v. Evans*, 9 W. Va. 373.

Wisconsin. *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241.

who made such alteration intended to alter the legal effect of the instrument, does not make such alteration material if the legal effect of the instrument after such alteration is the same as it was before.² If a provision waiving exemptions and the like is void, an alteration inserting such provision is immaterial.³ A memorandum for the payment of a higher rate of interest does not discharge a non-assenting surety if it is without consideration.⁴ The addition of a provision fixing the rate of interest at the legal rate where no rate had been fixed in the written contract;⁵ change of the rate of interest in excess of the rate fixed by the written contract where such rate was the highest allowed by law;⁶ adding the word "annually" to the phrase "with interest at the rate of ten per cent.;"⁷ adding "with exchange" if the law would allow exchange without such addition;⁸ adding "or order" to an indorsement in blank;⁹ adding "or bearer" to an instrument which is non-negotiable because subject to conditions;¹⁰ and adding "payment guaranteed" over the signature of an indorser where the note waives presentment, notices and protest,¹¹ are immaterial alterations. Where days of grace are allowed only on bills of exchange or on notes placed on the same footing, the addition of the word "fixed" to the date of maturity of a note, thereby providing against days of grace, has been held to be an immaterial alteration in case the note is never put on the footing of a bill of exchange by being discounted at a bank, though it was payable at a bank and might have been put on the footing of a bill of exchange.¹² If a blank

² Iowa Valley State Bank v. Sigstad, 96 Ia. 491, 65 N. W. 407; Keene v. Miller, 103 Ky. 628, 45 S. W. 1041; Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 160; Goodenow v. Curtis, 33 Mich. 505; Port Huron First National Bank v. Carson, 60 Mich. 432, 27 N. W. 589; Weaver v. Bromley, 65 Mich. 212, 31 N. W. 839; Holland v. Hatch, 15 O. S. 464.

³ Holland v. Hatch, 15 O. S. 464.

⁴ Huff v. Cole, 45 Ind. 300; Bearse v. Lebowich, 212 Mass. 344, 99 N. E. 175.

Contra, Saunders v. Bagwell, 32 S. Car. 238, 7 L. R. A. 743, 10 S. E. 946.

⁵ Port Huron First National Bank v. Carson, 60 Mich. 432, 27 N. W. 589; Merchants' National Bank v. Brastrup, — N. D. —, 168 N. W. 42 (obiter).

⁶ Keene v. Miller, 103 Ky. 628, 45 S. W. 1041.

Contra, Harsh v. Klepper, 28 O. S. 200.

⁷ Leonard v. Phillips, 39 Mich. 182. (In this case ten per cent. was held to mean ten per cent. annually; and the word "annually" was held to refer to the rate of interest and not to the time of payment.)

⁸ Galva First National Bank v. Nordstrom, 70 Kan. 485, 78 Pac. 804.

⁹ Weaver v. Bromley, 65 Mich. 212, 31 N. W. 839.

¹⁰ Goodenow v. Curtis, 33 Mich. 505.

¹¹ Iowa Valley State Bank v. Sigstad, 96 Ia. 491, 65 N. W. 407.

¹² Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 160.

in the phrase, which shows at what time interest is to begin, is filled by mistake so as to provide that the note bears interest at a certain rate "from annum until paid," such mistake can be corrected by construction; and in legal effect it is a promise to pay such interest from date. Accordingly, the change of the word "annum" to the word "date" is an immaterial alteration.¹³ A memorandum on the back of a note, which provides for compound interest, does not amount to a material alteration if there is no consideration for such promise;¹⁴ and accordingly, such memorandum will not discharge a surety, although he did not assent thereto.¹⁵ It is held that the serial number of a bond is not a part of the instrument, and that accordingly an alteration of such number is immaterial.¹⁶

A change in the name of the promisee which does not change the legal effect of the instrument,¹⁷ such as a change in the name of the corporation to which the promise is made, so as to make it conform to the true name of the corporation,¹⁸ or adding "& Co." to the name of the promisee,¹⁹ is not a material alteration. Since the principal debtor can either be compelled to pay before his surety can be compelled to pay, or the surety may compel the principal to exonerate him, the erasure of the name of a surety is not a material alteration so as to discharge the principal.²⁰

While removing a memorandum which is a part of a contract, is ordinarily a material alteration,²¹ the removal of a memorandum which has no legal effect, is an immaterial alteration.²² The removal of a memorandum to the effect that "this note is given upon condition," but which does not show what the condition was, is said to be an immaterial alteration.²³

Inserting an additional provision which has been performed before such insertion, as a provision for security, which is already given,²⁴ or an agreement to become surety on a renewal note, which

¹³ *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

¹⁴ *Schroyer v. Thompson*, 262 Pa. St. 282, 2 A. L. R. 1567, 105 Atl. 274.

¹⁵ *Schroyer v. Thompson*, 262 Pa. St. 282, 2 A. L. R. 1567, 105 Atl. 274.

¹⁶ *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

¹⁷ *Elliott v. Blair*, 47 Ill. 342; *Blenkiron v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

¹⁸ *Blenkiron v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

¹⁹ *Elliott v. Blair*, 47 Ill. 342.

²⁰ *Huntington v. Finch*, 3 O. S. 445.

²¹ See § 3085.

²² *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479.

²³ *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479.

²⁴ *J. I. Case Threshing Machine Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826.

has already been done,²⁵ is immaterial. The erasure from a building contract of a recital of receipt of the first payment, which has not in fact been made, is immaterial, since such term is not contractual and could have been contradicted by extrinsic evidence.²⁶ In a contract between property owners and the contractor for grading a street which provided that each owner was to pay in proportion to his interest in the abutting property, an interlineation was made, "each party hereto to pay only such parts of the total cost as his front footage bears to the total frontage improved in said street." Such interlineation was held to be immaterial.²⁷ The addition to the correct description of realty in a mortgage the words "containing one hundred sixty acres more or less," which is the correct number, has been held immaterial.²⁸ The addition of an internal revenue stamp has been held to be an immaterial alteration of a note payable in Massachusetts, since the Massachusetts courts have held that the provision of the federal statutes making such instruments inadmissible in evidence if a revenue stamp is not affixed, applies only to the federal courts and not to the state courts.²⁹

If the name of a witness is unnecessary, the erasure thereof is said to be an immaterial alteration.³⁰

§ 3106. Alteration of marginal figures. Since marginal figures are no part of a note,¹ an alteration in such marginal figures,² as changing them from one thousand, five hundred dollars to one thousand dollars,³ or from six hundred dollars to six hundred and fifty dollars,⁴ is not a material alteration.

²⁵ *Bank v. Miner*, 9 Colo. App. 361, 48 Pac. 837.

²⁶ *Sullivan v. Realty Co.*, 142 Cal. 201, 75 Pac. 767.

²⁷ *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135.

²⁸ *Gunter v. Addy*, 58 S. Car. 178, 36 S. E. 553.

²⁹ *Rowe v. Bowman*, 133 Mass. 488, 67 N. E. 636.

³⁰ *Davin v. Isman*, 228 N. Y. 1, 126 N. E. 257.

¹ *Merritt v. Boyden*, 101 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652; *Lombardo v. Lombardini*, 57 Wash. 352, 32 L. R. A. (N.S.) 515, 106 Pac. 907.

² *Alabama*. *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006.

Iowa. *Horton v. Horton*, 71 Ia. 448, 32 N. W. 452.

Texas. *Chamberlain v. Wright* (Tex. Civ. App.), 35 S. W. 707.

Washington. *Lombardo v. Lombardini*, 57 Wash. 352, 32 L. R. A. (N.S.) 515, 106 Pac. 907.

Wisconsin. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.

³ *Prim v. Hammel*, 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006.

⁴ *Schryver v. Hawks*, 22 O. S. 308.

Since printed provisions yield to written provisions when the two are inconsistent,⁵ the alteration of the printed figures in the date of an instrument, so as to make it correspond to the written figures in the body of the instrument, is not a material alteration.⁶

VI

PRESUMPTIONS, INFERENCES, ETC. .

§ 3107. Questions of law and fact. The existence of alteration, if apparent on the face of the instrument, seems to have been determined by the court at one time. Subsequently such questions were left to the jury.¹ At modern law, whether an alleged alteration has been made or not,² when it was made, if at all,³ by whom it was made,⁴ and whether the adversary party consented to such alteration or not,⁵ or ratified it thereafter,⁶ are all questions of fact and are to be determined by the jury if the facts are tried to the jury.

⁵ See § 2043.

⁶ *Lombardo v. Lombardini*, 57 Wash. 352, 32 L. R. A. (N.S.) 515, 106 Pac. 907.

¹ *Coke on Littleton*, 225b; *Sheppard's Touchstone of Common Assurances*, 69.

² *United States. Wood v. Steele*, 73 U. S. (6. Wall.) 80, 13 L. ed. 725.

Arkansas. Jones v. Horatio Bank, 102 Ark. 302, 143 S. W. 1060; *Arnold v. Wood*, 127 Ark. 234, 191 S. W. 960.

Colorado. Brunton v. Ditto, 51 Colo. 178, 117 Pac. 156.

Illinois. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

Kentucky. Elbert v. McClelland, 71 Ky. (8 Bush.) 577.

Minnesota. O. N. Bull Remedy Co. v. Clark, 109 Minn. 306, 32 L. R. A. (N.S.) 519, 124 N. W. 20.

New Jersey. Jones v. Crowley, 57 N. J. L. 222, 30 Atl. 871.

Oklahoma. Kapp v. Levyson, 58 Okla. 651, 160 Pac. 457.

Pennsylvania. Bowman v. Berkey, 259 Pa. St. 327, 103 Atl. 49.

West Virginia. Conner v. Fleshman, 4 W. Va. 693.

³ *Alabama. Burnett Cigar Co. v. Art Wall-Paper Co.*, 164 Ala. 547, 51 So. 263.

Illinois. Hutchison v. Kelly, 276 Ill. 438, 114 N. E. 1012.

Michigan. Wilson v. Hotchkiss, 81 Mich. 172, 45 N. W. 838.

Nebraska. Cass County Bank v. Morrison, 17 Neb. 341, 52 Am. Rep. 417, 22 N. W. 782.

Virginia. Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 S. E. 879.

⁴ *Hutchison v. Kelly*, 276 Ill. 438, 114 N. E. 1012; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467; *North v. Henneberry*, 44 Wis. 306.

⁵ *Cochran v. Nebeker*, 48 Ind. 459; *Holyfield v. Harrington*, 84 Kan. 760, 39 L. R. A. (N.S.) 131, 115 Pac. 546; *Stahl v. Berger*, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666; *Goldsmith v. Stocker*, 253 Pa. St. 127, 97 Atl. 1079; *North v. Henneberry*, 44 Wis. 306.

⁶ *American Trust & Savings Bank v. Perkins*, 108 Miss. 834, 67 So. 481; *Gray v. Williams*, 91 Vt. 111, 99 Atl. 935.

Whether an alteration is material or immaterial is a question of law. It is therefore error to leave such question to the jury, if the facts on which such question depends are conceded or are clearly established.⁷

§ 3108. Presumption as to date of alteration. Interlineations and erasures are suspicious, and it is well to explain them, if possible. Alteration is often criminal and always wrongful, and ought not to be presumed without some evidence. What presumption ought to arise on the production of a written instrument which shows erasures and interlineations on its face, and whether it will be assumed that they were made before execution or after execution is a question which has been answered in different ways at different times. The original common-law rule seems to have assumed that the possibility of alteration amounted to a probability.¹ The writers who attempt to state the early common law leave it at least doubtful whether an alteration would not be presumed to have been made before execution,² unless a memorandum of such interlineation was made at the time of execution.³ This rule seems to have been adopted in some of the earlier cases in the United States.⁴ Even in early English law, however, it seems to have been presumed that an interlineation was made at execution.⁵

⁷ *United States*. *Steele v. Spencer*, 26 U. S. (1 Pet.) 552.

Alabama. *Payne v. Long*, 121 Ala. 385, 25 So. 780.

Arkansas. *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9. (This point not touched on in opinion in 37 Am. Rep. 9.)

Georgia. *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375.

Illinois. *Milliken v. Marlin*, 66 Ill. 13.

Indiana. *Cochran v. Nebeker*, 48 Ind. 459.

Iowa. *Hessig-Ellis Drug Co. v. Todd-Baker Drug Co.*, 161 Ia. 535, 143 N. W. 569.

Kansas. *Holyfield v. Harrington*, 84 Kan. 760, 39 L. R. A. (N.S.) 131, 115 Pac. 546.

Maine. *Belfast National Bank v. Harriman*, 68 Me. 522.

Massachusetts. *Drum v. Drum*, 133 Masa. 566.

Nebraska. *Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488.

New Hampshire. *Burnham v. Ayer*, 35 N. H. 351.

Pennsylvania. *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.

South Carolina. *Kinard v. Glenn*, 29 S. Car. 590, 8 S. E. 203.

West Virginia. *Phillip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

¹ *London & Brighton R. R. Co. v. Fairclough*, 2 Mann. & G. 674.

² *Sheppard's Common Assurances*, 591 et seq. (Part II, Ch. 8); II *Blackstone's Commentaries*, 308.

³ II *Blackstone's Commentaries*, 308.

⁴ *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321.

⁵ *Trowel v. Castle*, 1 Keb. 21.

The theory of the modern law is that since the alteration of a contract without the consent of the adversary is a wrongful act, at least when not the correction of a mistake in expression, and it is often a criminal act, and since criminal or wrongful conduct will not be presumed, the weight of authority is that alterations apparent on the face of the instrument do not of themselves raise any presumption of its invalidity, as it will be presumed that they were made before execution.⁶ Accordingly, under this rule, it is not necessary for the party relying upon the instrument to explain such alterations⁷—the burden of proof is upon the party attacking the instrument;⁸ and it is not proper to leave it for the jury to say upon mere inspection of the instrument whether there had been an alteration therein after execution.⁹ This rule is applied with especial force to alterations which are self-explanatory.¹⁰

It has been said that this rule can not apply where the signature of an obligor has been erased, since this must have been made after execution.¹¹ However, since it is not signing but delivery that constitutes execution, the reason alleged for this rule does not seem to exist; and the rule itself is not always followed.¹²

⁶ *United States*. *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396.

Arkansas. *Gist v. Gans*, 30 Ark. 285; *Klein v. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183, 61 S. W. 572.

Indiana. *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Worth v. Wheatley*, 183 Ind. 598, 108 N. E. 958.

Iowa. *Tharp v. Jamison*, 154 Ia. 77, 39 L. R. A. (N.S.) 100, 134 N. W. 583; *First National Bank v. Patterson*, — Ia. —, 177 N. W. 545.

Kansas. *J. I. Case Threshing Machine Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470.

Kentucky. *Pike County v. Sowards*, 147 Ky. 37, 143 S. W. 745.

Massachusetts. *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324.

Michigan. *Willetts v. Shepard*, 34 Mich. 106; *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82.

Minnesota. *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467.

Missouri. *Collison v. Norman*, — Mo. —, 191 S. W. 60.

Nebraska. *Goodin v. Plugge*, 47 Neb. 284, 66 N. W. 407; *Hodge v. Scott*, 1 Neb. (unoff.) 619, 95 N. W. 837.

Ohio. *Huntington v. Finch*, 3 O. S. 445; *Franklin v. Baker*, 48 O. S. 296, 27 N. E. 550.

Pennsylvania. *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49.

⁷ *Klein v. Bank*, 69 Ark. 140, 86 Am. St. Rep. 183, 61 S. W. 572; *Franklin v. Baker*, 48 O. S. 296, 27 N. E. 550.

⁸ *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450; *First National Bank v. Patterson*, — Ia. —, 177 N. W. 545; *Huntington v. Finch*, 3 O. S. 445; *Franklin v. Baker*, 48 O. S. 296, 27 N. E. 550; *Galloway v. Bartholomew*, 44 Or. 75, 74 Pac. 467; *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017.

⁹ *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907.

¹⁰ *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450.

¹¹ *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770.

¹² *Cass County v. Bank*, 9 N. D. 263, 83 N. W. 12.

This rule has been applied even where the alteration is of a character markedly different from the rest of the instrument.¹³

In other jurisdictions, and sometimes in other cases in the same jurisdiction as that in which the opposite view is expressed, it has been held that alterations are presumed to have been made after execution.¹⁴ While some of the cases in apparent conflict can be reconciled by noting that the court occasionally uses the term "presumption" for inference of fact, drawn from the entire instrument, which inference may explain the interlineation and the circumstances under which it was made, the great bulk of the cases present an irreconcilable difference of opinion, modified only by an occasional attempt to frame some compromise theory.¹⁵

Where the latter theory is in force, the burden of proof is on the party claiming under such contract, to show when the alterations were made.¹⁶ This rule has been applied to receipts.¹⁷ Evidence that such interlineations were made before the contract was signed and delivered is sufficient to justify the admission of such an instrument in evidence.¹⁸

§ 3109. Presumption as to whether alteration is fraudulent. If the alteration is material, the question next presented is whether it is presumed to be fraudulent or not. A material alteration, made

¹³ *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416. (Where the letter "s" in ink was added to the type-written word "contract.")

¹⁴ *England*. *Johnson v. Marlborough*, 2 Stark. 313.

Arkansas. *Arnold v. Wood*, 127 Ark. 234, 191 S. W. 960.

California. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.

Connecticut. *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 42 L. R. A. 514, 41 Atl. 803.

Illinois. *Montag v. Linn*, 23 Ill. 503; *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *McAllister v. Avery*, 17 Ill. App. 568; *Sisson v. Pearson*, 44 Ill. App. 81.

Iowa. *Kauffman v. Logan*, — Ia. —, 174 N. W. 366.

Michigan. *Samberg v. American Express Co.*, 136 Mich. 639, 99 N. W. 879.

Oregon. *Hillsboro First National Bank v. Mack*, 35 Or. 122, 57 Pac. 326. *Pennsylvania*. *Cornog v. Wilson*, 231 Pa. St. 281, 80 Atl. 174.

¹⁵ On this question there is said to be "a wilderness of authority and much conflict of opinion." *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467.

¹⁶ *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107 [affirming, 103 Ill. App. 668]; *Cole v. Hills*, 44 N. H. 227; *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879.

¹⁷ For insurance assessments. *Rambousek v. Mystic Tolders*, 119 Ia. 263, 93 N. W. 277.

Receipt for payment for land. *Bradley v. Lumber Co.*, 106 Wis. 245, 81 N. W. 394.

¹⁸ *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879.

after execution, and not clearly beneficial to the obligor, is *prima facie* fraudulent.¹ An alteration increasing the rights of the obligee and the liabilities of the obligor, as increasing the amount of a note,² is *prima facie* fraudulent. If, on the other hand, the alteration reduces the rights of the obligee or the liabilities of the obligor, as reducing the rate of interest,³ or erasing the name of a surety,⁴ it is *prima facie* not fraudulent. A change in the date of payment of a note has been held to be not fraudulent *prima facie*.⁵

VII

EFFECT OF ALTERATION AND SPOLIATION

§ 3110. Effect of material alteration on liability on contract—Non-negotiable instrument. In order to prevent tampering with written instruments,¹ the courts have laid down the rule that a material alteration avoids the written contract.²

¹ *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; *Long v. Mason*, 84 N. Car. 15.

² *Maguire v. Eichmeier*, 109 Ia. 301, 80 N. W. 395; *Warder, Bushnell & Glessner Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300.

³ *Keene v. Weeks & Aldrich*, 19 R. I. 300, 33 Atl. 446.

⁴ *Cass County v. Bank*, 9 N. D. 263, 83 N. W. 12.

⁵ *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017.

¹ *Wood v. Steele*, 73 U. S. (6 Wall.) 80, 18 L. ed. 725; *Ruby v. Talbott*, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72.

² *Wood v. Steele*, 73 U. S. (6 Wall.) 80, 18 L. ed. 725.

Alabama. *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46, 4 L. R. A. 680, 6 So. 82; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 So. 498; *Payne v. Long*, 121 Ala. 385, 25 So. 780.

Arkansas. *Robertson v. Southwestern Co.*, 136 Ark. 417, 206 S. W. 755.

Illinois. *Keller v. State Bank*, — Ill. —, 127 N. E. 94.

Indiana. *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469, 22 N. E. 984.

Iowa. *Sherman v. Smith*, — Ia. —, 169 N. W. 216.

Kansas. *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559; *Kurth v. Farmers' & Merchants' State Bank*, 77 Kan. 475, 15 L. R. A. (N.S.) 612, 94 Pac. 798; *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163; *Hurt v. Stout*, 105 Kan. 54, 181 Pac. 623.

Louisiana. *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283.

Michigan. *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F, 1145, 168 N. W. 531.

Minnesota. *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L. R. A. (N. S.) 519, 124 N. W. 20.

Missouri. *Haskell v. Champion*, 30 Mo. 136; *Frazier v. Crook*, — Mo. —, 204 S. W. 302; *Bacon v. Theiss*, — Mo. —, 208 S. W. 254; *Highland Investment Co. v. Kansas City Computing Scales Co.*, 277 Mo. 365, 209 S. W. 895.

Nebraska. *Ball v. Beaumont*, 66 Neb. 56, 92 N. W. 170.

New Jersey. *Bodine v. Berg*, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

Any material alteration of an instrument releases a party to such instrument who does not consent to such alteration, no matter how many other parties have consented thereto.³ The act of one of the makers in adding seals to the names of the other makers,⁴ or in changing the date of the instrument,⁵ destroys the liability of the remaining makers who did not assent. A material alteration of a contract,⁶ though with the consent of the other parties thereto,⁷

Ohio. *Patterson v. McNeely*, 16 O. S. 348; *Newman v. King*, 54 O. S. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683.

Oklahoma. *Cox v. Kirkwood*, 59 Okla. 183, 158 Pac. 930; *Wayne County National Bank v. Kneeland*, — Okla. —, 161 Pac. 193; *Voris v. Birdsell*, — Okla. —, 162 Pac. 951; *First National Bank v. Ketchum*, — Okla. —, L. R. A. 1918F, 958, 172 Pac. 81; *Bank of Commerce v. Webster*, — Okla. —, L. R. A. 1918F, 696, 172 Pac. 942.

Pennsylvania. *Swank v. Kaufman*, 255 Pa. St. 316, L. R. A. 1917D, 826, 99 Atl. 1000; *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49; *Bowman v. Berkey*, 262 Pa. St. 411, 105 Atl. 557.

South Carolina. *White v. Harris*, 69 S. Car. 65, 104 Am. St. Rep. 791, 48 S. E. 41; *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

South Dakota. *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695; *Holbart v. Lauritsen*, 34 S. D. 267, 53 L. R. A. (N.S.) 166, 148 N. W. 19.

Vermont. *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

Virginia. *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879.

Washington. *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

³ **Alabama.** *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277.

Iowa. *Hall v. McHenry*, 19 Ia. 521, 87 Am. Dec. 451.

Kansas. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Massachusetts. *Fay v. Smith*, 83 Mass. (1 All.) 477, 79 Am. Dec. 752.

Missouri. *Frazier v. Crook*, — Mo. —, 204 S. W. 392.

Ohio. *Fullerton v. Sturges*, 4 O. S. 529; *Harsh v. Klepper*, 28 O. S. 200.

Pennsylvania. *Shiffer v. Mosier*, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426.

South Carolina. *First National Bank v. Wood*, 169 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

Vermont. *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

If the alteration is made without A's consent after A has executed the instrument, in order to induce B to execute it, no contract exists. *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283.

⁴ *Fullerton v. Sturges*, 4 O. S. 529.

⁵ *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

⁶ *Carrique v. Beaty*, 24 Ont. App. 302; *Robertson v. Southwestern Co.*, 136 Ark. 417, 206 S. W. 755; *State Solicitors' Co. v. Savage*, 39 Fla. 703, 23 So. 413; *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

⁷ **United States.** *United States Glass Co. v. Bottle Co.*, 81 Fed. 993.

Kansas. *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

releases a surety thereon. It is, however, error to restrict the effect of a material alteration as discharge to the case of sureties.⁸

The rule that a material alteration discharges the instrument as to those who do not assent thereto, applies, in most jurisdictions, to innocent alterations as well as to fraudulent alterations.⁹

It makes no difference whether the change makes the contract less favorable or more favorable to the party who does not assent to the alteration.¹⁰ An alteration in the date of a note, so that less interest is due thereon than was due on the instrument as originally executed;¹¹ or an alteration which reduces the amount of the principal due on the note;¹² or an alteration which reduces the rate of interest below that which the original instrument

Ohio. *Thompson v. Massie*, 41 O. S. 307.

Pennsylvania. *Swank v. Kaufman*, 255 Pa. St. 316, L. R. A. 1917D, 826, 99 Atl. 1000.

South Carolina. *First National Bank v. Wood*, 109 S. Car. 70, L. R. A. 1918D, 1061, 95 S. E. 140.

⁸ *Ball v. Beaumont*, 66 Neb. 56, 92 N. W. 170; *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270.

⁹ **Alabama.** *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277.

Iowa. *Hall v. McHenry*, 19 Ia. 521, 87 Am. Dec. 451.

Kansas. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Massachusetts. *Fay v. Smith*, 83 Mass. (1 All.) 477, 79 Am. Dec. 752.

Ohio. *Harsh v. Klepper*, 28 O. S. 200.

Oklahoma. *Richardson v. Fellner*, 9 Okla. 513, 60 Pac. 270.

Vermont. *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

¹⁰ **Alabama.** *Brown v. Johnson*, 127 Ala. 292, 85 Am. St. Rep. 134, 51 L. R. A. 403, 28 So. 579.

Indiana. *Weir Plow Co. v. Walmesley*, 110 Ind. 242, 11 N. E. 232.

Illinois. *Keller v. State Bank*, — Ill. —, 127 N. E. 94.

Kansas. *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

Massachusetts. *Wheelock v. Freeman*, 30 Mass. (13 Pick.) 165, 23 Am. Dec. 674.

New Hampshire. *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499.

Oklahoma. *Voris v. Robbins*, 52 Okla. 671, 153 Pac. 120.

Vermont. *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639; *Gray v. Williams*, 91 Vt. 111, 99 Atl. 735.

Washington. *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

Wisconsin. *Hecht v. Shenners*, 126 Wis. 27, 105 N. W. 309.

¹¹ *Barton Savings Bank & Trust Co. v. Stephenson*, 87 Vt. 433, 51 L. R. A. (N.S.) 346, 89 Atl. 639.

¹² *Highland Investment Co. v. Kansas City Computing Scales Co.*, 277 Mo. 365, 209 S. W. 895; *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

An alteration of a check, reducing the amount thereof, avoids it. *Keller v. State Bank*, — Ill. —, 127 N. E. 94.

would have borne legally,¹³ are all material, and discharge the party who did not assent thereto.

A material alteration avoids a contract not only as to the party making it, but as to an innocent transferee, such as a bona fide assignee who is not an indorsee.¹⁴

A material alteration operates as a discharge of a lease,¹⁵ at least if such alteration is made after one of the parties has signed or has executed it, and before the adversary party executes it.¹⁶ The alteration of a mortgage after execution seems to operate as a discharge thereof.¹⁷ Whether the alteration of a deed operates to divest the title of the grantee, or whether such alteration merely affects the executory covenants contained in the deed, is a question which is outside of contract law.¹⁸

In some jurisdictions, however, an innocent material alteration does not avoid the contract.¹⁹

In any event, the material alteration can not be regarded as a part of the contract.²⁰ Whatever the effect the addition of a memorandum or indorsement upon an instrument may have upon the validity thereof, it can not be regarded as a part of such instrument so as to show consideration upon its face.²¹

¹³ *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

¹⁴ *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622; *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

¹⁵ *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283.

¹⁶ *Dreyfuss v. Process Oil & Fuel Co.*, 142 La. 564, 77 So. 283.

¹⁷ *Frazier v. Crook*, — Mo. —, 204 S. W. 392.

¹⁸ See on this subject:

United States. Eadie v. Chambers, 172 Fed. 73, 24 L. R. A. (N.S.) 879 [reversed in *Waskey v. Chambers*, 224 U. S. 564, 56 L. ed. 885, on the theory that the deed, having but one witness and being altered after acknowledgment, was not entitled to registration].

Kansas. Hurt v. Stout, 105 Kan. 54, 181 Pac. 623.

Kentucky. Huffman v. Hatcher, 178

Ky. 8, L. R. A. 1918B, 484, 138 S. W. 236.

Massachusetts. Carr v. Frye, 225 Mass. 531, L. R. A. 1917E, 814, 114 N. E. 745.

Missouri. Frazier v. Crook, — Mo. —, 204 S. W. 392.

¹⁹ *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; *James v. Tilton*, 183 Mass. 275, 67 N. E. 326; *Wolferman v. Bell*, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017.

So in Georgia by statute. *Miller v. Slade*, 116 Ga. 772, 43 S. E. 69; *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227.

²⁰ *Jones v. Wixom*, — Wis. —, 174 N. W. 805.

²¹ *Jones v. Wixom*, — Wis. —, 174 N. W. 895.

In jurisdictions in which a change of a written instrument by one of the parties, so as to make it conform to the actual agreement between the parties, operates as an alteration if the adversary party does not assent

§ 3111. Negotiable instruments before the Negotiable Instruments Law. In the absence of statute, a negotiable instrument which has been altered materially is unenforceable, even in the hands of a bona fide holder without notice who takes for value and before maturity.¹ While in some of the cases in which a bona fide holder has not been allowed to recover on an altered negotiable instrument, the alteration was apparent on the face of the instrument,² the doctrine does not rest upon this ground. As long as the maker has not been negligent in giving opportunity for alteration,³

thereto (see § 3091), the act of the payee in changing the terms of an instrument to make it conform to the actual agreement between the parties discharges the instrument, although he acts without fraudulent intent. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

¹ *England. Master v. Miller*, 1 Anstr. 225.

United States. Wood v. Steele, 73 U. S. (6 Wall.) 80, 18 L. ed. 725.

Arkansas. Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892.

District of Columbia. Ofenstein v. Bryan, 20 D. C. App. 1.

Illinois. Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Keller v. State Bank*, — Ill. —, 127 N. E. 94.

Iowa. Knoxville National Bank v. Clark, 51 Ia. 264, 33 Am. Rep. 129, 1 N. W. 491; *Derr v. Keaough*, 96 Ia. 397, 65 N. W. 339.

Kansas. Herington Bank v. Wangerin, 65 Kan. 423, 59 L. R. A. 717, 70 Pac. 330.

Kentucky. Blakey v. Johnson, 76 Ky. (13 Bush.) 197, 26 Am. Rep. 254.

Massachusetts. Wade v. Withington, 83 Mass. (1 All.) 561; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

Michigan. Stevens v. Venema, 202 Mich. 232, L. R. A. 1918F, 1145, 168 N. W. 531.

Minnesota. Seebold v. Tatlie, 76 Minn. 131, 78 N. W. 967.

Mississippi. Simmons v. Atkinson-Lampton Co., 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Nebraska. Bothell v. Schweitzer, 84 Neb. 271, 133 Am. St. Rep. 623, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

Ohio. Newman v. King, 54 O. S. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683.

Oklahoma. Cox v. Kirkwood, 59 Okla. 183, 158 Pac. 930; *Wayne County National Bank v. Kneeland*, — Okla. —, 161 Pac. 193; *Voris v. Birdsall*, — Okla. —, 162 Pac. 951.

Pennsylvania. Citizens' National Bank v. Williams, 174 Pa. St. 66, 35 L. R. A. 464, 34 Atl. 304.

South Dakota. Rochford v. McGee, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695; *Holbart v. Lauritson*, 34 S. D. 267, L. R. A. 1915A, 166, 148 N. W. 19.

Tennessee. Moss v. Maddux, 108 Tenn. 405, 67 S. W. 855.

Texas. Farmers' & Merchants' National Bank v. Novich, 89 Tex. 381, 34 S. W. 914.

West Virginia. Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

Wisconsin. Hecht v. Shenners, 126 Wis. 27, 105 N. W. 309.

² *Citizens' National Bank v. Williams*, 174 Pa. St. 66, 35 L. R. A. 464, 34 Atl. 304.

³ *Farmers' & Merchants' National Bank v. Novich*, 89 Tex. 382, 34 S. W. 914.

alteration discharges the instrument, even if it is so skilfully done as to deceive a prudent man.⁴

§ 3112. Negotiable instruments under the Negotiable Instruments Law. The Negotiable Instruments Law provides: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."¹ The first part of this section did not change the pre-existing law, but the last paragraph revolutionized the pre-existing law as to the effect of alteration. Under this statute, the courts have no choice but to enforce it literally and to allow a bona fide holder to recover upon the original form of the instrument, in spite of the material alteration thereof.² Under this section, a bank which has paid a raised check in good faith may charge the account of its depositor with the amount for which such check was originally given.³ If a note is altered by changing the name of the maker thereof, a holder in due course may enforce it against the original maker.⁴ This section has, by its terms, no application if the instrument is in the hands of one who is not a

⁴ *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Herrington Bank v. Wangerin*, 65 Kan. 423, 59 L. R. A. 717, 70 Pac. 330; *Mid-land v. Elliott*, 61 Mo. App. 601; *Rochford v. McGee*, 16 S. D. 606, 61 L. R. A. 335, 94 N. W. 695.

¹ See § 124, Negotiable Instruments Law.

² *Kentucky*. *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

Massachusetts. *Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010; *Munroe v. Stanley*, 220 Mass. 438, 107 N. E. 1012.

Michigan. *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82.

Minnesota. *Public Bank of New York v. Burchard*, 135 Minn. 171 [sub nomine, *Public Bank v. Knox-Burchard Mercantile Co.*, 160 N. W. 667].

Nebraska. *Bothell v. Schweitzer*, 84 Neb. 271, 133 Am. St. Rep. 623, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

Ohio. *Dick v. Hyer*, 94 O. S. 351, 114 N. E. 251.

Oklahoma. *Conqueror Trust Co. v. Simmon*, — Okla. —, 162 Pac. 1098.

³ *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

⁴ *Public Bank of New York City v. Burchard*, 135 Minn. 171 [sub nomine, *Public Bank v. Knox-Burchard Mercantile Co.*, 160 N. W. 667].

holder in due course,⁵ as where the holder knows of the alteration,⁶ or the alteration was made after maturity.⁷

§ 3113. Right of recovery upon original consideration—Innocent material alteration. In cases of material alteration, where the written contract is discharged, the question then arises as to whether recovery can be had in quasi-contract on the original consideration for which the instrument was given. This depends on whether the alteration was made innocently or fraudulently. If it was made innocently, recovery can be had on the original consideration.¹ Accordingly, in jurisdictions in which the alteration of a note, so as to make it conform to the actual agreement of the parties, is held to be material so as to avoid the instrument,² the original debt can be recovered;³ and a mortgage which is given to secure such note can be enforced for the original obligation.⁴

§ 3114. Fraudulent material alteration. If the alteration is made fraudulently no recovery can be had upon the original con-

⁵ *Wilkes-Barre First National Bank v. Barnum*, 160 Fed. 245; *Pensacola State Bank v. Melton*, 210 Fed. 57; *Fairfield County National Bank v. Hammer*, 89 Conn. 592, 95 Atl. 31; *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N. S.) 1043, 134 Pac. 480.

⁶ *Wilkes-Barre First National Bank v. Barnum*, 160 Fed. 245; *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

⁷ *Pensacola State Bank v. Melton*, 210 Fed. 57; *Fairfield County National Bank v. Hammer*, 89 Conn. 592, 95 Atl. 31.

¹ *England. Atkinson v. Hawdon*, 2 Ad. & El. 628.

Canada. Bank v. Wharton, 27 N. S. 67.

Illinois. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

Indian Territory. Hampton v. Mayers, 3 Ind. Terr. 65, 53 S. W. 483.

Kansas. Edington v. McLeod, 87

Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Massachusetts. Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. 49.

Minnesota. Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467.

Missouri. Bobb v. Taylor (Mo.), 184 S. W. 1028.

New Jersey. Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

Ohio. Merrick v. Boury, 4 O. S. 60.

Oregon. Savage v. Savage, 36 Or. 268, 59 Pac. 461; *Catching v. Ruby*, 91 Or. 506, 178 Pac. 796.

Rhode Island. Keene v. Weeks, 19 R. I. 309, 33 Atl. 446.

Texas. Otto v. Half, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910.

Wisconsin. Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

² See § 3091.

³ *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

⁴ *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

sideration;¹ and the result of such fraudulent alteration is therefore to leave the innocent party in possession of the consideration, if he has received it, without any duty in return therefor, either contractual or quasi-contractual.² Various reasons have been suggested for this rule which is admittedly harsh. The original cause of action is said to be lost by merger in the negotiable instrument which has been altered thereafter.³ The rule has been justified on the theory that one who has deliberately destroyed the evidence of the contract will not be permitted to recover the original consideration.⁴ It is also justified as a penalty for fraudulent conduct;⁵ and the results reached under this theory go beyond those reached under the theory that the rule is based on the consequences of destroying evidence, so that it is not possible to enforce the contract although it was executed in duplicate, one of which is unaltered.⁶

¹ *Alabama*. *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548.

Iowa. *Woodworth v. Anderson*, 63 Ia. 503, 19 N. W. 296; *Maguire v. Eichmeier*, 109 Ia. 301, 80 N. W. 395; *Shea v. Cutler*, 147 Ia. 366, 126 N. W. 366.

Kansas. *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839.

Minnesota. *Warder, Bushnell & Glessner Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300.

Mississippi. *Merchants' & Farmers' Bank v. Dent*, 102 Miss. 455, 59 So. 805; *Lauderdale Bank v. Cole*, 111 Miss. 39, 71 So. 260.

Missouri. *Whitmer v. Frye*, 10 Mo. 348.

Nebraska. *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883.

New Hampshire. *Martendale v. Follett*, 1 N. H. 95.

North Dakota. *Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

Vermont. *Bigelow v. Stilphen*, 35 Vt. 521.

Virginia. *Newell v. Mayberry*, 71 Va. (3 Leigh) 250, 23 Am. Dec. 261.

West Virginia. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

² The decision of this question was avoided in *Bodine v. Berg*, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

³ *Woodworth v. Anderson*, 63 Ia. 503, 19 N. W. 296.

⁴ *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839.

⁵ *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839.

"The law will not permit the holder to take the chances of gain by fraudulently altering the note, without risk of loss in case of detection." *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883.

It is said that this rule is "the most effective means of preserving the integrity" of written contracts. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

⁶ *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49; *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

For the opposite result on this particular question see *Miller v. Yockey*, 49 Colo. 303, 112 Pac. 772, and *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427.

It seems to be held in some cases, however, that even in cases of fraudulent material alterations the maker can not avoid the note and at the same time retain the consideration received therefor. A note given in consideration of a deed to realty was subsequently altered fraudulently. The maker could avoid the entire transaction but he could not avoid the note and affirm the deed.¹

§ 3115. Effect of alteration of collateral instrument. Whether the alteration of one contract affects another contract or instrument in some way connected with the former instrument is a question sometimes presented for consideration. A material alteration in one of two instruments secured by a mortgage does not discharge the other.¹ A material alteration of some of a series of notes given under a conditional contract of sale does not avoid the contract of sale or the rest of the notes.² An alteration which avoids a mortgage does not avoid the note to secure which it was given.³ In some jurisdictions the converse of this rule is applied, and it is held that the alteration of a note, even though fraudulent, can not affect the validity of the mortgage by which it is secured.⁴ Some justification for this result can be found in jurisdictions in which a mortgage is regarded as a conveyance on condition subsequent;⁵ but it seems rather to be based on the theory that the original debt remains in existence for some purposes in spite of the alteration.⁶

Whether the alteration of a note discharges the mortgage given to secure the note depends in most jurisdictions, however, on the nature of the alteration and the purpose for which it was made. An immaterial alteration would, of course, have no effect on either note or mortgage. Such an alteration does not, therefore, discharge the mortgage. A material alteration, if innocent, discharges the written contract, but leaves the obligor thereon liable for the original consideration received by him, and the mortgage remains as a

¹ *Glover v. Green*, 96 Ga. 126, 22 S. E. 664. See for similar facts, *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652.

² *Parke, etc., Co. v. White River Lumber Co.*, 110 Cal. 658, 43 Pac. 202.

³ *Edward Thompson Co. v. Baldwin*, 62 Neb. 530, 87 N. W. 307.

⁴ *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050; *Zeiglar v. Vollers*, 59 Okla. 74, 157 Pac. 1035.

⁵ *Bobb v. Taylor (Mo.)*, 184 S. W.

1028; *Cheek v. Nall*, 112 N. Car. 370, 17 S. E. 80; *Plyler v. Elliott*, 19 S. Car. 257; *Smith v. Smith*, 27 S. Car. 166, 13 Am. St. Rep. 633, 3 S. E. 78.

⁶ See *Van Eps v. Newald*, 139 Wis. 129, 120 N. W. 853, in which a chattel mortgage was enforced in spite of the alteration of the note, on the theory that the action was not on the note, but to recover property.

⁷ *Smith v. Smith*, 27 S. Car. 166, 13 Am. St. Rep. 633, 3 S. W. 78.

valid security for such debt.⁷ On the other hand, a material fraudulent alteration of a note is held to operate as a discharge of the original liability, and therefore as a discharge of the mortgage which is given to secure such debt.⁸

§ 3116. Effect of immaterial alteration on liability on contract.

In a resolution in an early English case,¹ the court said that a deed was avoided by any alteration, even of immaterial words. This rule has been recognized in some early cases in the United States,² and it is still the rule in a few jurisdictions.³ It has been said that even an immaterial alteration in a money-bearing or title-bearing obligation avoids it.⁴ In some cases this statement is obiter, as the alteration is held to be material,⁵ or was made to correct a mistake in expression,⁶ or the cases are cases of spoliation.⁷

The great weight of modern authority in the United States, however, is to the effect that an immaterial alteration does not

¹ Illinois. *Elliott v. Blair*, 47 Ill. 342.

Iowa. *Clough v. Seay*, 49 Ia. 111.

Kansas. *Edington v. McLeod*, 87 Kan. 426, 41 L. R. A. (N.S.) 230, 124 Pac. 163.

Massachusetts. *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49.

Missouri. *Baskin v. Wayne*, 62 Mo. App. 515.

South Carolina. *Gillett v. Powell*, Speers Eq. (S. Car.) 142.

Wisconsin. *Gorden v. Robertson*, 48 Wis. 493, 4 N. W. 579.

² *Tate v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84; *Hocknell v. Sheley*, 66 Kan. 357, 71 Pac. 839; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883; *West v. Naten*, 49 Okla. 249, 152 Pac. 342.

Contra, *Hoffman v. Molloy*, 91 Mo. App. 367; *Plyler v. Elliott*, 19 S. Car. 257; *Smith v. Smith*, 27 S. Car. 166, 13 Am. St. Rep. 633, 3 S. E. 78.

¹ *Pigot's Case*, 11 Coke 26b, 27a.

² *Morris v. Vanderen*, 1 U. S. (1

Dall.) 64, 1 L. ed. 38; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Piercy v. Piercy*, 5 W. Va. 199.

See to the same effect, *Greenleaf on Ev.* (16th ed.), § 568; 2 *Parson's Notes and Bills* (2nd ed.), § 572; *Bishop on Cont.* (2nd ed.), § 755, the latter author saying: "Where in making an immaterial alteration he means a fraud, yet, mistaking the law does not accomplish his purpose, the other party will, in reason, be discharged."

³ *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300 [affirming in banc, 37 S. W. 516]; *Vanauken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

⁴ *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300 [affirming in banc, 37 S. W. 516].

⁵ *United States Glass Co. v. Bottle Co.*, 81 Fed. 993; *Crockett v. Thomson*, 37 Tenn. (5 Sneed) 342.

⁶ *Turner v. Billagram*, 2 Cal. 520.

⁷ *Lumbering v. Kohlbrecher*, 22 Mo. 596.

avoid a written contract.⁸ This is true whether the alteration was made innocently or fraudulently.⁹

* **United States.** *Gordon v. Chattanooga Third National Bank*, 144 U. S. 97, 36 L. ed. 360.

Alabama. *Nance v. Gray*, 143 Ala. 234, 38 So. 916.

California. *Oakland First National Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748.

Connecticut. *Nichols v. Johnson*, 10 Conn. 192.

Georgia. *Shirley v. Swafford*, 119 Ga. 43, 45 S. E. 722.

Idaho. *Exchange State Bank v. Taber*, 26 Ida. 723, 145 Pac. 1090.

Illinois. *Reed v. Kemp*, 16 Ill. 445; *McKibben v. Newell*, 41 Ill. 461; *Ryan v. First National Bank*, 148 Ill. 349 [sub nomine, *Reilly v. First National Bank*, 35 N. E. 1120].

Indiana. *State, ex rel., v. Berg*, 50 Ind. 496; *Shuck v. State*, 136 Ind. 63, 35 N. E. 903; *Fry v. P. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10.

Iowa. *Briscoe v. Reynolds*, 51 Ia. 673, 2 N. W. 529; *Rowley v. Jewett*, 56 Ia. 492, 9 N. W. 353.

Kentucky. *Shelton v. Deering*, 49 Ky. (10 B. Mon.) 405; *Terry v. Hazlewood*, 62 Ky. (1 Duv.) 104; *Citizens' State Bank of Greenup v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

Louisiana. *Hottinger v. Hottinger*, 49 La. Ann. 1633, 22 So. 847.

Massachusetts. *Smith v. Crooker*, 5 Mass. 538; *Granite Ry. Co. v. Bacon*, 32 Mass. (15 Pick.) 239.

Michigan. *Goodenow v. Curtis*, 33 Mich. 505.

Minnesota. *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161; *Spiering v. Spiering*, 138 Minn. 119, 164 N. W. 583; *Beck Electric Construction Co. v. National Contracting Co.*, — Minn. —, 173 N. W. 413.

Mississippi. *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598, 97 Am. Dec. 443.

Missouri. *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163.

Nebraska. *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Fisherdict v. Hutton*, 44 Neb. 122, 62 N. W. 488; *Blenkiron Brothers v. Rogers*, 87 Neb. 716, 31 L. R. A. (N.S.) 127, 127 N. W. 1062.

New Hampshire. *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Burnham v. Ayer*, 35 N. H. 351.

New York. *Flint v. Craig*, 59 Barb. (N. Y.) 319.

North Dakota. *Eaton v. Delay*, 32 N. D. 328, L. R. A. 1916D, 528, 155 N. W. 644.

Ohio. *Huntington v. Finch*, 3 O. S. 445.

Oregon. *Palomaki v. Laurell*, 86 Or. 491, 168 Pac. 935; *Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

Pennsylvania. *Robertson v. Hay*, 91 Pa. St. 242.

South Carolina. *Merchants' National Bank v. Smith*, — S. Car. —, 96 S. E. 690.

Tennessee. *Blair v. Bank*, 30 Tenn. (11 Humph.) 84.

Texas. *Churchill v. Bielstein*, 9 Tex. Civ. App. 445.

Vermont. *Langdon v. Paul*, 20 Vt. 217.

Washington. *Lombardo v. Lombardini*, 57 Wash. 352, 32 L. R. A. (N.S.) 515, 106 Pac. 907.

Wisconsin. *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907.

* **Illinois.** *Vogel v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Magers v. Dunlap*, 39 Ill. App. 618.

Iowa. *Robinson v. Phoenix Insurance Co.*, 25 Ia. 430.

Kentucky. *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

Massachusetts. *Commonwealth v. Bank*, 98 Mass. 12, 93 Am. Dec. 126.

§ 3117. Ratification of alteration. The party who did not make the alteration may, if he choose, ratify it.¹ This principle has been applied to negotiable instruments such as promissory notes² and to leases.³ If the party against whom liability is sought to be enforced has full knowledge of the facts, he may ratify an alteration of a simple contract by express acquiescence therein,⁴ as by express promise to pay the note as altered,⁵ or by making part payment on the altered instrument,⁶ or by paying interest,⁷ or even by failure to disavow within a reasonable time after learning of the alterations.⁸

If the party against whom liability is sought to be enforced does not know of the alteration his conduct does not amount to a ratification.⁹ Thus an offer to renew and pay an altered note,¹⁰ or part

Minnesota. Beck Electric Construction Co. v. National Contracting Co., — Minn. —, 173 N. W. 413.

"An immaterial alteration can not be made material simply by intent." Robinson v. Phoenix Insurance Co., 25 Ia. 430, 435.

"When men's acts can not be the subject of judicial investigation their motives can not be inquired into." Moye v. Herndon, 30 Miss. 110, 121.

¹United States. Smith v. United States, 69 U. S. (2 Wall.) 219, 17 L. ed. 788; Barnsdall v. Boley, 119 Fed. 191.

Alabama. Montgomery v. Cross-thwait, 90 Ala. 553, 12 L. R. A. 140, 8 So. 408.

Illinois. Goodspeed v. Cutler, 75 Ill. 534.

Kansas. Holyfield v. Harrington, 84 Kan. 760, 39 L. R. A. (N.S.) 131, 115 Pac. 546; Blair v. McQuary, 100 Kan. 203, 162 Pac. 1173, 164 Pac. 262.

Massachusetts. Prouty v. Wilson, 123 Mass. 297.

Nebraska. Nebraska v. Paxton, 65 Neb. 110, 90 N. W. 983.

New Jersey. Bodine v. Berg, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

Montana. Smith v. Barnes, 51 Mont. 202, 149 Pac. 963.

South Carolina. Jacobs v. Gilreath, 45 S. Car. 46, 22 S. E. 757.

Wisconsin. Marks v. Schram, 109 Wis. 452, 84 N. W. 830.

²Kansas. Holyfield v. Harrington, 84 Kan. 760, 39 L. R. A. (N.S.) 131, 115 Pac. 546.

Kentucky. Pulliam v. Withers, 38 Ky. (8 Dana) 98, 33 Am. Dec. 479.

North Carolina. Wester v. Bailey, 118 N. Car. 193, 24 S. E. 9.

Oregon. Matlock v. Wheeler, 29 Or. 64, 43 Pac. 867.

Wisconsin. Marks v. Schram, 109 Wis. 452, 84 N. W. 830.

³Barnsdall v. Boley, 119 Fed. 191.

⁴Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Wester v. Bailey, 118 N. Car. 193, 24 S. E. 9.

⁵Goodspeed v. Cutler, 75 Ill. 534; Marks v. Schram, 109 Wis. 452, 84 N. W. 830.

⁶Johnson v. Johnson, 66 Mich. 525, 33 N. W. 413; Evans v. Foreman, 60 Mo. 449.

⁷Prouty v. Wilson, 123 Mass. 297.

⁸Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888; Matlock v. Wheeler, 29 Or. 64, 43 Pac. 867; Gray v. Williams, 91 Vt. 111, 99 Atl. 735.

⁹Cutler v. Rose, 35 Ia. 456; Boalt v. Brown, 13 O. S. 364; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

¹⁰McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

payment of such altered note,¹¹ or bringing an action upon the instrument in its altered form,¹² is not ratification if made without knowledge of the fact of alteration.

Sealed instruments stand on a somewhat different footing. In some jurisdictions the old rule that authority to execute a sealed instrument must be under seal is still in force. Where this rule obtains it follows necessarily that a ratification not under seal is ineffective in case of an alteration in a sealed instrument.¹³ In other jurisdictions a sealed instrument may be executed or modified by authority not under seal. Where this rule obtains an oral ratification will validate an alteration in a sealed contract.¹⁴ An offer to pay a bond and request for an extension of time, with knowledge of the alteration,¹⁵ or claiming the benefit of the entire transaction with knowledge of the alteration,¹⁶ or taking collateral security against liability on such altered instrument,¹⁷ waives the right to treat such alteration as a ground of discharge.

Since co-makers are ordinarily not the agents of one another, ratification by one of several co-makers does not operate as ratification by those who do not know of such ratification and do not assent thereto.¹⁸

§ 3118. Effect of subsequent restoration of contract to original form. Assuming the correctness of the rule that a material alteration operates as a discharge of the contract, it should follow that if a material alteration has once been made and if the written contract has been discharged thereby, the subsequent erasure of such alteration and the restoration of the altered contract to its original condition should not revive the liability upon the original contract against a party who did not assent to such alteration and who does not assent to the restoration of the contract to its original condition. This view has been taken in most jurisdictions; and the

¹¹ *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Jacobs v. Gilreath*, 45 S. Car. 46, 22 S. E. 757.

¹² *Port Huron Engine & Thresher Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008; *Bigelow v. Stilphen*, 35 Vt. 521.

¹³ *Nesbitt v. Turner*, 155 Pa. St. 429, 26 Atl. 750; *Kilkeilly v. Martin*, 34 Wis. 525.

¹⁴ *Dickson v. Bamberger*, 107 Ala.

293, 18 So. 290; *Fairhaven v. Cowgill*, 8 Wash. 687, 36 Pac. 1093.

¹⁵ *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290.

¹⁶ *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492.

¹⁷ *Hagler v. State*, 31 Neb. 144, 47 N. W. 602.

¹⁸ *Davis v. Bauer*, 41 O. S. 257; *Shiffer v. Mosier*, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426.

restoration of the altered contract to its original condition does not make it enforceable against a party who is discharged by such alteration and who has not assented subsequently, either to such alteration or to such restoration.¹ Equity will, therefore, not decree the restoration of the altered instrument to its original form.² If the original alteration was made fraudulently, and if, as a result thereof, liability upon the original contract is discharged, and no quasi-contractual right arises upon the original consideration, the unauthorized erasure of the alteration and restoration of the altered contract to its original condition does not revive the original liability, either on the contract or in quasi-contract.³ If the party against whom it is sought to enforce the contract after restoration did not receive the original consideration, as in the case of a surety, and if his liability rested solely upon the original contract, the courts hold that his liability can not revive by the restoration of the altered contract to its original condition.⁴ A note is avoided by the addition of "with interest," even if erased before transfer to a bona fide holder.⁵

If the alteration was made innocently and not fraudulently, there is at least a quasi-contractual liability on the original consideration;⁶ and there is some authority for saying that the parties who were liable upon the original contract may be held liable by the erasure of the alteration and the restoration of the contract to its original condition.⁷ This rule has been applied even to sureties who could not have been held liable on the original consideration. Thus the addition, after surety has signed, of "with interest at 7 per cent." in accordance with an understanding with payee, and its erasure by payee without fraudulent intent, do not release surety.⁸

¹ Locknane v. Emmerson, 74 Ky. (11 Bush.) 69; Citizens' National Bank v. Williams, 174 Pa. St. 66, 72, 35 L. R. A. 464, 34 Atl. 303; Shiffer v. Mosier, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

² Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72.

³ Locknane v. Emmerson, 74 Ky. (11 Bush.) 69; Citizens' National Bank v. Williams, 174 Pa. St. 66, 35 L. R. A.

464, 34 Atl. 303; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

⁴ Robinson v. Reed, 46 Ia. 219; Shiffer v. Mosier, 225 Pa. St. 552, 24 L. R. A. (N.S.) 1155, 74 Atl. 426.

⁵ Citizens' National Bank v. Williams, 174 Pa. St. 66, 72, 35 L. R. A. 464, 34 Atl. 303, 304.

⁶ See § 3113.

⁷ Rogers v. Shaw, 59 Cal. 260; James v. Tilton, 183 Mass. 275, 67 N. E. 326.

⁸ McAlpin v. Clark, 11 Ohio C. C. 524.

§ 3119. Effect of spoliation—Theory that spoliation operates as discharge. The effect of spoliation was first presented to the English courts in cases involving contracts under seal which were enforceable because of their outward form.¹ The theory that it was the outward form, rather than the intention of the parties, which was to govern, was applied by the courts of law logically; and it was held that the destruction, mutilation or alteration of a sealed instrument operated as a discharge thereof, although the obligee was without fault.² This principle was applied to cases in which the seal was mutilated without any human agency,³ as where the seal was eaten by rats.⁴

The only limitation which the English courts seem to have imposed upon this doctrine was that the instrument must have been thus mutilated when the plea of non est factum was interposed. A mutilation of the seal after the plea of non est factum was interposed and before trial,⁵ as where the seal was eaten by mice after issue was joined and before trial,⁶ had no legal effect, and the instrument could be enforced as it was originally executed.

The rule that spoliation by a third party operated as a discharge of the instrument, was repeated in a later case,⁷ in which seals were added to an unsealed guaranty while in the hands of the promisee, although the defendant did not allege that the plaintiff knew of such alteration or was a party thereto. This result was justified on the theory that such alteration would have been impossible if it had not been for the fraud or carelessness of the promisee.⁸ This

¹ See § 1164.

² Markham v. Gonaston, Cro. Eliz. 626; Pigot's Case, 11 Coke 26b; Bayly v. Garford, March 125; S.aton v. Henson, 2 Lev. 220, 2 Show. 28.

See also, Sheppard's Touchstone of Common Assurances, 68, and Nichols v. Haywood, 1 Dyer 59a.

³ Bayly v. Garford, March 125.

⁴ Bayly v. Garford, March 125.

⁵ Nichols v. Haywood, 1 Dyer 59a; Michael's Case, Owen 8.

⁶ Nichols v. Haywood, 1 Dyer 59a.

⁷ Davidson v. Cooper, 13 M. & W. 343.

⁸ "After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on

the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there can not be any alteration except through fraud, or laches, on his part. To say that Pigot's case has been overruled is a mistake; on the contrary, it has been extended, the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly

rigid rule of the English law survived long enough to cause a similar holding in the United States.⁹

In the meantime, however, even the English courts had held that an alteration of an award under seal, made by the umpire after notice of such award and before delivery, was inoperative, either to modify the original award or to render it invalid.¹⁰

§ 3120. Effect of spoliation—Theory that spoliation is without legal effect. The English courts seem to have receded from their original rule¹ so far that spoliation of a sealed instrument by one who is not a party thereto is regarded as having no legal effect,² at least if the modification is immaterial.³

The great weight of authority in the United States has taken the position that a spoliation by a stranger to the contract has no legal effect. On the one hand, it does not avoid the contract,⁴ and,

as it was when signed, but only something is added near to the signatures of the defendants, we may observe that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth can not be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are, therefore, of opinion, both upon principle and authority, that this judgment must be

affirmed." Davidson v. Cooper, 13 M. & W. 343.

⁹ Pullen v. Shaw, 14 N. Car. 238.

¹⁰ Henfree v. Bromley, 6 East 309; Trew v. Burton, 1 Crompt. & M. 533.

¹ See § 3119.

² Waugh v. Bussell, 5 Taunt. 707.

³ Waugh v. Bussell, 5 Taunt. 707.

⁴ United States. United States v. Spalding, 2 Mason (U. S.) 482; Clyde Steamship Co. v. Whaley, 231 Fed. 76, L. R. A. 1916F, 289.

Alabama. Forbes v. Taylor, 139 Ala. 286, 35 So. 855.

Arkansas. Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449.

California. Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115.

Connecticut. Nichols v. Johnson, 10 Conn. 192; Aetna National Bank v. Winchester, 43 Conn. 391.

Florida. Orlando v. Gooding, 34 Fla. 244, 15 So. 770.

Georgia. Probasco v. Shaw, 144 Ga. 416, 87 S. E. 466.

Illinois. Paterson v. Higgins, 58 Ill. App. 268; Condict v. Flower, 106 Ill. 105; Pry v. Pry, 109 Ill. 466; Lanum v. Patterson, 143 Ill. App. 244; Fry v. Jenkins, 173 Ill. App. 486.

on the other hand, the original contract is to be enforced as if no spoliation had been made.⁵ The unauthorized addition of a seal by

Indiana. *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *Cochran v. Nebeker*, 48 Ind. 459.

Kentucky. *Lee v. Alexander*, 48 Ky. (9 B. Mon.) 25, 48 Am. Dec. 412.

Massachusetts. *Chessman v. Whittemore*, 40 Mass. (23 Pick.) 231.

Michigan. *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583.

Minnesota. *Ames v. Brown*, 22 Minn. 257.

Mississippi. *Ferguson v. White* (Miss.), 18 So. 124; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598, 97 Am. Dec. 443.

Missouri. *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Moore v. Ivers*, 83 Mo. 29; *State, ex rel. Pemiscot County, v. Scott*, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11.

Nebraska. *Bingham v. Shadle*, 45 Neb. 82, 63 N. W. 143; *Schlageck v. Widholm*, 59 Neb. 541, 81 N. W. 448.

New Jersey. *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

New York. *Rees v. Overbaugh*, 6 Cow. (N. Y.) 740; *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501; *Casoni v. Jerome*, 58 N. Y. 315; *Martin v. Tradesmen's Insurance Co.*, 101 N. Y. 498, 5 N. E. 338; *Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, 21 N. E. 168; *Gleason v. Hamilton*, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 283.

Ohio. *Tarbill v. Mill Works*, 1 Ohio C. D. 643; *Fullerton v. Sturges*, 4 O. S. 529; *Thompson v. Massie*, 41 O. S. 307.

Pennsylvania. *Robertson v. Hay*, 91 Pa. St. 242; *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058; *Bowman v. Berkeley*, 259 Pa. St. 327, 103 Atl. 49.

South Carolina. *White v. Harris*, 69

S. Car. 65, 104 Am. St. Rep. 791, 48 S. E. 41.

Tennessee. *Boyd v. McConnell*, 29 Tenn. (10 Humph.) 68; *Deering Harvester Co. v. White*, 110 Tenn. 132, 72 S. W. 962.

Vermont. *Bigelow v. Stilphen*, 35 Vt. 521; *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 104 Am. St. Rep. 915, 56 Atl. 87.

Washington. *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Edwards v. Thompson*, 99 Wash. 188, 169 Pac. 327; *Gould v. Gould*, 99 Wash. 204, 169 Pac. 324.

West Virginia. *Yeager v. Musgrave*, 28 W. Va. 90.

Wisconsin. *Union National Bank v. Roberts*, 45 Wis. 373; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907.

United States. *United States v. Spalding*, 2 Mason (U. S.) 482; *Clyde Steamship Co. v. Whaley*, 231 Fed. 76, L. R. A. 1916F, 289.

Alabama. *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855.

Arkansas. *Andrews v. Calloway*, 50 Ark. 358, 7 S. W. 449.

California. *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115.

Connecticut. *Nichols v. Johnson*, 10 Conn. 192; *Aetna National Bank v. Winchester*, 43 Conn. 391.

Florida. *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770.

Illinois. *Condict v. Flower*, 106 Ill. 105; *Pry v. Pry*, 109 Ill. 466; *Peterson v. Higgins*, 58 Ill. App. 268; *Lanum v. Patterson*, 143 Ill. App. 244; *Fry v. Jenkins*, 173 Ill. App. 486.

Indiana. *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *Cochran v. Nebeker*, 48 Ind. 459.

Kentucky. *Lee v. Alexander*, 48 Ky. (9 B. Mon.) 25, 48 Am. Dec. 412.

a stranger to the contract does not affect its validity.⁶ If a maker of a negotiable note which is not under seal adds seals to the names of the other makers without their authority and before he delivers the note to the payee, such addition of seals does not discharge the makers who did not assent thereto;⁷ although they are not liable, as on a sealed instrument.⁸ An unauthorized change in the name of the grantee after the deed has been delivered does not divest the title of the original grantee.⁹

The practical difficulties incident to any reliance on secondary evidence, when the primary evidence is destroyed, are occasionally encountered where the spoliation has been thorough.

Massachusetts. *Chessman v. Whittemore*, 40 Mass. (23 Pick.) 231.

Michigan. *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583.

Minnesota. *Ames v. Brown*, 22 Minn. 257.

Mississippi. *Ferguson v. White* (Miss.), 18 So. 124; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 508, 97 Am. Dec. 443.

Missouri. *Lubbering v. Kohlbrecher*, 22 Mo. 506; *Moore v. Ivers*, 83 Mo. 29; *State, ex rel. Pemiscot County, v. Scott*, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11.

Nebraska. *Bingham v. Shadle*, 45 Neb. 82, 63 N. W. 143; *Schlageck v. Widholm*, 59 Neb. 541, 81 N. W. 448.

New Jersey. *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501; *Casoni v. Jerome*, 58 N. Y. 315; *Martin v. Tradesmen's Insurance Co.*, 101 N. Y. 498, 5 N. E. 338; *Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, 21 N. E. 168; *Gleason v. Hamilton*, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 283.

Ohio. *Tarbill v. Richmond City Mill Works*, 1 Ohio C. D. 643; *Fullerton v. Sturges*, 4 O. S. 529.

Pennsylvania. *Robertson v. Hay*, 91 Pa. St. 242; *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058; *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49.

South Carolina. *White v. Harris*, 69 S. Car. 65, 104 Am. St. Rep. 791, 48 S. E. 41.

Tennessee. *Boyd v. McConnell*, 29 Tenn. (10 Humph.) 68; *Deering Harvester Co. v. White*, 110 Tenn. 132, 72 S. W. 962.

Vermont. *Bigelow v. Stilphen*, 35 Vt. 521; *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 104 Am. St. Rep. 915, 56 Atl. 87.

Washington. *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Edwards v. Thompson*, 99 Wash. 183, 169 Pac. 327.

West Virginia. *Yeager v. Musgrave*, 28 W. Va. 90.

Wisconsin. *Union National Bank v. Roberts*, 45 Wis. 373.

⁶ *Bowman v. Berkey*, 259 Pa. St. 327, 103 Atl. 49.

⁷ *Fullerton v. Sturges*, 4 O. S. 529.

⁸ *Fullerton v. Sturges*, 4 O. S. 529.

⁹ *Carr v. Frye*, 225 Mass. 531, L. R. A. 1917E, 814, 114 N. E. 745.

VIII

MODIFICATION OF CONTRACT AS AFFECTING NON-
ASSENTING PARTIES

§ 3121. Modification of contract discharging surety—General principles. The effect of a material modification of a contract agreed upon between the two adversary principals thereto without the consent of the sureties of one of such principles, is in some respects analogous to alteration, and requires a brief notice here. It is not usually a case of technical alteration, because the change is rarely made upon the face of the instrument; but in some respects the effect of such modification is the same as that of alteration. If one of two or more joint parties to a contract is a surety, a modification of the contract made between his principal and the adversary party without the consent of the surety discharges the latter.¹ A common form of modification is found where the creditor and the principal debtor have agreed upon an extension of time without the assent of the surety.² Extension of time discharges a

¹ **England.** *Calvert v. London Dock Co.*, 2 Keen 638.

United States. *Prairie States National Bank v. United States*, 164 U. S. 227, 41 L. ed. 412.

Alabama. *First National Bank v. Fidelity & Deposit Co.*, 145 Ala. 335, 5 L. R. A. (N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415.

Michigan. *Backus v. Archer*, 109 Mich. 660, 67 N. W. 913.

Minnesota. *Stone-Ordean-Wells Co. v. Taylor*, 139 Minn. 432, L. R. A. 1918E, 93, 166 N. W. 1069.

Pennsylvania. *Schroyer v. Thompson*, 262 Pa. St. 282, 2 A. L. R. 1567, 105 Atl. 274.

² **United States.** *Union Mutual Life Insurance Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118.

Arkansas. *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667.

Illinois. *Landon v. English*, 75 Ill. App. 483.

Indiana. *Matchett v. Winona Assembly & Summer School Association*, 185 Ind. 128, 113 N. E. 1; *Schieber v.*

Traudt, 19 Ind. App. 349, 49 N. E. 605; *Bugh v. Crum*, 26 Ind. App. 465, 84 Am. St. Rep. 307, 59 N. E. 1076.

Kansas. *Roberson v. Blevins*, 57 Kan. 50, 45 Pac. 63.

Minnesota. *National Iron Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802.

New York. *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Murray v. Marshall*, 94 N. Y. 611.

North Carolina. *Jenkins v. Daniel*, 125 N. Car. 161, 74 Am. St. Rep. 632, 34 S. E. 239.

Oklahoma. *Bennett v. Odneal*, 44 Okla. 354, 147 Pac. 1013.

Tennessee. *Watauga Bank v. Matson*, 99 Tenn. 390, 41 S. W. 1062.

Utah. *Gillett v. Taylor*, 14 Utah 190, 60 Am. St. Rep. 890, 46 Pac. 1099; *Schroeder v. Kinney*, 15 Utah 462, 49 Pac. 804.

Washington. *Bank v. Jeffs*, 15 Wash. 230, 46 Pac. 247, 32 S. E. 1002; *Lipsett v. Dettering*, 94 Wash. 629, 162 Pac. 1007.

guarantor.³ However, under a bond exacted by the government from a contractor under a public contract for the benefit of subcontractors and materialmen, conditioned on the contractor's paying them "promptly," it has been held that the act of the materialmen in taking notes for thirty and sixty days, does not discharge the surety.⁴ If A guarantees performance of a contract before it is made, he is released by a change in its terms from those guaranteed.⁵ In jurisdictions where A becomes a surety when X assumes A's debt to B, an extension of time given by B to X without A's consent discharges A.⁶ This principle does not, of course, apply where A does not under such circumstances become a surety, but remains primarily liable.⁷

If extension of time is relied upon as the alteration, there must be a binding contract for an extension. An implied contract for an extension of time will operate as a discharge as well as an express contract.⁸ An unenforceable promise to grant an extension does not, however, discharge the surety.⁹ Still less does mere delay, without any agreement therefor, discharge the surety in the absence of statute.¹⁰ In order that extension of time may operate as

West Virginia. *Parsons v. Harrold*, 46 W. Va. 122.

Wisconsin. *Fanning v. Murphy*, 126 Wis. 538, 4 L. R. A. (N.S.) 666, 105 N. W. 1056.

See, Giving Time to Principal Debtors, by W. H. Griffith, 14 Law Quarterly Review, 379.

³ *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115.

⁴ *United States Fidelity & Guaranty Co. v. Brick Co.*, 191 U. S. 416, 48 L. ed. 242. This holding was based upon the peculiar character of the covenant, the surety having no idea when he entered into the contract when the respective payments would fall due.

⁵ *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731, 21 L. R. A. 409, 33 N. E. 311.

⁶ *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Schroeder v. Kinney*, 15 Utah 462, 49 Pac. 894.

⁷ *Denison University v. Manning*, 65 O. S. 138, 61 N. E. 607.

⁸ *Robertson v. Blevins*, 57 Kan. 50, 45 Pac. 63.

⁹ *Georgia. Bunn v. Bank*, 98 Ga. 647, 26 S. E. 63; *Tatum v. Morgan*, 108 Ga. 336, 33 S. E. 940.

Illinois. Heenan v. Howard, 81 Ill. App. 629.

Indiana. Voris v. Shotts, 20 Ind. App. 220, 50 N. E. 484; *Olson v. Chism*, 21 Ind. App. 40, 51 N. E. 373.

Kentucky. Krupp v. Ritter Verein (Ky.), 53 S. W. 648.

Missouri. Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19.

Tennessee. Sully v. Childress, 106 Tenn. 100, 82 Am. St. Rep. 875, 60 S. W. 499.

¹⁰ *California. Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

Georgia. Hall v. Pratt, 103 Ga. 255, 20 S. E. 764.

Illinois. Villars v. Palmer, 67 Ill. 204.

Kansas. Hall v. Bank, 5 Kan. App. 493, 47 Pac. 566.

Louisiana. Foretall v. Fussell, 50 La. Ann. 249, 256, 23 So. 273, 1012.

a discharge, the holder of the note must know when he contracts for the extension that one of the parties is a surety.¹¹ If, however, he does not know of the fact of suretyship when he takes the note, but he does know of it when he grants the extension of time, he releases the surety.¹² If the surety assents to the extension of time, he is not discharged thereby.¹³ Extension of time granted by a contract between the creditor and one co-surety does not discharge a non-consenting surety.¹⁴ If the creditor grants an extension of time and expressly reserves his right of action against the surety, the surety is held not to be discharged by such contract.¹⁵

A surety for the performance of a building contract is discharged by a modification of the original contract as to the manner of payment,¹⁶ at least if such modification prejudices the rights of the surety.¹⁷ Such a modification discharges the surety, even if

Maryland. *Gray v. Bank*, 81 Md. 631, 32 Atl. 518.

Michigan. *Colby Wringer Co. v. Coon*, 116 Mich. 208, 74 N. W. 519.

Montana. *Hefferlin v. Krieger*, 19 Mont. 123, 47 Pac. 638.

Nebraska. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Bank v. McAllister*, 56 Neb. 188, 76 N. W. 552.

New Jersey. *Grier v. Flitercraft*, 57 N. J. Eq. 556, 41 Atl. 425.

South Dakota. *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58.

Tennessee. *Bank v. Matson*, 99 Tenn. 300, 41 S. W. 1062; *Weaver v. Ruhm* (Tenn. Ch. App.), 47 S. W. 171.

Utah. *Wallace v. Richards*, 16 Utah 52, 50 Pac. 804.

West Virginia. *First National Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

¹¹ *Union Mutual Life Insurance Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118; *Gillett v. Taylor*, 14 Utah 190, 60 Am. St. Rep. 890, 46 Pac. 1099; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

¹² *Zapalac v. Zapp*, 22 Tex. Civ. App. 375, 54 S. W. 938; *Gillett v. Taylor*, 14 Utah 190, 60 Am. St. Rep. 890, 46 Pac. 1099.

¹³ *Williams v. Gooch*, 73 Ill. App. 557; *Barrett v. Davis*, 104 Mo. 549, 16 S. W.

377; *Kuhlman v. Leavens*, 5 Okla. 562, 50 Pac. 171.

¹⁴ *Draper v. Weld*, 79 Mass. (13 Gray) 580; *Sherman County v. Nichols*, 65 Neb. 250, 91 N. W. 198; *Merchants' Bank v. Bussell*, 16 Wash. 546, 48 Pac. 242.

Contra, Ide v. Churchill, 14 O. S. 386.

¹⁵ **Alabama.** *Hodges v. Land Co.*, 100 Ala. 617, 20 So. 23.

Kansas. *Dean v. Rice*, 63 Kan. 691, 66 Pac. 992.

Michigan. *Big Rapids National Bank v. Peters*, 120 Mich. 518, 79 N. W. 891.

Pennsylvania. *Kaufman v. Rowan*, 189 Pa. St. 121, 42 Atl. 25.

Washington. *Boston National Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026.

¹⁶ *First National Bank v. Fidelity & Deposit Co.*, 145 Ala. 335, 117 Am. St. Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415; *Kiessig v. Allspaugh*, 91 Cal. 231, 13 L. R. A. 418, 27 Pac. 655; *Welch v. Hubschmitt Building & Woodworking Co.*, 61 N. J. L. 57, 38 Atl. 824.

Contra, if the right of the surety is not impaired. *Bateman Bros. v. Mapel*, 145 Cal. 241, 78 Pac. 734; *Hand Mfg. Co. v. Marks*, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 56 Pac. 519.

¹⁷ *First National Bank v. Fidelity & Deposit Co.* 145 Ala. 335, 117 Am. St.

the surety has agreed to protect the property owner against claims of the subcontractors and materialmen.¹⁸ A surety upon the bond of a contractor is discharged by a modification of the contract with the assent of the property owner, which brings the total cost of the improvement beyond the amount limited in the contract of suretyship, although the excess above such amount is, by special agreement, to be paid for by the lessee of the property owner.¹⁹

If the surety assents to a modification of the contract,²⁰ whether such modification is made before the contract of suretyship is made,²¹ or subsequently thereto,²² such modification does not discharge the surety.

If property is pledged as security for the performance of a contract by one who does not own such property, such property is to be treated as a surety, as far as the discharge thereof by alteration of the contract.²³

To operate as a discharge, the contract to which the surety is a party must be modified. Thus a collateral contract for paying two per cent. interest additional to that stipulated in the main contract does not release a surety on the main contract.²⁴ A release of the principal debtor operates as a discharge of the surety,²⁵ unless the creditor expressly reserves his right to hold the sureties.²⁶

§ 3122. Effect of discharge of surety on liability of remaining sureties. Whether the discharge of a surety operates as a discharge of the remaining sureties who have not assented thereto, is a question upon which there has been a divergence between law and

Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415; Kiessig v. Allspaugh, 91 Cal. 231, 13 L. R. A. 418, 27 Pac. 655; Welch v. Hubschmitt Building & Woodworking Co., 61 N. J. L. 57, 38 Atl. 824.

¹⁸ First National Bank v. Fidelity & Deposit Co., 145 Ala. 335, 117 Am. St. Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415; Kiessig v. Allspaugh, 91 Cal. 231, 13 L. R. A. 418, 27 Pac. 655; Welch v. Hubschmitt Building & Woodworking Co., 61 N. J. L. 57, 38 Atl. 824.

¹⁹ Southwestern Surety Ins. Co. v. Terry, 122 Ark. 522, 184 S. W. 54.

²⁰ Powell v. Fowler, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827; Williams v. Gooch, 73 Ill. App. 557; Bar-

rett v. Davis, 104 Mo. 519, 16 S. W. 377.

²¹ Powell v. Fowler, 85 Ark. 451, 102 Am. St. Rep. 41, 108 S. W. 827.

²² Williams v. Gooch, 73 Ill. App. 557; Barrett v. Davis, 104 Mo. 519, 16 S. W. 377.

²³ Mechanics' National Bank v. Comins, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191.

²⁴ Stuts v. Strayer, 60 O. S. 384, 71 Am. St. Rep. 723, 54 N. E. 368.

²⁵ Union National Bank v. Grant, 48 La. Ann. 18, 18 So. 705; Commercial Bank v. Cunningham, 41 Mass. (24 Pick.) 270, 35 Am. Dec. 322.

²⁶ Faneuil Hall National Bank v. Meloon, 183 Mass. 66, 97 Am. St. Rep. 416, 66 N. E. 410.

equity, and in which law for once has been more favorable to the surety than has equity, by reason of its technical rules as to the effect of the modification of a joint contract;¹ although it must be added that it is frequently difficult to determine whether the cases in which the surety was held to be released at law were all of them cases of joint contracts. At law it is held that the release or discharge of a surety discharges his cosureties as to liabilities which arise thereafter.² In equity, on the other hand, it was held that the release or discharge of a surety did not operate as a complete discharge of liability of the other sureties,³ but that it operated as a pro tanto discharge only.⁴ In a number of jurisdictions, the equity theory has been adopted, and it has been held that sureties who are liable for the same debt are discharged only so far as they are actually injured by the release or discharge of one of their number without the consent of the rest.⁵ This result is reached under statutes which provide that the discharge of a joint debtor shall not operate as an entire discharge of the remaining joint debtors.⁶

§ 3123. Extension of time as discharge of surety under Negotiable Instruments Law. In jurisdictions in which the Negotiable Instruments Law is in force, the construction which the courts have placed upon the statute has revolutionized the effect of an extension of time upon the liability of a surety who is a joint maker. This statute provides:

"A negotiable instrument is discharged: (1) By payment in due course or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made

¹ See § 2074.

² Britnell v. Smith, 189 Ala. 440, 86 So. 569; Wilkinson v. Conley, 133 Ga. 518, 66 S. E. 372; Hunter v. First National Bank of Fort Wayne, 172 Ind. 62, 87 N. E. 734; Stone-Ordean-Wells Co. v. Taylor, 139 Minn. 432, L. R. A. 1918E, 93, 166 N. W. 1069.

³ England. Ex parte Gifford, 6 Ves. Jr. 805.

Arkansas. State Bank v. Bozeman, 13 Ark. 631.

Maryland. Smith v. State, 46 Md. 617.

Missouri. State of Missouri, ex rel., v. Matson, 44 Mo. 305.

New York. Morgan v. Smith, 70 N. Y. 537.

⁴ State Bank v. Bozeman, 13 Ark. 631; Smith v. State, 46 Md. 617; State of Missouri, ex rel., v. Matson, 44 Mo. 305; Morgan v. Smith, 70 N. Y. 537.

⁵ Gillespie v. Smith, 229 Fed. 760; Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; Darland v. First National Bank, 177 Ky. 261, 197 S. W. 826; Hallock v. Yankey, 102 Wis. 41, 72 Am. St. Rep. 861, 78 N. W. 156.

⁶ Walsh v. Miller, 51 O. S. 463, 38 N. E. 381.

or accepted for accommodation. (3) By the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."¹

The courts have apparently held that the Negotiable Instruments Law was intended as a codification, not only of the law of negotiable instruments in the limited sense, but also as a codification of collateral topics as far as they involved the validity or effect of negotiable instruments.

While the courts have not carried this idea to its extreme, they have applied it to the effect of an extension of time upon the liability of a non-assenting surety; and they have held that the methods of discharge enumerated in this section are exclusive, and that, since extension of time is not named as a method of discharging a joint maker or other party who appears to be liable primarily, but who is known to be a surety, this section is to be construed as reversing the common-law rule; and accordingly the surety is not discharged by such extension of time.²

The result of this holding has been most unfortunate. It has seemed to be very doubtful whether the statute was intended to codify the law of suretyship as far as it affected a negotiable instrument. If this construction is to be applied generally to statutes which undertake a partial codification of the law, these statutes must contain provisions limiting their scope in unequivocal language to the subject which is to be codified; or the unity of the

¹ § 119 Negotiable Instruments Law.

² *Arizona*. *Cowan v. Ramsey*, 15 Ariz. 533, 140 Pac. 501.

Kansas. *First National Bank v. Livermore*, 90 Kan. 395, 47 L. R. A. (N.S.) 274, 133 Pac. 734.

Kentucky. *First State Bank v. Williams*, 164 Ky. 143, 175 S. W. 10.

Maryland. *Vanderford v. Farmers' & Mechanics' National Bank*, 105 Md. 164, 10 L. R. A. (N.S.) 129, 66 Atl. 47.

Ohio. *Richards v. Market Exchange Bank Co.*, 81 O. S. 348, 26 L. R. A. (N.S.) 99, 90 N. E. 1000.

Oklahoma. *Cleveland National Bank v. Bickel*, 59 Okla. 279, 159 Pac. 302.

Oregon. *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426 [sub nomine, *Cellers v. Lyons*, 10 L. R. A. (N.S.) 133].

Tennessee. *Graham v. Shepherd*, 136 Tenn. 418, 189 S. W. 867.

Washington. *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170.

The opposite result has been reached, as between the payee and a surety who is a joint maker, on the theory that the payee can not be a holder in due course. *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50.

In most jurisdictions, however, the payee may be a bona fide holder.

See § 2364.

law will be destroyed, and more harm will thus be done than can be made up by any good which will result from codification, no matter how excellent, and uniformity throughout the commercial nations, no matter how desirable. A concrete illustration of this is found in the topic under discussion. Where the Negotiable Instruments Law is in effect, the law of principal and surety is cut into two parts for practical purposes; one part dealing with suretyship in negotiable contracts, and the other with the other forms suretyship.

CHAPTER LXXXVI

BANKRUPTCY

- § 3124. Nature of bankruptcy.
- § 3125. English bankrupt acts.
- § 3126. Federal bankrupt acts.
- § 3127. State bankrupt acts—Validity and general effect.
- § 3128. Effect of state bankrupt acts as against non-resident creditors.
- § 3129. Effect as against prior obligations.
- § 3130. Effect of passage of federal bankrupt act.
- § 3131. Statutory provisions concerning discharge.
- § 3132. Provable debts—Nature.
- § 3133. What are provable debts—Claims arising on contract.
- § 3134. Claims arising on quasi-contract.
- § 3135. Judgments.
- § 3136. Claims in nature of tort, not reduced to judgment.
- § 3137. When debt must exist.
- § 3138. Liability for contribution and exoneration.
- § 3139. Continuing contracts.
- § 3140. Contingent liabilities.
- § 3141. Liability to support wife and children.
- § 3142. Statutory exceptions to effect of discharge—Provable character of claim.
- § 3143. Judgments for wilful and malicious injuries to person or property—
Nature of malice.
- § 3144. Wilful and malicious injury to person.
- § 3145. Wilful and malicious injury to property.
- § 3146. Judgments for fraud.
- § 3147. Debt created by fraud not in fiduciary capacity.
- § 3148. General nature of fraud.
- § 3149. Liability for obtaining property by false pretense or false representations.
- § 3150. Proof of claim for fraud.
- § 3151. Debts created in fiduciary capacity—Technical trust relations.
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- § 3153. Debts omitted from schedule.
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- § 3155. Debts due to United States and state.
- § 3156. General effect of discharge.
- § 3157. Domestic and foreign discharges.
- § 3158. Discharge as affecting liens.
- § 3159. Effect on liability of co-debtor.
- § 3160. Surety on bond conditioned on judgment against principal.
- § 3161. Partnership and individual debts.
- § 3162. Who can take advantage of discharge in bankruptcy.
- § 3163. Other forms of secondary liability.

§ 3164. Necessity and method of pleading discharge.

§ 3165. Burden of proof.

§ 3166. New promise as waiving discharge.

§ 3167. Elements of new promise.

§ 3168. Nature of liability created by new promise.

§ 3169. Part payment.

§ 3124. Nature of bankruptcy. Blackstone defines bankruptcy as the act of becoming a bankrupt; and he defines a bankrupt as "a trader who secretes himself or does certain other acts tending to defraud his creditors."¹

Bankruptcy is of importance in the law of contracts because of the fact that, by compliance with the provisions of the bankruptcy laws, a discharge may be obtained which will operate as a defense to many of the prior obligations of the bankrupt.² Bankruptcy will accordingly be considered from the standpoint of the discharge and the effect thereof. Bankruptcy is a proceeding or a system of law under which such proceeding is brought, or the status of a person who has been adjudged a bankrupt under such system of law and such proceeding. A bankrupt law is, as a rule, easy to recognize and hard to define. It is a statutory rule of law, since there was no common-law bankruptcy; and it provides for adjudging an insolvent debtor bankrupt, for taking charge of his property and distributing it among his creditors, and for discharging a debtor who has complied with the provisions of such bankrupt law from certain debts, so that no personal liability can be enforced against him thereafter by reason of such debts, unless he has assented thereto in some way. All of these elements are present, as a matter of fact, in most bankruptcy legislation. They need not all be present in each proceeding in bankruptcy. A proceeding is none the less a proceeding in bankruptcy, although the bankrupt may have no property, or although a discharge may be refused to the bankrupt because of his failure to comply with requirements of the bankrupt law.

§ 3125. English bankrupt acts. Neither common law nor equity, as such, had bankruptcy jurisdiction, and neither of them had any general principles of bankrupt law. The contest for jurisdiction among the king's courts and the determination to outbid each other in granting efficient remedies, led to arrest of the defendant as an incident to the ordinary action; and his imprison-

¹ II Blackstone's Commentaries, 285.

² See § 3156.

ment for debt if he was unable to satisfy a judgment rendered against him. At the same time, and partly because of the severity of the law against the person of the debtor, the machinery for attacking conveyances in defraud of creditors was very limited. Legislation finally came to the rescue, in part to give more efficient remedies to the creditors in case of conveyance of property by the debtor in order to defraud his creditors; and in part to give to a debtor who had complied with the provisions of the bankrupt act an opportunity to escape the extreme consequences of imprisonment for debt. The early statutes fell far short of accomplishing either of these purposes, and they were confined to merchants and traders. The later statutes have carried these underlying principles out in considerable detail.¹

§ 3126. Federal bankrupt acts. The Constitution of the United States¹ gives to Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States." Under this grant of power Congress has enacted four distinct bankrupt acts which have been in force altogether only thirty-eight years since the foundation of our present government.² The present bankrupt act took effect July 1, 1898, and was amended February 5, 1903, June 25, 1910, and March 2, 1917.

¹ For English legislation on insolvent traders and other debtors and on bankruptcy, see 34 & 35 Hen. VIII, c. 4; 13 Eliz., c. 7; 1 Jac. I, c. 15; 21 Jac. I, c. 19; 4 Anne, c. 17; 10 Anne, c. 15; 6 Geo. IV, c. 16; 24 & 25 Vict., c. 134; 32 & 33 Vict., c. 71; 46 & 47 Vict., c. 52; 50 & 51 Vict., c. 66; 52 & 53 Vict., c. 63; § 38; 3 & 4 Geo. V, c. 34; 4 & 5 Geo. V, c. 47; 4 & 5 Geo. V, c. 59.

On the general question of bankruptcy, see *The Early History of English Bankruptcy*, by Louis E. Levinthal, 67 *University of Pennsylvania Law Review*, 1; *English and Scottish Bankruptcies*, by John Burns, 29 *Law Quarterly Review*, 460; *Bankruptcy a Commercial Regulation*, by James M. Olmstead, 15 *Harvard Law Review*, 829; *Ancillary Receiverships in Bankruptcy*, by Lee Max Friedman, 18 *Harvard Law Review*, 519; *Debtor's*

Interference in the Election of a Trustee in Bankruptcy, by Lee Max Friedman, 19 *Harvard Law Review*, 106; *Distribution of Assets of Bankrupt Partnerships and Partners*, by William J. Shroder, 18 *Harvard Law Review*, 495, and *Unrecorded Conditional Sales in Bankruptcy*, by Samuel Williston, 24 *Harvard Law Review*, 620.

¹ Art. I, § 8, par. 4.

² In *Hanover National Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, Fuller, C. J., gave the following list of federal bankrupt acts as in force prior to the act of 1898:

Act of 1800, 2 Stat. 19, c. 19. Repealed 1803, 2 Stat. 248, c. 6.

Act of 1841, 5 Stat. 440, c. 9. Repealed 1843, 5 Stat. 614, c. 842.

Act of 1867, 14 Stat. 517, c. 176. Repealed 1878, 20 Stat. 90, c. 160.

The Federal Bankrupt Act of 1898 is constitutional.³ Power to make laws on the subject of bankruptcies confers power to provide for voluntary bankruptcy, as well as involuntary bankruptcy; and the fact that the Bankrupt Act of 1898 provides for voluntary bankruptcy without notice to the creditors of the filing of such petition, and that it does not require personal service of notice of the hearing of the debtor's application for his discharge, does not render it unconstitutional.⁴

§ 3127. State bankrupt acts—Validity and general effect. Various state bankrupt laws have been enacted which provide for granting discharges to debtors who comply with the provisions thereof.¹ A state of the union has power to enact laws of this sort;² and a discharge which is granted thereunder is a defense as against all obligations which were incurred after such state statute was enacted, which were in existence when the bankruptcy proceedings took place, and which were due and owing to a citizen of the state in which such proceedings were had, or to one who entered his appearance in such proceedings or otherwise submitted himself to the jurisdiction of the court.³ These state bankrupt acts, however, lack efficiency for several reasons, the more important of which are discussed in the following sections.⁴

§ 3128. Effect of state bankrupt acts as against non-resident creditors. The discharges granted by a state bankrupt court can have no extraterritorial effect.¹ Hence a creditor domiciled out-

³ *Hanover National Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113.

See, *The United States Bankruptcy Law of 1898*, by Henry G. Newton, 9 *Yale Law Journal*, 287.

⁴ *Hanover National Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113.

¹ See, *Voluntary Assignments and Insolvency in Massachusetts*, by Prescott F. Hall, 8 *Harvard Law Review*, 265.

² *Crapo v. Kelly*, 83 U. S. (16 Wall.) 610, 21 L. ed. 430; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *Hempsted v. Wisconsin Marine & Fire Ins. Co. Bank*, 78 Wis. 375, 47 N. W. 627.

³ *Butler v. Goreley*, 146 U. S. 303, 36 L. ed. 981; *McDermott v. Hall*, 177

Mass. 224, 58 N. E. 695; *Hempsted v. Wisconsin Marine & Fire Ins. Co. Bank*, 78 Wis. 375, 47 N. W. 627.

⁴ See §§ 3128 et seq.

¹ *United States. Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *Cook v. Moffat*, 46 U. S. (5 How.) 295, 12 L. ed. 159; *Baldwin v. Hale*, 68 U. S. (1 Wall.) 223, 17 L. ed. 531; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773.

California. Bean v. Loryea, 81 Cal. 151, 22 Pac. 513.

Iowa. Hawley v. Hunt, 27 Ia. 303, 1 Am. Rep. 273.

Maine. Swift v. Winchester, 96 Me. 480, 90 Am. St. Rep. 414, 52 Atl. 1017.

side of the state which grants such discharge, who does not participate in the proceedings in bankruptcy is in no way affected by such discharge,² even if he has notice of such proceedings,³ since actual notice can not confer jurisdiction.⁴ This rule applies even to contracts made in the state where the discharge was given or to be performed there, or both, as long as the creditor is actually domiciled in another state.⁵ It applies to a foreign corporation doing business in the state which grants the discharge, even if such corporation has appointed an agent in such state on whom service can be made.⁶ It applies even where a non-resident individual has been doing business in the state under a name that suggests a domestic corporation.⁷ It applies to a partnership, one member of

Massachusetts. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 251, 51 N. E. 531.

New Hampshire. *Stirn v. McQuade*, 66 N. H. 403, 22 Atl. 451.

New York. *Pratt v. Chase*, 44 N. Y. 597, 4 Am. Rep. 718.

North Dakota. *Adams v. Hartzell*, 18 N. D. 221, 119 N. W. 635.

Oregon. *Main v. Messner*, 17 Or. 78, 20 Pac. 255.

Vermont. *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133, 15 Atl. 159.

Washington. *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473.

² **United States.** *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *Baldwin v. Hale*, 68 U. S. (1 Wall.) 223, 17 L. ed. 531; *Gilman v. Lockwood*, 71 U. S. (4 Wall.) 409, 18 L. ed. 432; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491.

California. *Scamman v. Bonslett*, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272.

Idaho. *Security Savings & Trust Co. v. Rogers*, 6 Ida. 526, 57 Pac. 316.

Maine. *Swift v. Winchester*, 96 Me. 480, 90 Am. St. Rep. 414, 52 Atl. 1017.

Massachusetts. *Pattee v. Paige*, 163 Mass. 352, 47 Am. St. Rep. 459, 28 L. R. A. 451, 40 N. E. 108; *Haman v. Bremman*, 170 Mass. 405, 49 N. E. 655.

South Carolina. *Wilson v. Keels*, 54 S. Car. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

Washington. *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473.

³ **Hammond Beef & Provision Co. v. Best**, 91 Me. 431, 42 L. R. A. 528, 40 Atl. 338.

⁴ *Swift v. Winchester*, 96 Me. 480, 90 Am. St. Rep. 414, 52 Atl. 1017.

⁵ **United States.** *Baldwin v. Hale*, 68 U. S. (1 Wall.) 223, 17 L. ed. 531.

Connecticut. *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237.

Maine. *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, 24 Atl. 796.

Massachusetts. *Tebbetts v. Pickering*, 59 Mass. (5 Cush.) 83, 51 Am. Dec. 48; *Phoenix National Bank v. Batcheller*, 151 Mass. 589, 8 L. R. A. 644, 24 N. E. 917.

New York. *Pratt v. Chase*, 44 N. Y. 597, 4 Am. Rep. 718.

Vermont. *Bedell v. Scruton*, 54 Vt. 493.

⁶ **Hammond Beef & Provision Co. v. Best**, 91 Me. 431, 42 L. R. A. 528, 40 Atl. 338; *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 251, 51 N. E. 531.

⁷ *Swift v. Winchester*, 96 Me. 480, 90 Am. St. Rep. 414, 52 Atl. 1017. (Swift did business in Maine under the name of the Bangor Beef Co.)

which is a non-resident.⁸ It applies to a contract entered into with a non-resident through an agent who is a resident.⁹ It applies to a debt due to a resident which is in good faith transferred to a non-resident before insolvency proceedings are begun.¹⁰ Thus a citizen of Massachusetts made a note payable to himself at Boston and then indorsed it to a citizen of Vermont. Such note was not barred by a discharge granted in Massachusetts.¹¹ A claim assigned by a non-resident to a resident of the state in which insolvency proceedings are instituted is barred by such discharge,¹² even if such assignment is merely to facilitate collection.¹³

If a discharge granted by a state court of insolvency is valid when granted, it may be interposed as a defense to an action in another state upon the same debt. Accordingly, a discharge granted in one state and barring debts due to another citizen of the same state may be interposed as a defense in a subsequent action in another state.¹⁴

A non-resident creditor may, however, take part in the insolvency proceedings, and thereby so submit himself to the jurisdiction of the court of the other state that a discharge will be binding upon him.¹⁵ He may take part in the proceedings so as to have this result by proving his claim,¹⁶ or by accepting a dividend.¹⁷

⁸ Chase v. Henry, 166 Mass. 577, 55 Am. St. Rep. 423, 44 N. E. 988.

⁹ Regina Flour Mill Co. v. Holmes, 156 Mass. 11, 30 N. E. 170.

¹⁰ Baldwin v. Hale, 68 U. S. (1 Wall.) 223, 17 L. ed. 531; Felch v. Bugbee, 48 Me. 9, 77 Am. Dec. 203.

¹¹ Baldwin v. Hale, 68 U. S. (1 Wall.) 223, 17 L. ed. 531.

¹² Wheelock v. Leonard, 20 Pa. St. 440.

¹³ Where the claim is reduced to judgment in such state by such assignee in his own name. French v. Robinson, 86 Me. 142, 41 Am. St. Rep. 533, 29 Atl. 960.

¹⁴ Manufacturers' National Bank v. Hall, 86 Me. 107, 29 Atl. 952; Hall v. Boardman, 14 N. H. 38.

Discharge in Maryland: suit in Ohio. Smith v. Parsons, 1 Ohio 236, 13 Am. Dec. 608.

Discharge in New York: suit in Ohio. Bank v. Card, 7 Ohio, Part II,

170; Jeffries v. Thompson, 2 Yeates (Pa.) 482.

¹⁵ United States. Baldwin v. Hale, 68 U. S. (1 Wall.) 223, 17 L. ed. 531. California. Lowenberg v. Levine, 93 Cal. 215, 16 L. R. A. 159, 28 Pac. 941. Florida. Rosenheim v. Morrow, 37 Fla. 183, 20 So. 243.

Massachusetts. Murray v. Roberts, 150 Mass. 353, 15 Am. St. Rep. 209, 6 L. R. A. 346, 23 N. E. 208; Gerding v. East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206.

New Hampshire. Perley v. Mason, 64 N. H. 6, 3 Atl. 629.

¹⁶ Clay v. Smith, 28 U. S. (3 Pet.) 411, 7 L. ed. 723.

¹⁷ Clay v. Smith, 28 U. S. (3 Pet.) 411, 7 L. ed. 723; Murray v. Roberts, 150 Mass. 353, 15 Am. St. Rep. 209, 6 L. R. A. 346, 23 N. E. 208. (Writ of error dismissed in 150 U. S. 361, on the ground that no federal question was involved.)

§ 3129. Effect as against prior obligations. An additional disadvantage of state insolvent laws is found in the fact that discharges under state bankrupt acts can not affect debts which were contracted before the passage of the state act,¹ even if the state act specifically provides for such discharge; since no state can pass any law impairing the obligation of contracts.²

Whether a debt which was originally contracted before the state act was passed, but which was merged in another obligation after the state act was passed, is subject to the operation of a discharge under such state act, is a question upon which there has been some conflict of authority. Debts of this sort,³ includes debts merged in a judgment after the passage of the state statute,⁴ or debts merged in a new contract after the passage of the state statute.⁵ They can, however, affect debts which are contracted after the passage of the state act and have been held to be barred by a discharge which was subsequently given under such statute. On the other hand, such law has been held not to be applicable to a debt which was incurred before the law was enacted, although it was reduced to judgment after the law was enacted.⁶

§ 3130. Effect of passage of federal bankrupt act. State bankrupt and insolvent laws are suspended by the passage of a federal bankrupt act,¹ as far as the federal bankrupt law covers

¹ *United States. Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. ed. 529; *Mechanics' Bank v. Smith*, 19 U. S. (6 Wheat.) 131, 5 L. ed. 224; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606.

Maine. Schwartz v. Drinkwater, 70 Me. 409.

Massachusetts. Bigelow v. Pritchard, 38 Mass. (21 Pick.) 169.

New York. Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313.

North Dakota. Elton v. O'Connor, 6 N. D. 1, 33 L. R. A. 524, 68 N. W. 84.

² See ch. XCV.

³ *Snow v. Foster*, 70 Me. 558, 11 Atl. 602; *Bangs v. Watson*, 75 Mass. (9 Gray) 211.

⁴ *Bangs v. Watson*, 75 Mass. (9 Gray) 211.

⁵ *Snow v. Foster*, 70 Me. 558, 11 Atl. 602.

⁶ *Ross v. Tozier*, 78 Me. 312, 4 Atl. 860.

¹ *United States. Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. ed. 529; *Tua v. Carriere*, 117 U. S. 201; *In re Watts*, 190 U. S. 1, 47 L. ed. 933; *In re Bruss Ritter Co.*, 90 Fed. 651; *In re Rouse*, 91 Fed. 96; *In re Curtis*, 91 Fed. 737; *In re Weedman Stave Co.*, 199 Fed. 948.

Illinois. Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207.

Massachusetts. Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 70 Am. St. Rep. 258, 51 N. E. 529; *Rogers v. Boston Club*, 205 Mass. 281, 28 L. R. A. (N.S.) 743, 91 N. E. 321.

Minnesota. Armour Packing Co. v. Brown, 76 Minn. 465, 79 N. W. 522.

the same ground as the state laws. Proceedings under a state law are unauthorized after the passage of the United States act of 1898, if the case is one for which provision is made by the federal statute.² An assignment for the benefit of creditors, made after the passage of a federal bankrupt act, is valid except on attack by the trustee in bankruptcy,³ and a creditor who has assented to the assignment can not attack its validity.⁴ The act of 1898 provides, "Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it."⁵

State insolvency laws are not affected by the passage of a federal bankrupt act, as to matters for which no provision is made in such federal bankrupt act.⁶ A state statute which makes a fraudulent mortgage operate as a general assignment for the benefit of creditors, is not suspended by the passage of a federal bankrupt act;⁷ and proceedings may be had under such statute to have a fraudulent mortgage declared a general assignment, even if the fraudulent mortgagor has been adjudged a bankrupt and has received his discharge in bankruptcy.⁸ The fact that a federal bank-

New Jersey. *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 55 Atl. 868.

Rhode Island. *In re Reynolds*, 8 R. I. 485, 5 Am. Rep. 615.

See, *The Effect of a National Bankruptcy Law upon State Laws*, by Samuel Williston, 22 *Harvard Law Review*, 547.

²*Barber v. International Co.*, 73 Conn. 587, 48 Atl. 758; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 173, 70 Am. St. Rep. 258, 51 N. E. 529; *Rogers v. Boston Club*, 205 Mass. 261, 28 L. R. A. (N.S.) 743, 91 N. E. 321.

"The operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." *In re Watts*, 190 U. S. 1, 47 L. ed. 933.

³*Boese v. King*, 108 U. S. 379, 27 L. ed. 760; *Armour Packing Co. v. Brown*, 76 Minn. 465, 79 N. W. 522.

⁴*In re Romanow*, 92 Fed. 510.

⁵Sec. 72, b; *Harbaugh v. Costello*, 184 Ill. 110, 75 Am. St. Rep. 147, 56 N. E. 363 [affirming, 83 Ill. App. 29]; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 173, 70 Am. St. Rep. 259, 51 N. E. 529; *E. C. Westcott Co. v. Berry*, 69 N. H. 505, 45 Atl. 352.

⁶*Roberts Cotton Oil Co. v. Morse*, 97 Ark. 513, 135 S. W. 334; *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925; *Rogers v. Boston Club*, 205 Mass. 261, 28 L. R. A. (N.S.) 743, 91 N. E. 321; *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 35 Atl. 868.

⁷*Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 135 Am. St. Rep. 451, 28 L. R. A. (N.S.) 363, 121 S. W. 1042.

⁸*Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 135 Am. St. Rep. 451, 28 L. R. A. (N.S.) 363, 121 S. W. 1042.

rupt law has been enacted does not prevent a court of equity from appointing a receiver for the property of an insolvent corporation if such corporation has not been adjudged a bankrupt.⁹

§ 3131. Statutory provisions concerning discharge. The effect of a discharge in bankruptcy upon pre-existing contract liabilities depends, of course, upon the provisions which the legislature has seen fit to enact.

The bankrupt law of 1898 provides in section 17: "DEBTS NOT AFFECTED BY A DISCHARGE.—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The amendment of February 5, 1903, provides in section 17: "DEBTS NOT AFFECTED BY A DISCHARGE.—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The amendment of March 2, 1917, provides: "DEBTS NOT AFFECTED BY A DISCHARGE.—A discharge in bankruptcy shall

⁹State v. King County Superior Court, 20 Wash. 545, 45 L. R. A. 177, 56 Pac. 35.

release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

§ 3132. Provable debts—Nature. Under the provisions of the bankrupt act, with reference to discharge,¹ the debt in question, to be affected by a discharge in bankruptcy, must be: (1) a debt provable in bankruptcy; and (2) not within any of the statutory exceptions. It is, therefore, necessary to determine, first, what is a debt provable in bankruptcy, and then what debts fall within the statutory exceptions.

Section 63 of the bankrupt act of 1898 provides: "DEBTS WHICH MAY BE PROVED.—(a) Debts of the bankrupt may be proved and allowed against his estate which are: (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bank-

¹ See §§ 3133 et seq.

rupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

In determining whether a debt is provable in bankruptcy it is, therefore, necessary to consider: (1) What is the nature of the debt? and (2) When did the debt come into existence?

§ 3133. What are provable debts—Claims arising on contract. The term "provable debts" includes all liabilities which arise on contract if the amount thereof is fixed at the time of the proceedings in bankruptcy, or if the amount thereof can be liquidated.¹ The term "provable debts" includes amounts due under contracts,² such as loans³ and liabilities on negotiable instruments.⁴ The fact that the party who has lent money to a bankrupt has borrowed such money from a third person, does not prevent the claim from

¹ United States. *In re Silverman*, 101 Fed. 219; *In re Stern*, 116 Fed. 604; *James v. Gray*, 131 Fed. 401, 1 L. R. A. (N.S.) 321; *In re Neff*, 157 Fed. 57, 28 L. R. A. (N.S.) 349; *Ohio Valley Bank v. Mack*, 163 Fed. 155, 24 L. R. A. (N.S.) 184; *In re Lyons Beet Sugar Refining Co.*, 192 Fed. 445. *Alabama. Pearce v. Fisher*, 170 Ala. 456, 54 So. 164.

Kentucky. Dycus v. Brown, 135 Ky. 140, 28 L. R. A. (N.S.) 190, 121 S. W. 1010.

Indiana. Sweaney v. Baugher, 166 Ind. 557, 77 N. E. 1083.

Texas. Blackwell v. Farmers' & Merchants' National Bank (Tex. Civ. App.), 76 S. W. 454.

See also, *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 53 L. ed. 591; *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676; *Williams v. United States Fidelity & Guaranty Co.*, 236 U. S. 549, 59 L. ed.

713; *Sibley v. Nason*, 196 Mass. 125, 12 L. R. A. (N.S.) 1173, 81 N. E. 887.

"Within the intendment of the law, provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation." *Williams v. United States Fidelity & Guaranty Co.*, 236 U. S. 549, 59 L. ed. 713 [citing, *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 53 L. ed. 591, and *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676].

² *In re Glick*, 184 Fed. 967.

³ *Coder v. Arts*, 152 Fed. 943, 15 L. R. A. (N.S.) 372; *Ohio Valley Bank v. Mack*, 163 Fed. 155, 24 L. R. A. (N.S.) 184.

⁴ *In re Kyte*, 164 Fed. 302; *Blackwell v. Farmers' & Merchants' National Bank* (Tex. Civ. App.), 76 S. W. 454.

being a provable debt belonging to the party who lent to the bankrupt.⁵ The amount which is due under a contract for buying and selling goods and for dividing the profit and loss between the parties is a provable debt if such amount is susceptible of liquidation.⁶ Liability for breach of a contract is a provable debt if the amount thereof can be liquidated.⁷ Accordingly, a right of action for breach of an express warranty in a sale of personalty is a provable claim.⁸ The liability of the bankrupt upon a warranty contained in a deed of realty is a provable claim if such covenant is broken at the time of such proceedings in bankruptcy.⁹ Judgment in an action for breach of promise is a provable claim.¹⁰ If the bankrupt has entered into a contract to deliver certain property on demand in the future, his bankruptcy prevents him from performing such contract;¹¹ and accordingly such obligation is regarded as a provable debt on the theory that bankruptcy is a breach or a renunciation of such promise.¹² On the other hand, a contract by which one of several persons who purchase timber land together, warrants the other purchasers that there is a certain quantity of timber thereon, does not amount to an implied promise on his part to reimburse them against loss in case there is less than the specified amount of timber on such land; and accordingly such claim is not a provable debt in bankruptcy.¹³

Equitable obligations may be provable debts,¹⁴ including a loan made by a married woman out of her separate estate to a partnership of which her husband was a member;¹⁵ and the bankruptcy court will allow such claim, although the state courts may not recognize its existence.¹⁶

If the principal of the debt is a provable debt, the interest thereon is also a valid claim.¹⁷

⁵ *Ohio Valley Bank v. Mack*, 163 Fed. 155, 24 L. R. A. (N.S.) 184.

⁶ *Dycus v. Brown*, 135 Ky. 140, 28 L. R. A. (N.S.) 190, 121 S. W. 1010.

⁷ *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 53 L. ed. 591; *In re National Wire Corporation*, 166 Fed. 631.

⁸ *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 53 L. ed. 591.

⁹ *Sweaney v. Baugher*, 166 Ind. 557, 77 N. E. 1083.

¹⁰ *Bond v. Milliken*, 134 Ia. 447, 120 Am. St. Rep. 440, 109 N. W. 774.

¹¹ See § 2938.

¹² *In re Swift*, 112 Fed. 315; *In re Pettingill*, 137 Fed. 143; *In re Neff*, 157 Fed. 57, 28 L. R. A. (N.S.) 349.

¹³ *Switzer v. Henking*, 158 Fed. 784, 15 L. R. A. (N.S.) 1151.

¹⁴ *James v. Gray*, 131 Fed. 401, 1 L. R. A. (N.S.) 321.

¹⁵ *James v. Gray*, 131 Fed. 401, 1 L. R. A. (N.S.) 321.

¹⁶ *James v. Gray*, 131 Fed. 401, 1 L. R. A. (N.S.) 321.

¹⁷ *Coder v. Arts*, 152 Fed. 943, 15 L. R. A. (N.S.) 372.

§ 3134. Claims arising on quasi-contract. The term "contract express or implied," in section 63 of the present Federal Bankruptcy Act,¹ has been held to include not only genuine contracts, but also obligations of a quasi-contractual character.² This includes cases in which the creditor was induced by the fraud of the bankrupt to enter into a genuine contract. In a case of this sort the claim of the creditor is a provable debt and is, accordingly, barred by a discharge in bankruptcy.³ It also includes cases in which the debtor and creditor have entered into a genuine contract under which the debtor has acquired possession of property belonging to the creditor, and the debtor has thereupon wrongfully and fraudulently converted such property to his own use.⁴ A liability of this sort is barred by a discharge in bankruptcy, even though the creditor subsequently brings an action in trover on the theory of a wrongful conversion.⁵ In determining whether such an obligation is a so-called implied contract or not, the bankruptcy court is not bound by the decisions of the state court in which the cause of action has arisen, even though the state court holds that the right of action is in tort and not in quasi-contract.⁶ A claim of a creditor against the bankrupt for money wrongfully embezzled from the creditor by the bankrupt, is a claim based upon a so-called implied contract and is a provable debt.⁷

§ 3135. Judgments. A judgment which has been rendered before proceedings in bankruptcy are begun, is a "fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the petition"; and accordingly such judgment is a provable debt and accordingly is barred by a discharge in bankruptcy.¹ A judgment which is rendered in a tort action, before

¹ See § 3132.

² Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762 [affirming, 183 N. Y. 267, 76 N. E. 25]; Clarke v. Rogers, 183 Fed. 518; Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N.S.) 391.

³ Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762 [affirming, 183 N. Y. 267, 76 N. E. 25].

⁴ Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N.S.) 391.

⁵ Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N.S.) 391.

⁶ Reynolds v. New York Trust Co., 188 Fed. 611, 39 L. R. A. (N.S.) 391.

⁷ Clarke v. Rogers, 183 Fed. 518.

¹ Alabama. Ellis v. Mobile, Jackson & Kansas City Ry., 166 Ala. 187, 51 So. 860.

California. Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743.

New Jersey. Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 Atl. 515.

the petition in bankruptcy is filed, is a provable debt within the meaning of the bankrupt act, and accordingly is barred by a discharge.² The discharge of a judgment in bankruptcy prevents subsequent proceedings from reviving a judgment which has become dormant.³

If a judgment is rendered after a petition in bankruptcy is filed, and before the discharge in bankruptcy is granted, the judgment itself is not a fixed liability when the petition is filed; and accordingly it is necessary to look to the nature of the original claim, to see whether it was a provable debt at the time that the petition in bankruptcy was filed or not.⁴ If the cause of action on which the subsequent judgment was rendered was a provable debt when the petition in bankruptcy was filed, the rendition of a judgment thereon after such petition was filed and before the discharge was ordered, does not prevent the discharge from operating as a bar; while if the original cause of action was not a provable debt, the rendition of a judgment after the petition in bankruptcy is filed, does not retroact to the date of the filing of the petition, and accordingly it does not make such cause of action a provable claim as of such date.⁵ If a claim in tort is reduced to judgment after proceedings in bankruptcy have been instituted, it is not a provable debt.⁶

§ 3136. Claims in nature of tort not reduced to judgment. A claim in tort or in the nature of tort, which has not been reduced to judgment and is not liquidated is not a fixed liability nor does it arise on contract; and therefore it is not a provable debt and is therefore not barred by a discharge in bankruptcy.¹ The fact that

North Dakota. *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 42 L. R. A. (N.S.) 292, 137 N. W. 412 (obiter).

Vermont. *In re Grout*, 88 Vt. 318, 92 Atl. 646; *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, 166 N. W. 1.

² *In re Putman*, 193 Fed. 464; *In re Grout*, 88 Vt. 318, 92 Atl. 646; *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, 166 N. W. 1.

³ *Throop v. Griffin*, 180 Pa. St. 452, 36 Atl. 865.

⁴ See §§ 3133 et seq.

⁵ See § 3137.

⁶ *In re Crescent Lumber Co.*, 154 Fed. 724.

¹ *United States. Schall v. Camors*, 251 U. S. 239, — L. ed. —; *Brown v. United Button Co.*, 149 Fed. 48, 8 L. R. A. (N.S.) 961; *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N.S.) 649.

Iowa. *Bever v. Swecker*, 138 Ia. 721, 116 N. W. 704.

Massachusetts. *Hapgood v. Blood*, 77 Mass. (11 Gray) 400.

New Hampshire. *Imbriani v. Anderson*, 76 N. H. 491, 84 Atl. 974.

New York. *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546.

Pennsylvania. *Weisfield v. Beale*, 231 Pa. St. 39, 79 Atl. 878.

section 17 of the bankrupt act² excepts certain liabilities which arise in tort, from the operation of the discharge, does not show that the legislature intended that tort liabilities should be included with provable debts, since such exception is inserted so as to include tort liabilities which had been reduced to judgment before bankruptcy proceedings were instituted.³ The fact that the creditor has proved a claim for a tort liability, and that such claim has been allowed, does not make it a provable claim within the meaning of the statute relating to discharge.⁴ A right of action for death by a wrongful act,⁵ or for deceit,⁶ or for injury to property through negligence,⁷ or for injury to property by the commission of a nuisance,⁸ is not a provable debt and is not barred by a discharge in bankruptcy. An action in trover for the recovery of personalty is not barred by a discharge in bankruptcy though a money verdict may be taken, and in the particular case is taken.⁹ A claim for double rent for withholding rented premises unlawfully from a landlord is not a debt *ex contractu*, and is therefore not barred by a discharge in bankruptcy.¹⁰ The statutory liability of a director of a corporation imposed for failure to file the report required by statute is in the nature of tort and is not discharged by bankruptcy.¹¹

Rendition of judgment is necessary to liquidate a claim in tort so as to make it a provable debt. Even if a claim in tort has been the basis of a verdict, but judgment has not been rendered, it is not a provable debt.¹² Further discussion of this topic is unnecessary, as it concerns the law of tort and not the law of contract. If a liability in tort is reduced to judgment before bankruptcy proceedings are begun, a judgment is a fixed liability and is a provable debt.¹³

Virginia. *Winfree v. Jones*, 104 Va. 30, 1 L. R. A. (N.S.) 201, 51 S. E. 153.

² See § 3131.

³ *Brown v. United Button Co.*, 149 Fed. 48, 8 L. R. A. (N.S.) 961.

⁴ *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N.S.) 649.

⁵ *In re New York Tunnel Co.*, 159 Fed. 688; *Imbriani v. Anderson*, 76 N. H. 491, 84 Atl. 974.

⁶ *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N.S.) 649.

⁷ *Brown v. United Button Co.*, 149 Fed. 48, 8 L. R. A. (N.S.) 961.

⁸ *Brown v. United Button Co.*, 149 Fed. 48, 8 L. R. A. (N.S.) 961.

⁹ *Berry v. Jackson*, 115 Ga. 196, 90 Am. St. Rep. 102, 41 S. E. 698.

¹⁰ *Hamilton v. McCroskey*, 112 Ga. 651, 37 S. E. 859.

¹¹ *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557, 67 N. H. 870.

¹² *In re Ostrom*, 185 Fed. 988; *Hodges v. Chace*, 2 Wend. (N. Y.) 248.

¹³ See § 3135.

§ 3137. When debt must exist. To constitute a provable debt, the debt in question must have been in existence when the proceedings in bankruptcy were instituted. A debt which comes into existence after a petition in bankruptcy is filed is not affected by such proceedings in bankruptcy,¹ even though such debt arose subsequently out of a contract and the like, which was in existence when the proceedings in bankruptcy were begun.² A discharge in bankruptcy does not protect a creditor against a judgment for costs rendered against the bankrupt after the adjudication in bankruptcy, even if such judgment is rendered in an action begun before such adjudication.³ A note given after proceedings in bankruptcy have been begun is treated as a debt then created, even if given for an antecedent debt which existed when proceedings in bankruptcy were begun. Such a note is therefore not barred by a discharge in bankruptcy.⁴ Such a note is analogous to a new promise.

If a judgment is rendered and the action is for a claim which was a provable debt while bankruptcy proceedings are pending, a discharge in bankruptcy subsequently rendered is a bar to the enforcement of such judgment.⁵ If a discharge is granted before

¹ *In re Burka*, 104 Fed. 326; *In re Roth*, 181 Fed. 667, 31 L. R. A. (N. S.) 270; *Rice v. Murphy*, 100 Me. 101, 82 Atl. 842; *Hornthal v. McRae*, 67 N. Car. 21.

See, *Proof of Unmatured Claims in Bankruptcy*, by Garrard Glenn, 10 *Columbia Law Review*, 709.

² *Colman Co. v. Withoft*, 195 Fed. 250; *Robinson v. Pesant*, 53 N. Y. 419.

³ *In re Marcus*, 105 Fed. 907, 45 C. A. 115 [affirming, s. c., 104 Fed. 331].

⁴ *Lerow v. Wilmarth*, 89 Mass. (7 All.) 463, 83 Am. Dec. 701.

⁵ *United States. Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985 [reversing, 105 Ill. 627].

Kansas. Tefft v. Knox, 37 Kan. 37, 14 Pac. 441.

Kentucky. Pine Hill Coal Co. v. Harris, 86 Ky. 421, 6 S. W. 24.

Maine. Gordon v. Texas Co., — Me. —, 109 Atl. 368.

Massachusetts. Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035.

Minnesota. Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711.

New Jersey. Whyte v. McGovern, 51 N. J. L. 356, 17 Atl. 957.

Tennessee. Dick v. Powell, 32 Tenn. (2 Swan) 632; *Locheimer v. Stewart*, 91 Tenn. 385, 30 Am. St. Rep. 887, 19 S. W. 21.

Virginia. Blair v. Carter, 78 Va. 621.

West Virginia. Zumbro v. Stump, 38 W. Va. 325, 18 S. E. 443.

Reducing a partnership debt to judgment, after the commencement of bankruptcy proceedings, involving an individual partner, does not prevent such debt from being provable against the estate of such partner if credit is made for costs and interest after such bankruptcy proceedings began. *Gordon v. Texas Co.*, — Me. —, 109 Atl. 368.

See § 3135.

Contra, under a state insolvent law, on the theory that the debt is merged in the judgment and hence is not prov-

judgment is rendered, the bankrupt should plead his discharge in bar; and his failure to plead it is a waiver of the defense.⁶ If a discharge is granted before judgment is rendered, but the discharge is not entered until after judgment is rendered, such discharge takes effect from the time it is granted and not from the time it is entered. It is therefore not a bar to such judgment.⁷ A liability for contribution on a judgment rendered after bankruptcy proceedings are begun, is said not to be a provable claim; and accordingly it is not barred by the discharge of the party from whom contribution can be exacted.⁸

If the bankrupt has entered into a covenant of warranty, the question of the effect of a discharge upon his liability under such covenant depends on when such covenant is broken. If the covenant is broken before proceedings in bankruptcy are instituted the covenantor's liability thereon is barred by such discharge.⁹ If the covenant is not broken until after such proceedings are instituted, the covenantor's liability is not barred by such discharge.¹⁰ Liability on a bond, breach of which did not occur until two months after the petition in bankruptcy is filed, is not barred by a discharge in bankruptcy.¹¹ A decree rendered against a stockholder based on his stock liability, in a suit to which he is not a party, makes his liability a provable debt; and such liability is barred by his discharge.¹²

§ 3138. Liability for contribution and exoneration. If a bankrupt receives a discharge, this is not, as will be seen,¹ a bar which can be invoked by those who are liable with him, whether primarily or secondarily. If such persons are compelled to pay such debt to

able, while the judgment is not provable because rendered after bankruptcy proceedings were instituted. *Emery, Appellant*, 89 Me. 544, 56 Am. St. Rep. 440, 36 Atl. 992.

See to the same effect as the last case cited: *Percy v. Foote*, 36 Conn. 102; *Bowen v. Eichel*, 91 Ind. 22, 46 Am. Rep. 574; *Wheeler & Wilson Mfg. Co. v. Taft*, 61 N. H. 1.

⁶ See § 3164.

⁷ *Leisure v. Kneeland*, 2 Wash. 537, 26 Am. St. Rep. 888, 27 Pac. 176.

⁸ *Hefner v. Hefner*, 26 S. D. 74, 127 N. W. 634.

⁹ *Williams v. Harkins*, 55 Ga. 172; *Sweaney v. Baugher*, 166 Ind. 557, 77 N. E. 1083; *Merrill v. Schwartz*, 68 Me. 514; *Dow v. Davis*, 73 Me. 288.

¹⁰ *Bush v. Person*, 59 U. S. (18 How.) 82, 15 L. ed. 273; *French v. Morse*, 66 Mass. (2 Gray) 111; *Magwire v. Riggin*, 44 Mo. 512; *Wright v. Gottschalk* (Tenn. Ch. App.), 43 L. R. A. 189, 48 S. W. 140.

¹¹ *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222.

¹² *Dight v. Chapman*, 44 Or. 265, 75 Pac. 585.

¹ See § 3159.

the creditor, the question whether their claim against the bankrupt for contribution or exoneration is barred by such discharge is presented for adjudication.

If the persons who are compelled to pay such debt are jointly liable with the bankrupt not as surety for him, but all as surety for a third person, his discharge is no bar to their claim for contribution for payments made by them after bankruptcy proceedings have been instituted according to the numerical weight of authority,² though some carefully considered cases have, with better reasoning, held that such claims are barred by such discharge.³ Where the bankrupt law provides a means for proving the joint claim against the bankrupt's estate no good reason appears why the liability of the maker to his co-obligors can not be estimated and treated as a provable claim.

If the bankrupt is primarily liable and those liable jointly with him are liable as sureties for him, the weight of authority treats his discharge as barring the claims of his sureties for contribution arising out of payments upon such debt made by them after proceedings in bankruptcy were begun, if such claim on which the bankrupt is primarily liable was itself provable in bankruptcy.⁴ A minority of the states hold that the claim of the surety is not barred.⁵ Of course if such claim was not provable in bankruptcy the liability of the bankrupt to his creditor is not barred, and hence his liability over to his surety for subsequent payments on such debt is not barred either.⁶

§ 3139. Continuing contracts. If a contract has been entered into between the parties, but no liability of any sort has accrued

² *Brown v. J. & E. Stevens Co.*, 52 Conn. 110; *Dale v. Warren*, 32 Me. 94, 52 Am. Dec. 640; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Smith v. Hodson*, 50 Wis. 279, 6 N. W. 812.

³ *Tobias v. Rogers*, 13 N. Y. 59; *Eberhardt v. Wood*, 74 Tenn. (8 Lea) 467.

⁴ *United States. Mace v. Wells*, 48 U. S. (7 How.) 272, 12 L. ed. 698 [reversing, 17 Vt. 503]; *Williams v. United States Fidelity & Guaranty Co.*, 236 U. S. 549, 59 L. ed. 713.

Indiana. Post v. Losey, 111 Ind. 75, 60 Am. Rep. 677, 12 N. E. 121.

Iowa. Hayer v. Comstock, 115 Ia. 187, 88 N. W. 351.

Massachusetts. Columbia Falls Brick Co. v. Glidden, 157 Mass. 175, 31 N. E. 801.

Tennessee. Hardy v. Carter, 27 Tenn. (8 Humph.) 153.

⁵ *Lewis v. Brown*, 41 Me. 448; *Paxson v. Haster*, 11 N. J. L. 410.

⁶ *Dunn v. Sparks*, 7 Ind. 490; *Haliburton v. Carter*, 55 Mo. 435.

See also, *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222, where the breach occurred after the discharge in bankruptcy.

under it up to the time of the institution of the proceedings in bankruptcy, such contract is not a fixed liability since nothing is due thereon;¹ and the liability which accrues under such contract, after the bankruptcy proceedings are instituted, is not a debt which exists at the time of the filing of the petition in bankruptcy, and accordingly it is not a provable debt.² For these reasons, it is held that a continuing contract is not affected by a discharge in bankruptcy as to amounts which fall due thereunder after bankruptcy proceedings are instituted unless there is some special provision therefor in the bankrupt statute.³ Rents which are not due when the petition in bankruptcy is filed, but which become due after the filing of such petition, on a lease into which the parties had entered before the filing of the petition in bankruptcy, are held not to be barred by a discharge in such bankruptcy proceedings.⁴

If the contract, which is entered into before the petition in bankruptcy is filed, provides for payments in the future by the party who thereafter becomes bankrupt, his bankruptcy is treated in some jurisdictions as a renunciation of the contract on his part, or as the voluntary creation of an impossibility which prevents him from performing the contract thereafter.⁵ Where this explanation can be employed, the bankruptcy of the debtor operates as an immediate breach of a prior contract; and the damages to which the adversary party is entitled by reason of such breach are a provable debt which may be liquidated in such proceedings.⁶ If a corporation has dissolved voluntarily, and if proceedings in bankruptcy are subsequently instituted and a lease to such corporation for a term of years is repudiated, both by its receiver and by its trustee in bankruptcy, the lessor is entitled to damages because of such repudiation; and such claim forms a provable debt.⁷

¹ See § 3137.

² See § 3133.

³ *Bernhardt v. Curtis*, 109 La. 171, 94 Am. St. Rep. 445, 33 So. 125; *Robinson v. Peasant*, 53 N. Y. 419.

⁴ *Watson v. Merrill*, 136 Fed. 359, 69 L. R. A. 719; *In re Roth*, 181 Fed. 667, 31 L. R. A. (N.S.) 270; *Bernhardt v. Curtis*, 109 La. 171, 94 Am. St. Rep. 445, 33 So. 125; *Rodick v. Bunker*, 84 Me. 441, 30 Am. St. Rep. 364, 24 Atl. 807; *Tredwell v. Marden*, 123 Mass. 390, 25 Am. Rep. 108.

See, Does the Relation of Landlord

and Tenant Become Severed by Operation of the Bankrupt Law? by John M. Patterson, 39 American Law Register (N.S.), 656.

⁵ See § 2938.

⁶ *Chicago Auditorium Association v. Central Trust Co.*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811; *In re Neff*, 157 Fed. 57, 28 L. R. A. (N.S.) 349; *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539.

⁷ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

Even under the United States Act of 1898 it has been held that bankruptcy discharges a lease,⁸ even if under the state statute the landlord has a lien upon the tenant's property on the premises for rent to become due.⁹ If a transfer company has entered into a contract with a hotel company, by the terms of which the transfer company is to take charge of all the baggage and livery business for the hotel, and is to pay a certain sum for such privilege, the bankruptcy of the transfer company may be regarded as an anticipatory breach of such contract;¹⁰ and the claim of the hotel company for damages may be liquidated, and in such case it will constitute a provable debt.¹¹

Liability on a penal bond, conditioned on the payment to another for life, of certain rents and annuities, has been held to be provable as a fixed liability against the estate of the bankrupt, as to instalments in arrears, but not as to those to fall due thereafter.¹² If the lease contains a reservation to the lessor of the right of re-entry upon the bankruptcy of the lessee and a covenant on the part of the lessee to pay to the lessor, under such circumstances, the difference between the rent fixed by the lease and the rent which the lessor is able to obtain by reletting the property after the bankruptcy of the lessee, such claim of the lessor is not a fixed liability absolutely owing;¹³ and accordingly it can not be liquidated.¹⁴ The bankruptcy of the lessee is said not to operate as a discharge of the lease, unless the bankrupt elects to accept such lease as an asset.¹⁵ A trustee in bankruptcy may, if he chooses, accept an executory contract of the bankrupt, or he may renounce it;¹⁶ and his election to accept or renounce is to be exercised for the interest of the estate of the bankrupt without regard to the interest of the adversary party to the contract.¹⁷

⁸ *Bray v Cobb*, 100 Fed. 270; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

⁹ *In re Jefferson*, 93 Fed. 948.

¹⁰ See § 2938.

¹¹ *Central Trust Co. v Chicago Auditorium Association*, 240 U. S. 581, L. R. A. 1917B, 580, 60 L. ed. 811.

¹² *Cobb v. Overman*, 109 Fed. 65, 54 L. R. A. 369, 48 C. C. A. 223 (The amount of the claim was limited to the penalty of the bond, where the computed value of the expectancy exceeded that amount.)

¹³ *In re Roth*, 181 Fed. 667, 31 L. R. A. (N.S.) 270.

¹⁴ *In re Roth*, 181 Fed. 667, 31 L. R. A. (N.S.) 270.

¹⁵ *In re Roth*, 181 Fed. 667, 31 L. R. A. (N.S.) 270.

¹⁶ *Barr v. Youngsville Sugar Factory, Ltd.*, 141 La. 869, L. R. A. 1917F, 654, 75 So. 805.

See §§ 1822 et seq.

¹⁷ *Barr v. Youngsville Sugar Factory, Ltd.*, 141 La. 869, L. R. A. 1917F, 654, 75 So. 805.

It was held in England that the bankruptcy of a publisher operated as a breach of his contract with authors to publish their books and to pay them royalties thereon;¹⁸ and it was further held that the only claim of the author was for damages, and that if the trustee elected to perform the contract and to publish the book, he could not be compelled to pay royalties thereon to the author.¹⁹ This rule rested on the theory that the assignee of the benefits of such a contract can not be compelled to pay the royalty agreed upon,²⁰ that the author was not a party to the contract between the publisher and the assignee, and that the contract gave no specific lien on the proceeds arising from the sale of the books. The injustice of the rule was so apparent that it was abolished by statute, as to proceedings in bankruptcy; and it was provided that if the trustee elected to publish the book, he was obliged to pay the royalty therefor.²¹

§ 3140. Contingent liabilities. While it is often said that a provable debt can not be contingent or uncertain,¹ and that it must be fixed,² the question whether a contingent liability is barred by a discharge in bankruptcy really depends on the question whether it is a provable debt. If the contingent debt is provable, it is barred by the discharge.³ The liability of a bankrupt as surety, guarantor, indorser, and the like, for another is provable, and is therefore barred by a discharge in bankruptcy if it existed when proceedings in bankruptcy were begun.⁴ Under the bankrupt act of 1898 a means is provided by which a party secondarily liable may prove the claim against the primary debtor, if the creditor does not prove it. The claim of a surety against his principal, for a debt which the surety is obliged to pay after the discharge of his

¹⁸ *Re Grant Richards* [1907], 2 K. B. 33, 4 B. R. C. 597.

¹⁹ *Re Grant Richards* [1907], 2 K. B. 33, 4 B. R. C. 597.

²⁰ *Barker v. Stickney* [1918], 2 K. B. 356.

²¹ See § 60 of the Bankruptcy Act of 1914; 4 & 5 Geo. V, c. 59.

¹ *Leader v. Mattingly*, 140 Ala. 444, 37 So. 270.

² *Phoenix National Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435.

³ *California. Mooney v. Detrick*, 85 Cal. 549, 28 Pac. 280.

Iowa. Hayer v. Comstock, 115 Ia. 187, 88 N. W. 351.

Kentucky. Hardy Buggy Co. v. Paducah Banking Co., 183 Ky. 776, 210 S. W. 452.

Massachusetts. Rand v. King, 156 Mass. 515, 31 N. E. 650.

Pennsylvania. Nesbit v. Greaves, 6 W. & S. (Pa.) 120.

⁴ *Reitz v. People*, 72 Ill. 435; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 406; *Hardy Buggy Co. v. Paducah Banking Co.*, 183 Ky. 776, 210 S. W. 452; *Bouie v. Prickett*, 26 Tenn. (7 Humph.) 169.

principal in bankruptcy, is therefore barred by such discharge.⁵ If the amount of a stockholder's liability to creditors of a corporation under a statute imposing such liability is fixed,⁶ as where the corporation has ceased to do business and the amount of its debts is fixed,⁷ or the corporation is avowedly insolvent, having made an assignment for the benefit of creditors,⁸ or the liability of the stockholder has been fixed by a decree against the corporation,⁹ a discharge in bankruptcy granted to a stockholder is a bar which the stockholder may invoke as against the creditors of the corporation.

In Massachusetts the liability of directors and stockholders for debts of the corporation is held not to be a debt provable when the petition in bankruptcy is filed, and hence not barred by such discharge.¹⁰ If there is a binding contract between the parties at the time that the proceedings in bankruptcy are instituted, and there is bound to be some liability thereunder, the fact that the transaction is not completed and that the amount of the liability can not therefore be ascertained, does not render it a contingent claim, or at least it does not prevent it from being a provable debt.¹¹ If the bankrupt has entered into a valid contract before the commencement of the bankruptcy proceedings, by which he is to repay a certain sum of money if the adversary party elects to avoid the contract and to return what he has received thereunder, the duty of the bankrupt to return such sum of money is regarded as a fixed liability, on the theory that the bankruptcy is a renunciation of the executory contract which fixes liability at once.¹²

§ 3141. Liability to support wife and children. The liability of one for the support of his wife and children is not a debt and is

⁵ Hayer v. Comstock, 115 Ia. 187, 88 N. W. 351. (The note was here listed and proved in bankruptcy.)

See §§ 3159 et seq.

⁶ Irons v. Bank, 27 Fed. 501; Carey v. Meyer, 79 Fed. 926; Marr v. Bank, 72 Tenn. (4 Lea) 578.

⁷ Irons v. Bank, 27 Fed. 591.

⁸ Carey v. Mayer, 79 Fed. 926. In this case A had subscribed to capital stock in a corporation and had not paid the corporation fully therefor. The corporation became insolvent and made an assignment for the benefit of creditors. A then filed a petition in

bankruptcy and obtained a discharge. Then a call was made for payment on stock. It was held that A's discharge in bankruptcy was a bar to liability for such stock.

⁹ Dight v. Chapman, 44 Or. 265, 65 L. R. A. 793, 75 Pac 585.

¹⁰ First National Bank v. Mfg. Co., 127 Mass. 563; Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870.

¹¹ Dycus v. Brown, 135 Ky. 140, 23 L. R. A. (N.S.) 190, 121 S. W. 1010.

¹² In re Neff, 157 Fed. 57, 28 L. R. A. (N.S.) 349.

certainly not a provable debt.¹ Accordingly, the weight of authority, including the supreme court of the United States,² has held that the liability of one to support his wife, even if such liability has resulted in a decree of alimony,³ is not barred by a discharge in bankruptcy. The fact that the decree of alimony is for a lump sum payable in instalments,⁴ or that the discharge is sought as against over-due instalments,⁵ does not alter the rule. The fact that a judgment for alimony has been recovered and that subsequently, in another jurisdiction, a judgment has been recovered upon such original judgment, does not prevent the second judgment from being in effect a judgment for alimony; and a discharge in bankruptcy is not a bar as against such second judgment.⁶

¹ Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390; Menzie v. Anderson, 65 Ind. 239; Romaine v. Chauncey, 129 N. Y. 566, 26 Am. St. Rep. 544, 14 L. R. A. 712, 20 N. E. 826; In re Williams, 208 N. Y. 32, 46 L. R. A. (N.S.) 719, 101 N. E. 853.

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction." Audubon v. Shufeldt, 181 U. S. 575, 577, 45 L. ed. 1009.

² Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009.

³ England. In re Hawkins [1894], 1 Q. B. 25; Kerr v. Kerr [1897], 2 Q. B. 439; Linton v. Linton, L. R. 15 Q. B. Div. 239.

United States. In re Shepard, 97 Fed. 187; In re Anderson, 97 Fed. 321; In re Nowell, 99 Fed. 931; Turner v. Turner, 108 Fed. 785.

Illinois. Barclay v. Barclay, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; Welty v. Welty, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161.

New York. In re Williams, 208 N.

Y. 32, 46 L. R. A. (N.S.) 719, 101 N. E. 853.

Ohio. Lemert v. Lemert, 72 O. S. 364, 74 N. E. 194.

Vermont. Noyes v. Hubbard, 64 Vt. 302, 33 Am. St. Rep. 928, 15 L. R. A. 394, 23 Atl. 727.

Contra, In re Houston, 94 Fed. 119; In re Van Orden, 96 Fed. 86; In re Challoner, 98 Fed. 82 (overdue instalments under an Illinois decree); Fite v. Fite, 110 Ky. 197, 53 L. R. A. 265, 61 S. W. 26 (where the state law makes it an ordinary debt); Arrington v. Arrington 131 N. Car. 143, 92 Am. St. Rep. 769, 42 S. E. 551. (This last case was so decided because the court had already decided that this decree was a final judgment. Arrington v. Arrington, 127 N. Car. 190, 80 Am. St. Rep. 791, 52 L. R. A. 201, 37 S. E. 212. And they held themselves bound by such decision to treat a subsequent discharge in bankruptcy as barring such decree. The original decree of alimony was rendered in Illinois.)

⁴ Welty v. Welty, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161.

⁵ Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009; In re Anderson, 97 Fed. 321; Lemert v. Lemert, 72 O. S. 364, 74 N. E. 194.

⁶ In re Williams, 208 N. Y. 32, 46 L. R. A. (N.S.) 719, 101 N. E. 853.

A contract by A to pay a certain sum annually to his divorced wife as long as she remains unmarried, and to support their two children till they came of age, is not barred by A's discharge in bankruptcy.⁷ The value of the wife's interest under the contract depending, as it does, on the double contingency of remarriage or death, is impossible to ascertain;⁸ and his liability to support his children, being a "contract to do that which the law obliged him to do," could not be barred by such discharge.

A discharge does not bar an order of court requiring payment for the support of minor children;⁹ nor a judgment in bastardy requiring the putative father to pay a certain monthly sum to the mother of the child for its support.¹⁰ However, a final judgment for the total amount due under a prior order directing a putative father to make certain monthly payments to his bastard child, has been held to be barred by his discharge in bankruptcy.¹¹ Liability of a father to reimburse a wife for money expended by her in support of their minor child has been held to be an ordinary debt, and hence barred by discharge.¹²

Before the amendment of February 5, 1903, the federal bankrupt act did not contain any express provision as to the effect of a discharge upon the liability of a husband to support his wife or to pay alimony to her; and up to that time, the question was determined upon the general theory of alimony; and the decisions which held that alimony was not a provable debt were based upon the theory that it was not a fixed liability, that it did not arise on contract, and that it was not a debt in the proper sense of the term.¹³ By the act of February 5, 1903, it was expressly provided that a discharge in bankruptcy did not release a bankrupt from liability for alimony, or for maintenance or support of wife or child.¹⁴ This amendment was merely declaratory of the prior law under the act of 1898.¹⁵

⁷ *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084 [affirming, 180 Mass. 170, 94 Am. St. Rep. 623, 62 N. E. 248].

⁸ See also, *Mudge v. Rowan*, L. R. 3 Ex. 85.

⁹ *In re Hubbard*, 98 Fed. 710; *Rush v. Flood*, 105 Ill. App. 182.

¹⁰ *In re Baker*, 96 Fed. 954; *Hawes v. Cooksey*, 13 Ohio 242.

¹¹ *McKittrick v. Cahoon*, 89 Minn. 383, 62 L. R. A. 757, 95 N. W. 223.

¹² *Rush v. Flood*, 105 Ill. App. 182.

¹³ *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009.

¹⁴ See § 3131.

¹⁵ *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390.

§ 3142. Statutory exceptions to effect of discharge—Provable character of claim. Certain claims of provable debts are specifically excepted by the bankrupt act from the operation of a discharge in bankruptcy. The fact that such an exception to the operation of the discharge is specifically made by statute does not show that the claim which is thus excepted is not a provable debt; and such exception does not exclude such a creditor from proving his claim and from sharing in the distribution of the bankrupt's estate.¹ Indeed, if the claim were not in itself a provable claim, it would not be necessary to insert these specific exceptions. A number of specific exceptions are made, however, by the provisions of section 17 of the bankrupt act;² and the scope and effect of these provisions must be considered separately.

§ 3143. Judgments for wilful and malicious injuries to person or property—Nature of malice. The bankrupt act of 1898 excepts from the operation of the discharge judgments in actions for wilful and malicious injury to the person or property of another.¹ The term "wilful" in the statute means intentional.² The term "malice" does not involve actual hatred or ill-will, but it means the doing of a wrongful act without just cause or excuse.³ We do not think the language used was intended to limit the exception in

¹ *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718; *Clarke v. Rogers*, 228 U. S. 534, 57 L. ed. 953.

² See § 3131.

¹ *Woehrle v. Canclini*, 158 Cal. 107, 109 Pac. 888; *Covington v. Rosenbusch*, 148 Ga. 459, 97 S. E. 78; *Mason v. Perkins*, 180 Mo. 702, 103 Am. St. Rep. 591, 70 S. W. 683; *Ex parte Cote*, — Vt. —, 106 Atl. 519.

See also, though not a bankruptcy case, *Wellman v. Mead*, — Vt. —, 107 Atl. 396.

² *Ex parte Cote*, — Vt. —, 106 Atl. 519.

³ *Ex parte Cote*, — Vt. —, 106 Atl. 519.

"In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could

not be maintained. * * * A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Commonwealth v. Williams*, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception."

any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged.⁴

If the liability in tort has not been reduced to judgment, it is not barred by a discharge in bankruptcy, whether the injury is wilful and malicious or not.⁵ This result, however, is reached because such a claim is not a provable debt,⁶ and not because it was a special statutory exception to the provable debts which are barred by a discharge in bankruptcy.

§ 3144. Wilful and malicious injury to person. Within the meaning of this section, a judgment for death by wrongful act, which was caused by operating an automobile at a high rate of speed and attempting to pass another automobile in violation of law,¹ or a judgment for assault,² even if such judgment has been entered on a recognizance,³ or for false imprisonment,⁴ or for malicious prosecution,⁵ or slander,⁶ or libel,⁷ or for criminal conversation,⁸ or for alienating the affections of the husband⁹ or wife¹⁰ of the judgment creditor, or for seduction of the judgment creditor's minor daughter,¹¹ or for the seduction of the judgment creditor herself, recovered under a state statute giving an action therefor,¹² is not barred by a subsequent discharge in bankruptcy.

On the other hand, a judgment in an action for breach of promise in which seduction is not alleged is not an action for wilful and

⁴ *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754 [quoted in *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205].

See discussion in *Wellman v. Mead*, — Vt. —, 107 Atl. 396, which is not, however, a bankruptcy case.

⁵ *Winfrey v. Jones*, 104 Va. 39, 1 L. R. A. (N.S.) 201, 51 S. E. 153.

⁶ See § 3136.

⁷ *Ex parte Cote*, — Vt. —, 106 Atl. 519.

² *McChristal v. Clisbee*, 190 Mass. 120, 3 L. R. A. (N.S.) 702, 76 N. E. 511.

³ *In re Cololuca*, 133 Fed. 255.

⁴ *McChristal v. Clisbee*, 190 Mass. 120, 3 L. R. A. (N.S.) 702, 76 N. E. 511.

⁵ *McChristal v. Clisbee*, 190 Mass. 120, 3 L. R. A. (N.S.) 702, 76 N. E. 511; *Mason v. Perkins*, 180 Mo. 702,

103 Am. St. Rep. 591, 79 S. W. 683.

⁶ *Sanderson v. Hunt*, 116 Ky. 435, 76 S. W. 179; *Parker v. Brattan*, 120 Md. 428, 87 Atl. 756; *Drake v. Vernon*, 26 S. D. 354, 128 N. W. 317.

⁷ *McDonald v. Brown*, 23 R. I. 546, 91 Am. St. Rep. 659, 58 L. R. A. 768, 51 Atl. 213.

⁸ *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754 [affirming, *Colwell v. Tinker*, 169 N. Y. 531, 98 Am. St. Rep. 586, 58 L. R. A. 765, 62 N. E. 668].

Compare *In re Tinker*, 99 Fed. 79; *In re Freche*, 109 Fed. 620; *Colwell v. Tinker*, 169 N. Y. 531, 98 Am. St. Rep. 586, 58 L. R. A. 765, 62 N. E. 668.

⁹ *Leicester v. Hoadley*, 66 Kan. 172, 71 Pac. 318.

¹⁰ *Exline v. Sargent*, 3 Ohio C. C. (N.S.) 66, 13 Ohio C. D. 180.

¹¹ *In re Freche*, 109 Fed. 620.

¹² *In re Maples*, 105 Fed. 919.

malicious injury;¹³ and accordingly it is barred by a discharge in bankruptcy.¹⁴ A judgment based on a cause of action for negligence, in which there is no element of wilfulness or malice, is barred by bankruptcy.¹⁵

Whether costs rendered against the bankrupt in an action for wilful and malicious injuries to persons or property are barred by a discharge in bankruptcy is a question on which there has been a conflict of authority, due to a conflict of opinion as to the nature of costs. Where costs are regarded as an incident to the judgment, costs rendered in an action of this sort have been held not to be barred by a discharge, since the judgment to which the costs are incident is not barred.¹⁶ Where costs are regarded as a statutory liability they are held to be barred, since they are not within any of the exceptions named by the bankrupt act.¹⁷

§ 3145. Wilful and malicious injury to property. A judgment for wilful and malicious injury to property is not barred by a discharge in bankruptcy under the provisions of this section.¹ An intentional conversion of property may amount to a wilful and malicious injury to property within the meaning of this section,² and the conversion may be either of corporeal³ or of incorporeal⁴ property. If a mortgagor of chattels is permitted to have possession thereof, his conduct in selling such chattels and in appropriating the proceeds to his own use is a wilful and malicious injury to the mortgagee's property.⁵ The act of a pledgee of stock, in selling it without authority and appropriating the proceeds to his own use, is a wilful and malicious injury to property.⁶ If an assignor has collected, from the original debtor, the debt which he has assigned, his conduct in collecting such debt is a wilful and malicious injury

¹³ *Bond v. Milliken*, 134 Ia. 447, 120 Am. St. Rep. 440, 109 N. W. 774.

¹⁴ *Bond v. Milliken*, 134 Ia. 447, 120 Am. St. Rep. 440, 109 N. W. 774.

¹⁵ *In re Lorde*, 144 Fed. 320; *In re Wakefield*, 207 Fed. 180.

¹⁶ *In re Dowie*, 202 Fed. 816.

¹⁷ *Drake v. Vernon*, 26 S. D. 354, 128 N. W. 317.

¹ *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205; *Covington v. Rosenbusch*, 148 Ga. 459, 97 S. E. 78; *Mason v. Sault*, — Vt. —, 108 Atl. 267.

² *McIntyre v. Kavanaugh*, 242 U. S.

138, 61 L. ed. 205; *Bever v. Swecker*, 138 Ia. 721, 116 N. W. 704; *Mason v. Sault*, — Vt. —, 108 Atl. 267.

³ *Mason v. Sault*, — Vt. —, 108 Atl. 267.

⁴ *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205.

⁵ *Mason v. Sault*, — Vt. —, 108 Atl. 267.

⁶ *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205.

Contra, as to conversion by a pledgee of a note, *First National Bank v. Bamforth*, 90 Vt. 75, 96 Atl. 600.

to property, as against the assignee; and the discharge of such assignor in bankruptcy is not a defense as against a subsequent action by such assignee.¹

§ 3146. Judgments for fraud. The bankrupt act of 1898 excepts from the operation of the discharge judgments in actions for fraud or obtaining property by false pretenses or false representations.¹ The practical difficulty which arises in applying these provisions is in determining whether a judgment is a judgment in an action for fraud or not, within the meaning of this section of the federal statute.

On the one hand, the United States courts will not review the question of the sufficiency of the charge of fraud in the petition or declaration, since pleading is a question of state law, and not a federal question.² On the other hand, it is not necessary that the judgment should show on its face that it is a judgment for fraud; and it is sufficient if the record, taken as a whole, shows that the action was treated by the state court as an action for fraud.³

To constitute a judgment for fraud within the meaning of the bankrupt act of 1898, the fraud must have been the very basis of the action, and not merely a fact collateral thereto.⁴ A judgment in an action on a simple contract debt, and to set aside a transfer of property as in fraud of the debtor's creditors, is not a judgment for fraud within the meaning of the bankrupt act.⁵ If an action has been brought for fraud, and judgment recovered thereon, the judgment is not such a merger of the original cause of action as to prevent this section of the bankrupt act from applying and to prevent such judgment from being barred by a discharge in bankruptcy.⁶

¹ *Covington v. Rosenbusch*, 148 Ga. 459, 97 S. E. 78.

² *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723 [affirming, 176 Ill. 359, 52 N. E. 551]; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340; *In re Shepardson*, 220 Fed. 186; *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55 [affirmed, *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723]; *Goodman v. Herman*, 172 Mo. 344, 60 L. R. A. 885, 72 S. W. 546.

³ *Forsyth v. Vehmeyer*, 177 U. S.

177, 44 L. ed. 723; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340.

⁴ *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340; *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S. E. 604; *Ziegler v. Suggit*, 118 Minn. 74, 136 N. W. 411; *In re Bullis*, 171 N. Y. 689, 64 N. E. 1119.

⁵ *In re Blumberg*, 94 Fed. 476.

⁶ *In re Blumberg*, 94 Fed. 476.

⁷ *Packer v. Whittier*, 91 Fed. 511, 33 C. C. A. 658; *Bennett v. Justices*, 166 Mass. 126, 44 N. E. 121.

What is an action for fraud in such sense that a judgment rendered therein is not barred by a discharge in bankruptcy is a question on which there is some divergence of judicial opinion. If an action is brought against the debtor for deceit, and judgment recovered against him, such judgment is evidently not discharged in bankruptcy.⁷ If, on a similar transaction, the creditor waives the fraud, and sues to enforce the contract, this waiver of the fraud has been held binding upon the creditor for purposes of a discharge in bankruptcy, and he can not, after obtaining such judgment, claim, for the purpose of avoiding the effect of a discharge, that the cause of action was based on fraud.⁸ A judgment rendered on the common counts in an action the record of which does not contain allegations of fraud, is not a judgment in an action for fraud.⁹ If the debtor obtains a loan of money from the bank by means of false representations as to the amount of property owned by him, and gives his promissory note for the amount of the loan, a judgment taken upon such note is not a judgment in an action for fraud, within the meaning of this section of the statute.¹⁰ A judgment in an action for goods sold to a bankrupt, induced by his false representations and fraud, has been held not to be a judgment in an action for fraud or false pretenses,¹¹ even if in that action a writ of attachment issued, one of the grounds of which was that the debt sued for was fraudulently contracted.¹² On the other hand, a judgment for goods sold, the sale of which it is alleged and found by the court to have been procured by false representations, is a debt which is not barred by the debtor's discharge in bankruptcy.¹³ A judgment in an action to recover goods obtained by fraud is a judgment in an action for fraud within the meaning of this section.¹⁴ A judgment rendered in an action brought in part for money had and received, and also in part on an indebtedness created by the fraud and embezzlement of the

⁷ *In re Cole*, 106 Fed. 837; *Turner v. Atwood*, 124 Mass. 411.

⁸ *United States v. Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 Fed. 232 [affirming, 111 Fed. 361].

Georgia. Ford v. Blackshear Mfg. Co. 140 Ga. 670, 79 S. E. 576.

Minnesota. Ziegler v. Sugrit, 118 Minn. 74 136 N. W. 411.

Missouri. Goodman v. Herman, 172 Mo. 344, 80 L. R. A. 885, 72 S. W. 546.

New Jersey. Barnes Mfg. Co. v.

Norden, 67 N. J. L. 493, 51 Atl. 454.

⁹ *Barnes Mfg. Co. v. Norden*, 67 N. J. L. 493, 51 Atl. 454.

¹⁰ *In re Rhutassel*, 96 Fed. 597.

¹¹ *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916.

¹² *Goodman v. Herman*, 172 Mo. 344, 80 L. R. A. 885, 72 S. W. 546.

¹³ *In re Lewensohn*, 104 Fed. 1006.

¹⁴ *C. C. A. 309* [affirming, 99 Fed. 731].

¹⁵ *Nichols v. Doak*, 48 Wash. 457, 125 Am. St. Rep. 943, 93 Pac. 919.

debtor as trustee, where a general verdict is rendered without showing that it is in any part made up of the latter indebtedness, is not a debt created by fraud, and is barred by the discharge in bankruptcy.¹⁵ A judgment in an action of trover and conversion is not a judgment for fraud.¹⁶ If the action is based upon fraudulent representations, a judgment or a decree therein is a judgment in an action for fraud, although such proceeding was begun as a suit for specific performance.¹⁷ A judgment which has been rendered for costs in a criminal proceeding, is not a judgment in an action for fraud within the meaning of this section.¹⁸

§ 3147. Debt created by fraud not in fiduciary capacity. The act of 1898 made provision in section 17, clause 2, excepting "judgments in action for fraud" from the operation of a discharge; and in clause 4, excepting debts which were created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Accordingly, if a debt has been created by fraud, but has not been reduced to judgment and the fraud was not committed by one acting in a fiduciary capacity, there was a divergence of judicial opinion as to whether such debt is barred by discharge. By one view a claim for fraud was held to be included under the head of "judgments in actions for fraud," even if not reduced to judgment, and hence by clause 2 of section 17 of the bankrupt act of 1898, is not affected by the discharge.¹ By another view, such a debt is not affected by a discharge because of clause 4 of section 17. This conclusion is reached by holding that the clause "while acting as an officer or in any fiduciary capacity" does not refer to debts "created by his fraud," but only to the classes of debts subsequently enumerated.² A third view is that such a debt is not exempt from the operation of a discharge. This conclusion is reached on the ground that such a claim is not a "judgment" under clause 2; and if not incurred in a fiduciary capacity is not included under clause 4.³ The ques-

¹⁵ *Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1064.

¹⁶ *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328.

¹⁷ *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340.

¹⁸ *Olds v. Forrester*, 126 Ia. 456, 102 N. W. 419.

¹ *In re Wallock*, 120 Fed. 516; *Louis-*

ville Dry Goods Co. v. Lanman, 135 Ky. 163, 28 L. R. A. (N.S.) 363, 121 S. W. 1042.

² *In re Butts*, 120 Fed. 966; *Crawford v. Burke*, 201 Ill. 581, 66 N. E. 833 [affirming, 102 Ill. App. 566].

³ *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762; *J. C. Smith*

tion has in part been settled by the amendment of 1903, which substitutes the word "liabilities" for "judgments" in clause 2. The object of this amendment was to except from the operation of the discharge liabilities of the class specified in the statute, whether such liabilities had been reduced to judgment or not; and, accordingly, liabilities of such class are not barred by the discharge, even though they were not reduced to judgment when the proceedings in bankruptcy were instituted.⁴ Provisions similar to those of the amendment of 1903 are found in earlier bankrupt acts. The word "judgment" is not employed, some expression like "claim," "debt" or "liability" being found in its place.⁵

§ 3148. General nature of fraud. The nature of fraud whether the basis of a judgment, as under the act of 1898, or whether a claim not in judgment, as under other bankrupt acts, must next be considered. The term "fraud" means positive fraud, and distinguished from constructive fraud; and it implies some degree of moral turpitude.¹ In construing section 14b of the bankrupt act,

& Wallace Co. v. Lambert, 69 N. J. L. 487, 55 Atl. 88; Crosby v. Miller, 25 R. I. 172, 55 Atl. 328.

⁴ United States. Friend v. Talcott, 228 U. S. 27, 57 L. ed. 718 [affirming, Talcott v. Friend, 179 Fed. 676, 43 L. R. A. (N.S.) 649].

Arkansas. Dilley v. Simmons National Bank, 108 Ark. 342, 158 S. W. 144.

California. Woehrle v. Canclini, 158 Cal. 107, 109 Pac. 888.

Kansas. Gregory v. Williams, — Kan. —, 189 Pac. 932.

New Hampshire. Lund v. Bull, 76 N. H. 132, 80 Atl. 141.

Contra, apparently on the theory that the amendment of 1903 did not change the rule in Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; Roth v. Pechin, 260 Pa. St. 450, 103 Atl. 894.

⁵ United States. Warner v. Cronk-bite, 6 Biss. (U. S. C. C.) 453.

Kentucky. Taylor v. Farmer, 81 Ky. 458.

Massachusetts. Wilson v. Hawley, 158 Mass. 250, 33 N. E. 522.

North Dakota. In re Kaeppler, 7 N. D. 435, 75 N. W. 789.

Pennsylvania. Hughes v. Oliver, 8 Pa. St. 426.

Rhode Island. Stokes v. Mason, 10 R. I. 261.

¹ Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565 [affirming, 77 N. Y. 427, 33 Am. Rep. 641]; Noble v. Hammond, 129 U. S. 65, 32 L. ed. 621 [reversing, 57 Vt. 193]; Bullis v. O'Beirne, 195 U. S. 606, 49 L. ed. 340; Louisville & Nashville Ry. v. Bryant, 149 Ky. 359, 149 S. W. 830; Lund v. Bull, 76 N. H. 132, 80 Atl. 141.

The term "fraud" means "positive fraud or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law which may exist without the imputation of bad faith or immorality." Ames v. Moir, 138 U. S. 306, 311. 34 L. ed. 951 [affirming, 130 Ill. 582, 22 N. E. 535; and citing, Neal v. Clark, 95 U. S. 704, 24 L. ed. 586; Wolf v. Stix, 99 U. S. 1, 25 L. ed. 309; Hennequin v. Clews, 111 U.

which provides that a materially false statement may be a ground for refusing a discharge, it is held that the word "false" means knowingly false, and that it does not include innocent though erroneous statements.² A false representation by a member of a partnership does not prevent the other partner from obtaining a discharge if he was ignorant of such false representation;³ and it would seem that such discharge would be a bar against such obligation. A debt which arises from an overpayment by a mistake which the party receiving it declines to refund, is not a debt created by fraud.⁴ If the statement which was relied upon as a false representation was true when made, the fact that the party who made it did not disclose a subsequent change of facts which made such representation untrue at the time, may amount to fraud for which the transaction could be avoided;⁵ but it is not fraud within the meaning of this section of the bankrupt act,⁶ and a debt thus incurred is barred by a discharge in bankruptcy.⁷

A false statement which is intended to deceive, but which does not induce action in reliance thereon, is not fraud within section 17, clause 2, of the bankrupt act.⁸

"Fraud" means fraud whereby the bankrupt deceives his creditor and induces him to extend credit. It has no reference to fraud which the bankrupt and his creditor have conspired to practice on a third person.⁹ Hence, if A buys on credit from B under an agreement to defraud B's creditors, A's debt to B is not incurred through "fraud," and hence is barred by A's discharge in bankruptcy.¹⁰ If A borrows money from B, intending to prefer one of

S. 676, 28 L. ed. 565; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Noble v. Hammond*, 129 U. S. 65, 32 L. ed. 621, and *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931.

See also as to fraud which prevents a discharge, *Gilpin v. Merchants' National Bank*, 165 Fed. 607, 20 L. R. A. (N.S.) 1023.

² *Gilpin v. Merchants' National Bank*, 165 Fed. 607, 20 L. R. A. (N. S.) 1023.

³ *Hardie v. Swafford Bros. Dry Goods Co.*, 165 Fed. 588, 20 L. R. A. (N.S.) 785; *Frank v. Michigan Paper*

Co., 179 Fed. 776, 30 L. R. A. (N.S.) 623.

⁴ *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442.

⁵ See § 323.

⁶ *Gregory v. Pierce*, — Ia. —, 172 N. W. 288.

⁷ *Gregory v. Pierce*, — Ia. —, 172 N. W. 288.

⁸ *Rudstrom v. Sheridan*, 122 Minn. 262, 142 N. W. 313.

⁹ *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309.

¹⁰ *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309.

A's creditors, B's debt is not incurred in fraud, at least if B does not know of A's intention.¹¹

To fall within this clause of the statute the debt must have been created by fraud. Fraudulent conduct after the debt has been created does not bring it within this class.¹² A promise which is made after the original transaction, without the intention of keeping such promise, does not convert the original liability into a liability for obtaining property by false pretenses.¹³ Accordingly, the conduct of the debtor in inducing the creditor to dismiss an action upon a note and to surrender such note to him in reliance upon his promise to pay it, does not make the original liability a liability for obtaining property by false representations, although the debtor did not mean to keep such promise and made it in order to secure an opportunity to conceal his property and to resort to voluntary bankruptcy.¹⁴ If the seller has agreed to refund the purchase price to the buyer in case certain representations and warranties which were made a part of the contract of sale prove to be untrue, the liability of the seller upon such promise is not a liability for obtaining property by false pretenses or false representations;¹⁵ and a judgment rendered in an action against the seller on such contract is barred by such discharge in bankruptcy.¹⁶ A judgment rendered in favor of a father against one who has seduced the former's daughter not under promise of marriage, is not a "debt created by fraud."¹⁷ Advances of money obtained by false and fraudulent representations that the debtor had a certain amount of wood cut and ready for shipment, and that he had contracted for the sale of it at a certain price, constitute a debt created by means of fraud involving moral turpitude and intentional wrong. Such debt is not barred by a discharge under the bankrupt act of 1867.¹⁸

If the original liability growing out of fraud is barred by the Statute of Limitations, and it is sought to hold the debtor upon

¹¹ *Ohio Valley Bank v. Mack*, 163 Fed. 155, 24 L. R. A. (N.S.) 184.

¹² *Neal v. Clark*, 95 U. S. 704, 24 L. ed. 586; *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309; *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442; *Jenkins v. Pilcher*, 160 Mich. 349, 28 L. R. A. (N.S.) 423, 125 N. W. 355; *Brown v. Broach*, 52 Miss. 536; *Bank v. Crandall*, 87 Mo. 208.

¹³ *Jenkins v. Pilcher*, 160 Mich. 349,

28 L. R. A. (N.S.) 423, 125 N. W. 355.

¹⁴ *Jenkins v. Pilcher*, 160 Mich. 349, 28 L. R. A. (N.S.) 423, 125 N. W. 355.

¹⁵ *Guindon v. Brusky*, 142 Minn. 86, 170 N. W. 918.

¹⁶ *Guindon v. Brusky*, 142 Minn. 86, 170 N. W. 918.

¹⁷ *Howland v. Carson*, 28 O. S. 625.

¹⁸ *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723 [affirming, *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55].

his subsequent promise to discharge such liability, his discharge in bankruptcy is a bar to his liability upon such express promise.¹⁹

Acceptance of a negotiable instrument in place of the original liability created by fraud, does not waive the fraud; and such instrument is not barred by a discharge in bankruptcy.²⁰

§ 3149. Liability for obtaining property by false pretenses or false representations. Since the amendment of 1903 omits the general term "fraud" and covers "liabilities for obtaining property by false pretenses or false representations," obtaining services by false pretenses or representations is held not to be within such provision of the statute.¹ Accordingly, a claim for legal services which are rendered by false and fraudulent representations, is not a claim for property within the meaning of this section, and it is barred by a discharge in bankruptcy.²

Actual fraud is included in this provision of the bankrupt act.³ A debt which is incurred by one who has purchased goods without the intention of paying for them,⁴ and who intends to resell such goods and to appropriate the proceeds,⁵ or by one who borrows money, knowing that he will be unable to repay it,⁶ or by one who induces the sale on credit by false and fraudulent statements as to his own financial condition,⁷ or by false representations as to the condition of his business and the profits thereof,⁸ is created by

¹⁹ *Nelson v. Petterson*, 229 Ill. 240, 13 L. R. A. (N.S.) 912, 82 N. E. 229.

²⁰ *Gregory v. Williams*, — Kan. —, 189 Pac. 932.

¹ *Gleason v. Thaw*, 185 Fed. 345, 34 L. R. A. (N.S.) 894.

² *Gleason v. Thaw*, 185 Fed. 345, 34 L. R. A. (N.S.) 894.

³ *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951 [affirming, 130 Ill. 582, 22 N. E. 535]; *Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 28 L. R. A. (N. S.) 363, 121 S. W. 1042.

⁴ *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951 [affirming, 130 Ill. 582, 22 N. E. 535]; *Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 28 L. R. A. (N. S.) 363, 121 S. W. 1042.

⁵ *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951 [affirming, 130 Ill. 582, 22 N. E. 535].

⁶ *Bullis v. O'Beirne*, 105 U. S. 606, 49 L. ed. 340.

⁷ *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718 [affirming, *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N. S.) 649]; *Broadnax v. Bradford*, 50 Ala. 270; *Turner v. Atwood*, 124 Mass. 411 (the action in which this question arose being "tort or contract"); *Rowell v. Ricker*, 79 Vt. 552, 66 Atl. 569.

The opposite result was reached in *Roth v. Pechin*, 260 Pa. St. 450, 103 Atl. 894, apparently on the theory that the amendment of 1903 did not affect the pre-existing law; and that accordingly, under the doctrine of *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, a discharge in bankruptcy was a bar to such liability.

⁸ *Morse v. Hutchins*, 102 Mass. 439.

fraud. A loan, induced by fraudulently giving worthless bonds as security therefor,⁹ or an accommodation note fraudulently procured by false representations that accommodation notes executed prior thereto had not been put into circulation,¹⁰ or a note and mortgage which A induces X to execute to B, to obtain a loan from B to X, where A concealed from X the fact that A was indebted to B and that A had used the money derived from this loan in part to pay off his own debt to B, instead of using it to discharge a debt owing from X, as he promised to do,¹¹ are all liabilities created by fraud.

§ 3150. Proof of claim for fraud. The fact that the fraud is not of such a nature that it will prevent the granting of a discharge to the bankrupt, does not show the absence of fraud conclusively; and it is possible that the discharge may be granted over the objection of the creditor, but the discharge when granted may not be a bar against the debt in question.¹

⁹ *Bank v. Crandall*, 87 Mo. 208. (The court points out that a different result would have been reached had the fraudulent use of the bonds been made after the debt had been incurred.)

¹⁰ *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248 [affirming, 89 N. Y. 299].

¹¹ *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411.

¹ "To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding, on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing

could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (§ 14c, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge.' It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a re-

Conversely, the act of the debtor in proving a judgment rendered in an action for fraud or a debt created by fraud, as a claim in the bankruptcy proceeding,² and accepting a dividend thereon,³ does not make the debt one which is barred by a discharge in bankruptcy.

§ 3151. Debts created in fiduciary capacity—Technical trust relations. The bankrupt act of 1898 excepts from the operation of the discharge provable debts created by the fraud, embezzlement, misappropriation or defalcation of the debtor while acting as an officer or in any fiduciary capacity.¹ Similar provisions have appeared in other bankrupt acts.² These words in the act of 1898 are the same as those in the acts of 1867 and 1841, and have the same meaning.³

The question whether the words "while acting as an officer or in any fiduciary capacity" apply to all the classes of debts named in this clause or only to the latter classes is discussed elsewhere.⁴ A debt incurred by the defalcation of a public officer,⁵ or by the

suit of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition." *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718 [affirming, *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N.S.) 649].

² *United States. Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718 [affirming, *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N.S.) 649]; *In re Lewensohn*, 99 Fed. 73 [affirmed, 104 Fed. 1006].

Illinois. Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55.

North Carolina. Standard Sewing Machine Co. v. Owings, 140 N. Car. 503, 63 S. E. 345.

Rhode Island. Stokes v. Mason, 10 R. I. 261; *Whittier v. Collins*, 15 R. I. 90.

South Carolina. Standard Sewing

Machine Co. v. Alexander, 68 S. Car. 506, 47 S. E. 711.

³ *Friend v. Talcott*, 228 U. S. 27, 57 L. ed. 718 [affirming, *Talcott v. Friend*, 179 Fed. 676, 43 L. R. A. (N. S.) 649]; *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55.

⁴ *Williams v. Virginia-Carolina Chemical Co.*, 182 Ala. 413, 62 So. 755; *American Agricultural Chemical Co. v. Berry*, 110 Me. 528, 45 L. R. A. (N.S.) 1106, 87 Atl. 218.

² *Chapman v. Forsyth*, 43 U. S. (2 How.) 202, 11 L. ed. 236; *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Mayberry v. Cook*, 121 Cal. 588, 54 Pac. 95; *Mock v. Howell*, 101 N. Car. 443, 8 S. E. 167; *Pawlet v. Kelley*, 69 Vt. 398, 38 Atl. 92.

³ *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328.

⁴ See § 3147.

⁵ *Madison v. Dunkle*, 114 Ind. 262, 16 N. E. 593; *Johnson v. Auditor*, 78 Ky. 282; *Grantham v. Clark*, 62 N. H. 426.

fraud of an officer of a corporation, as of a bank,⁶ is not barred by a discharge in bankruptcy. The term "fiduciary capacity" includes technical trusts, but not such trusts as the law implies from contract relations or from relations of general trust and confidence.⁷ Thus it includes technical trustees,⁸ receivers,⁹ executors and administrators,¹⁰ guardians,¹¹ and surviving partners,¹² as far as they are acting in a trust capacity. If a trustee has embezzled property and has secured such liability by mortgage, such liability is not merged in the subsequent promise; and it is to be regarded as an embezzlement while acting in a fiduciary capacity.¹³ An averment that the defendant "embezzled" plaintiff's money has been held to import a fiduciary relation, and hence the defense of a discharge in bankruptcy is an insufficient answer to such a petition.¹⁴

This provision does not include debts created by special contract between the parties in fiduciary capacities.¹⁵ It does not include the liability of a surety on the bond of a trustee. If such surety obtains a discharge in bankruptcy this clause of the bankrupt act will not prevent such discharge from barring liability on such bond;¹⁶ nor does it include the liability of one who has made default in his trust capacity and who has given his note to his sureties to reimburse them for sums advanced to cover such default.¹⁷ Actual intent to deprive the beneficiary of the property

⁶ *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596. (An action for defrauding third persons by a false statement of the condition of the bank.)

⁷ *United States v. Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147.

⁸ *Kansas. Inge v. Stillwell*, 88 Kan. 33, 42 L. R. A. (N.S.) 1093, 127 Pac. 527.

⁹ *Maryland. American Surety Co. v. Spice*, 119 Md. 1, 85 Atl. 1031.

¹⁰ *Nebraska. Martin v. Starrett*, 97 Neb. 653, 151 N. W. 154.

¹¹ *Vermont. Johnson's Administrator v. Parmenter*, 74 Vt. 58, 52 Atl. 73; *First National Bank v. Bamforth*, 90 Vt. 75, 96 Atl. 600.

¹² *Donovan v. Haynie*, 67 Ala. 51; *Field v. Howry*, 132 Mich. 687, 94 N. W. 213; *Mock v. Howell*, 101 N. Car. 443, 8 S. E. 167; *Warren v. Robinson*, 21 Utah 429, 61 Pac. 28.

¹³ *Field v. Howry*, 132 Mich. 687, 94 N. W. 213.

¹⁴ *Laramore v. McKinzie*, 60 Ga. 532; *Waller v. Edwards*, Litt. Sel. Cas. (Ky.) 348; *Johnson's Administrator v. Parmenter*, 74 Vt. 58, 52 Atl. 73.

¹⁵ *Simpson v. Simpson*, 80 N. Car. 332.

¹⁶ *Haggerty v. Badkin*, 72 N. J. Eq. 473, 66 Atl. 420.

¹⁷ *Field v. Howry*, 132 Mich. 687, 94 N. W. 213.

¹⁸ *Watertown Carriage Co. v. Hall*, 176 N. Y. 313, 68 N. E. 629.

¹⁹ *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.

²⁰ *Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583; *Eberhardt v. Wood*, 74 Tenn. (6 Lea) 467; *Davis v. McCurdy*, 50 Wis. 569, 7 N. W. 665.

²¹ *Light v. Merriam*, 132 Mass. 283.

or fund permanently is not necessary. Thus A, a trustee for the creditors of X, and afterwards appointed as receiver of X's property, loaned the trust funds to a firm of which he was a member, taking their note therefor. He concealed the fact of this loan as long as he could. It was held that this debt was contracted in a fiduciary capacity, and was not barred by A's discharge in bankruptcy.¹⁸

This clause of the statute includes both active and passive wrongdoing. If the liability was incurred through neglect, as distinguished from active wrongdoing, such debt is not barred by a discharge.¹⁹ If a debt is created by fraud in a fiduciary capacity, the interest thereon is a mere incident of the debt and is not affected by such discharge.²⁰

§ 3152. Debts created in fiduciary capacity—Non-technical trust relations. This clause of the bankrupt act does not include implied trusts, nor does it include cases involving an actual breach of trust and confidence between persons who are not in technical fiduciary relations.¹ A grantee to whom property has been conveyed in fraud of the grantor's creditors is not in a fiduciary capacity within the meaning of this provision.² Accordingly, a

¹⁸ Field v. Howry, 132 Mich. 687, 94 N. W. 213.

¹⁹ Warren v. Robison, 21 Utah 429, 61 Pac. 28.

²⁰ Johnson's Administrator v. Parmenter, 74 Vt. 58, 52 Atl. 73.

¹ United States. Chapman v. Forsyth, 43 U. S. (2 How.) 202, 11 L. ed. 236; Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147; In re Basch, 97 Fed. 761; Bracken v. Milner, 104 Fed. 522; In re Butts, 120 Fed. 966; Barrett v. Prince, 143 Fed. 302; In re Camelo, 195 Fed. 632.

Alabama. Austill v. Crawford, 7 Ala. 335; Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711.

Illinois. Pierce v. Shippee, 90 Ill. 371.

Indiana. Du Pont v. Beck, 81 Ind. 271.

Kansas. Inge v. Stillwell, 88 Kan. 33, 42 L. R. A. (N.S.) 1093, 127 Pac. 527.

Louisiana. Commercial Bank v. Buckner, 2 La. Ann. 1023.

Maine. American Agricultural Chemical Co. v. Berry, 110 Me. 528, 45 L. R. A. (N.S.) 1106, 87 Atl. 219; New England Milk Producers' Association v. Wing, — Me. —, 109 Atl. 375.

Massachusetts. Hayman v. Pond, 48 Mass. (7 Met.) 328; Wolcott v. Hodge, 81 Mass. (15 Gray) 547, 77 Am. Dec. 381; Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337.

Minnesota. Gee v. Gee, 84 Minn. 384, 87 N. W. 1116.

Missouri. Goodman v. Herman, 172 Mo. 344, 60 L. R. A. 835, 72 S. W. 546.

New Jersey. Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

Rhode Island. Crosby v. Miller, 25 R. I. 172, 55 Atl. 328.

Tennessee. Pankey v. Nolan, 25 Tenn. (6 Humph.) 154.

² Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

buyer and seller of personal property are not thereby brought into fiduciary relations.³ Hence, a judgment against the vendee for the purchase price of the goods, even though the sale was induced by fraud,⁴ is not a debt created while acting in a fiduciary capacity. A shipped goods to B to be resold by him under a contract, on the back of which was a memorandum to the effect that B was to hold the goods and their proceeds "in trust and separate for the settlement of our account." This was held not to be sufficient to establish a technical trust, and therefore B's debt to A was barred by B's discharge in bankruptcy.⁵ A debt due from an agent,⁶ a commission merchant,⁷ or an attorney at law,⁸ to his principal arising out of the transaction of the agency, is not within this clause. A liability caused by the default of an agent, in failing to pay over to his principal the proceeds derived from the sale of the goods of the principal,⁹ or the liability arising from the misappropriation by a broker of the proceeds of stocks placed in his hands, as collateral, by a customer,¹⁰ is not created by embezzlement or defalcation in a fiduciary capacity within the meaning of this section. If A transfers property to B under a contract by which B is to sell it, pay A's debts out of the proceeds, and pay the balance over to A, B's failure to make such payment to A is not an embezzlement or de-

³ *Goodman v. Herman*, 172 Mo. 344, 60 L. R. A. 885, 72 S. W. 546.

⁴ *Goodman v. Herman*, 172 Mo. 344, 60 L. R. A. 885, 72 S. W. 546.

⁵ *In re Butts*, 120 Fed. 966.

⁶ *Chapman v. Forsyth*, 43 U. S. (2 How.) 202, 11 L. ed. 236; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147; *Bracken v. Milner*, 104 Fed. 522; *Barrett v. Prince*, 143 Fed. 302; *In re Camelo*, 195 Fed. 632; *Du Pont v. Beck*, 81 Ind. 271; *American Agricultural Chemical Co. v. Berry*, 110 Me. 528, 45 L. R. A. (N.S.) 1106, 87 Atl. 218; *Woodward v. Towne*, 127 Mass. 41, 34 Am. Rep. 337.

⁷ *Chapman v. Forsyth*, 43 U. S. (2 How.) 202, 11 L. ed. 236; *In re Basch*, 97 Fed. 761; *New England Milk Producers' Association v. Wing*, — Me. —, 109 Atl. 375; *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328.

So under the act of 1867. *Henne-*

quin v. Clews, 111 U. S. 676, 28 L. ed. 565.

So under the act of 1841. *Austill v. Crawford*, 7 Ala. 335; *Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Hayman v. Pond*, 48 Mass. (7 Met.) 328.

See to the same effect, *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711; *Hayman v. Pond*, 48 Mass. (7 Met.) 328; *Pankey v. Nolan*, 25 Tenn. (6 Humph.) 154.

Contra, *Mayberry v. Cook*, 121 Cal. 588, 54 Pac. 95; *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326.

⁸ *Wolcott v. Hodge*, 81 Mass. (15 Gray) 547, 77 Am. Dec. 381.

Contra, *Heffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281.

⁹ *American Agricultural Chemical Co. v. Berry*, 110 Me. 528, 45 L. R. A. (N.S.) 1106, 87 Atl. 218.

¹⁰ *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147.

falcation while acting in a fiduciary capacity.¹¹ The liability of a creditor to return collateral pledged to secure a debt, after payment of the same,¹² or to pay the surplus left out of the proceeds of such collateral after payment of the debt,¹³ is not created in a fiduciary capacity. Where X pledged certain securities with A to secure X's debt to A, and A pledged them to B to secure A's debt to B, A's liability to X was not as trustee or in a fiduciary capacity.¹⁴ If, however, an agent intrusted by his principal with money to be loaned on trust deed or mortgage, makes such loan, taking the title to himself as trustee, he thereby becomes a technical trustee, and his failure to pay over the proceeds arising on foreclosure of such trust deed creates a debt while he is acting in a fiduciary capacity.¹⁵ The misappropriation of money by one partner while acting in the partnership business does not, unless it is in violation of an express trust, create a debt owing by one acting in a fiduciary capacity.¹⁶

Breach of contract is not fraud within the meaning of this section.¹⁷

A sold wood to B, the title to remain in A until the wood was paid for. B sold the wood and appropriated the proceeds. His liability was held not to be created by fraud, embezzlement, or misappropriation while acting in a fiduciary capacity.¹⁸ A borrowed money from B under a contract whereby A was to pay interest to X for life as long as A thought that X was conducting herself properly; but if not, the interest was to accumulate, to be paid over with the principal to the ultimate owner. This was held not to be a trust. Hence, A's debt was barred by his discharge in bankruptcy.¹⁹

¹¹ Bissell v. Couchaine, 15 Ohio 58.

¹² So in case of a broker. Crosby v. Miller, 25 R. I. 172, 55 Atl. 328.

¹³ Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232.

¹⁴ Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565.

For similar facts, see Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 302.

¹⁵ Bracken v. Milner, 104 Fed. 522.

So, Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 290.

¹⁶ Pierce v. Shippee, 90 Ill. 371; Inge v. Stillwell, 88 Kan. 33, 42 L. R. A. (N.S.) 1003, 127 Pac. 527; Gee v. Gee,

84 Minn. 384, 87 N. W. 1116; Karger v. Orth, 116 Minn. 124, 133 N. W. 471; Martin v. Starrett, 97 Neb. 653, 151 N. W. 154.

¹⁷ Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931 [affirming, 37 La. Ann. 148, which revoked 37 La. Ann. 138]; Bryant v. Kinyon, 127 Mich. 152, 53 L. R. A. 801, 86 N. W. 531.

¹⁸ Bryant v. Kinyon, 127 Mich. 152, 53 L. R. A. 801, 86 N. W. 531.

¹⁹ Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931 [affirming, 37 La. Ann. 148, 154, which revoked 37 La. Ann. 138].

Some authorities, however, have construed the word "fraud" to include more than is included by the courts in the cases already discussed, and give a broader meaning to "fiduciary capacity." Thus misappropriating the proceeds of a note received for collection,²⁰ or money received to use in purchase of land for the party advancing the money,²¹ or to buy exchange,²² or money collected for laundry work by an agent working on a commission,²³ has been held to create debts which are not barred by a discharge in bankruptcy.

§ 3153. Debts omitted from schedule. The earlier federal bankrupt laws contained no provision concerning the omission of debts from the schedule. It was accordingly held that, under the clause of the statute providing that the discharge should bar all debts with certain exceptions, of which a debt omitted was not one, a discharge barred debts omitted from the schedule,¹ unless such omission was wilful and fraudulent.²

The bankrupt act of 1898 excepts from the operation of the discharge debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Accordingly, a discharge does not bar a debt omitted from the schedule where the omitted creditor has no notice or knowledge of the bankruptcy proceedings in time to prove his claim.³ The knowledge of the proceedings in bankruptcy means knowledge which is acquired in time to enable the creditor to take part in the administration of the estate of the bankrupt and to share in the dividends, and not knowledge which is acquired too late for such purpose, but in time to apply for a

²⁰ *Fulton v. Hammond*, 11 Fed. 291.

²¹ *Matteson v. Kellogg*, 15 Ill. 547.

²² *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320.

²³ *Shipley v. Platts*, 17 S. D. 357, 97 N. W. 1.

¹ *Alabama*. *Fox v. Paine*, 10 Ala. 523.

District of Columbia. *Hoffman v. Haight*, 3 Mack. (D. C.) 21.

Michigan. *Graves v. Wright*, 53 Mich. 425, 19 N. W. 129.

Ohio. *Mitchell v. Singletary*, 19 Ohio 291.

Tennessee. *Eberhardt v. Wood*, 74 Tenn. (6 Lea) 467.

Wisconsin. *Thomas v. Jones*, 39 Wis. 124.

² *Shepard v. Abbott*, 137 Mass. 224; *Thomas v. Jones*, 39 Wis. 124.

³ *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231; *In re Monroe*, 114 Fed. 398; *Hughes v. Clark*, 109 Ill. App. 107; *Smith v. Hill*, 232 Mass. 188, 2 A. L. R. 1667, 122 N. E. 310; *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652 [affirmed, *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231].

revocation of the discharge.⁴ If the bankrupt knows that a note has been discounted at a certain bank, and schedules such note in the name of the original payee, and the bank has no notice or actual knowledge of the proceedings in bankruptcy, such note is not barred by such discharge.⁵

The fact that the debt was omitted in good faith does not bring it within the operation of the discharge.⁶ On the other hand, a debtor to whom no notice of an assignment has been given is protected if he gives notice to the original creditor,⁷ especially if such debt has been reduced to judgment and notice has been given to the judgment creditor of record.⁸

⁴ *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231 [affirming, *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652].

"The finding of the trial-court is that the defendant 'had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein.' This is made more definite as to time by the court of appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about *Russell & Birkett*, was informed that they had gone through bankruptcy, and subsequently (November 17th), the Northern district was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (section 65), and to move to revoke the discharge of the bankrupt (section 15). It is hence argued that defendant in error must be held to have had 'actual knowledge of the proceedings in bankruptcy,' as those words of section 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other

creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends (section 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceedings without penalty to him. It is easy to see what results such looseness would permit—what preference could be accomplished and covered by it." *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231 [affirming, *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652].

⁵ *Columbia Bank v. Birkett*, 174 N. Y. 112, 102 Am. St. Rep. 478, 66 N. E. 652 [affirmed, *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231].

⁶ *Santa Rosa Bank v. White*, 139 Cal. 703, 73 Pac. 577.

⁷ *Morency v. Landry*, — N. H. —, 108 Atl. 855.

⁸ *Morency v. Landry*, — N. H. —, 108 Atl. 855.

If the creditor has actual knowledge of the proceedings in bankruptcy, his claim is barred by discharge even if omitted from the schedule.⁹ If the creditor has actual notice of the proceedings in bankruptcy, in time to present his claim and to take part in the administration of the bankrupt's estate, it makes no difference how such knowledge or notice is acquired.¹⁰ A note is barred by discharge, which is scheduled by the debtor as being held by the original payee, although he knows it has been transferred if the transferee has actual knowledge of the proceedings in bankruptcy.¹¹

By reason of the special provision of subdivision 5 of section 70a of the bankrupt act of 1898, the right of the bankrupt who has paid the cash surrender value of his life insurance policies to the trustee, to hold such policies free from the claims of the creditors, is limited to the creditors who participate in the distribution of his estate under the bankruptcy proceedings; and he can not hold such policies free from the claims of other creditors, even if they had notice of the bankruptcy proceedings and even if they presented their claims, but subsequently, on their own application, had such claims expunged from the list of claims and received no dividends thereon.¹² If the debt is not listed in the schedule it is for the debtor to show affirmatively that the creditor had actual notice of the bankruptcy proceedings, to make the discharge operative as to such debt.¹³

§ 3154. Defective description as omission. The fact that the schedule of debts uses the initial of the creditor, instead of his Christian name,¹ or that it refers to the debt as an open account, instead of referring to it as a judgment in which such open account

⁹ *Alabama*. *Davis v. Findley*, — Ala. —, 78 So. 869.

Kansas. *Zimmerman v. Ketchum*, 66 Kan. 98, 71 Pac. 264; *Inge v. Stillwell*, 88 Kan. 33, 42 L. R. A. (N.S.) 1003, 127 Pac. 527.

Kentucky. *Jones v. Walter*, 115 Ky. 556, 74 S. W. 249; *Dycus v. Brown*, 135 Ky. 140, 28 L. R. A. (N.S.) 190, 121 S. W. 1010.

Ohio. *Knapp v. Harold*, 1 Ohio C. C. (N.S.) 469, 15 Ohio C. D. 213.

¹⁰ *Davis v. Findley*, — Ala. —, 78 So. 869.

¹¹ *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2.

¹² *Andrews v. Nix*, 246 U. S. 273, 62 L. ed. 711 [affirming, 88 N. J. L. 718, 96 Atl. 1102].

¹³ *Sloan v. Grollman*, 113 Md. 192, 77 Atl. 577; *Smith v. Hill*, 232 Mo. 188, 2 A. L. R. 1667, 122 N. E. 310; *Wineman v. Fisher*, 135 Mich. 604, 98 N. W. 404; *Caimenson v. Moudry*, 137 Minn. 123, 162 N. W. 1076.

See § 3165.

¹ *Kreitlein v. Fenger*, 238 U. S. 21, 59 L. ed. 1184; *Gatliff v. Mackey* (Ky.), 104 S. W. 379.

was merged,² or that there is a slight discrepancy between the amount set forth in the schedule and the amount actually due,³ does not amount to an omission of the debt from the schedule.

Misspelling the name of the debtor,⁴ or giving his address as "unknown" when in fact it is known,⁵ or giving his address as in a city in which he does not live,⁶ or giving his street and number but omitting the city of his residence,⁷ have been held equivalent to omitting the claim from the schedule.

§ 3155. Debts due to United States and state. Under the bankrupt act of 1867, a discharge barred "all debts," with certain exceptions. It was held that this statute did not include debts due to the United States, even if such debts were not expressly excepted from the operation of such discharge.¹ It was generally held that debts due to a state were not barred by a discharge.²

The present bankrupt act expressly excepts debts "due as a tax levied by the United States, the state, county, district, or municipality" in which the debtor resides. It does not provide for other debts due to the United States or a state.³ Accordingly, a debt due on the bond of a contractor to the United States is barred by a discharge in bankruptcy,⁴ as it is not a tax. A judgment for costs in a criminal prosecution is not a tax, and accordingly it is barred by a discharge in bankruptcy.⁵

² Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184.

³ Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184.

⁴ Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263.

⁵ Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231; Miller v. Guasti, 226 U. S. 170, 57 L. ed. 173.

A bankrupt who gives his creditor's address as "unknown" is not protected unless he has used due diligence in attempting to ascertain such address. Popejoy v. Diedrich, — Colo. —, 189 Pac. 841.

⁶ Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449.

⁷ Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177.

¹ To the same effect, see United States v. Wilson, 21 U. S. (8 Wheat.) 253, 5 L. ed. 610; United States v.

Herron, 87 U. S. (20 Wall.) 251, 22 L. ed. 275; Smith v. Hodson, 50 Wis. 279, 6 N. W. 812.

² State v. Shelton, 47 Conn. 400; Johnson v. Auditor, 78 Ky. 282; Saunders v. Commonwealth, 51 Va. (10 Gratt.) 494.

Contra, State v. Walsh, 2 Gill & J. (Md.) 406.

³ United States v. Illinois Surety Co., 226 Fed. 653; McPhee v. United States, 64 Colo. 421, 174 Pac. 808; Owen v. United States, — Colo. —, 174 Pac. 816; Olds v. Forrester, 126 Ia. 456, 102 N. W. 419.

⁴ United States v. Illinois Surety Co., 226 Fed. 653; McPhee v. United States, 64 Colo. 421, 174 Pac. 808; Owen v. United States, — Colo. —, 174 Pac. 816.

⁵ Olds v. Forrester, 126 Ia. 456, 102 N. W. 419.

§ 3156. General effect of discharge. By the express provisions of section 17 of the bankrupt act of 1898,¹ a discharge in bankruptcy releases a bankrupt from all of his provable debts except those which are specifically excepted by statute.² The exceptions have been discussed in detail elsewhere.³ It is generally said that the discharge does not extinguish the debt itself.⁴ The pre-existing debt has sufficient legal effect to serve as a consideration for a subsequent promise to pay it.⁵ If eviction may be had for non-payment of rent, a discharge in bankruptcy is a bar to an action to recover rent; but such proceeding is not a payment of the rent, and it does not prevent eviction for non-payment.⁶ While it has been said that a discharge in bankruptcy extinguishes the debt,⁷ this statement, from the context, means that an express promise to pay such debt is necessary; and that a part payment upon such prior debt is not sufficient.⁸ It is said that a discharge in bankruptcy releases the bankrupt, so that a prior creditor can not bring an action to set aside a prior fraudulent conveyance,⁹ but this

¹ See § 3131.

² United States. In re Julius, 217 Fed. 3, L. R. A. 1915C, 89.

Florida. Bluthenthal v. Jones, 51 Fla. 396, 120 Am. St. Rep. 181, 41 So. 533 [affirmed, Bluthenthal v. Jones, 203 U. S. 64, 52 L. ed. 390].

Georgia. Morris v. Perkins, 148 Ga. 554, 97 S. E. 526.

Illinois. Nelson v. Petterson, 229 Ill. 240, 13 L. R. A. (N.S.) 912, 82 N. E. 229.

Kansas. First National Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

Kentucky. Dycus v. Brown, 135 Ky. 140, 28 L. R. A. (N.S.) 190, 121 S. W. 1010.

Maine. Gordon v. Texas Co., — Me. —, 109 Atl. 368.

Massachusetts. Barry v. New York Holding & Construction Co., 229 Mass. 308, 118 N. E. 639.

Mississippi. Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 So. 94.

Montana. Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478.

New Hampshire. Morency v. Landry, — N. H. —, 108 Atl. 855.

South Dakota. Drake v. Vernon, 26 S. D. 354, 128 N. W. 317.

West Virginia. Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 10 L. R. A. (N.S.) 305, 56 S. E. 898.

Wisconsin. Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

³ See §§ 3142 et seq.

⁴ Sound Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031.

See §§ 3166 et seq.

⁵ See §§ 632 and 3166.

⁶ Carter v. Sutton, 147 Ga. 496, 94 S. E. 760.

⁷ Needham v. Matthewson, 81 Kan. 340 [sub nomine, Matthewson v. Needham, 26 L. R. A. (N.S.) 274, 105 Pac. 436].

See also, Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478.

⁸ See § 3169.

⁹ Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 10 L. R. A. (N.S.) 305, 56 S. E. 898.

means that the right of bringing such suit is in the trustee.¹⁰ A debt which is barred by a discharge in bankruptcy can be used as a set-off according to some authorities,¹¹ though not according to others.¹²

If a discharge in bankruptcy is granted, it has retroactive effect and relates to the date of the adjudication,¹³ since, by the terms of the statute,¹⁴ it discharges provable debts, and since provable debts are those which exist at the time of the filing of the petition.¹⁵ The fact that an application for a discharge is once refused upon the objection of certain creditors, does not prevent a subsequent discharge from operating as a bar against the claims of such creditors.¹⁶

In order to prevent a discharge from operating as a bar, such creditors must show that their debts fall within one of the classes of exceptions specified in the statute.¹⁷ The fact that the petition in bankruptcy sets up two or more grounds of bankruptcy, one of which is of a sort which will prevent a discharge, does not prevent a discharge given in such proceeding from having full legal effect,¹⁸ at least if the decree of bankruptcy does not show that it was rendered upon the ground which would prevent the granting of the discharge.¹⁹

The validity and effect of a discharge depends on the provisions of the law under which it was given and not on the provisions of any former law. The fact that certain debts existed under the bankrupt act of 1867 and could not be barred by a discharge obtained thereunder, and were kept alive by subsequent judgment, does not prevent them from being barred by a discharge obtained under the bankrupt act of 1898, if by the terms of such act they would be barred.²⁰ A discharge was refused to a debtor in a state insolvent court. The cause of such refusal did not appear on the record, and it might have been, by virtue of a provision in the state statute controlling such proceedings, because the debtor's assets did not make more than fifty per cent. of the proved claims,

¹⁰ See § 3158.

¹¹ *Wilson v. Kelly*, 10 S. Car. 216.

¹² *Francis v. Dodsworth*, 4 C. B. 202.

¹³ *Morris v. Perkins*, 148 Ga. 554, 97 S. E. 526; *Rate v. American Smelting & Refining Co.*, 56 Mont. 277, 184 Pac. 478.

¹⁴ See § 3131.

¹⁵ See § 3137.

¹⁶ *Bluthenthal v. Jones*, 51 Fla. 396,

120 Am. St. Rep. 181, 13 L. R. A. (N. S.) 629, 41 So. 533.

¹⁷ See §§ 3142 et seq.

¹⁸ *In re Julius*, 217 Fed. 3, L. R. A. 1915C, 89.

¹⁹ *In re Julius*, 217 Fed. 3, L. R. A. 1915C, 89.

²⁰ *In re Herrman*, 106 Fed. 987, 46 C. C. A. 77 [affirming, 102 Fed. 753].

and a majority of his creditors in number and value would not consent to his discharge. Such refusal was held not to be such an adjudication as to prevent a discharge thereafter given him by a federal court of bankruptcy from barring debts owing by him when such discharge was refused by the state court.²¹

Whether the discharge bars the debt in question must be determined in the first instance by the court in which an action on the debt is pending. The question whether a debt is contracted by fraud may be passed upon by a state court whenever such question comes before it, but its action is not necessarily conclusive upon the federal court. Under a petition to the court of bankruptcy for an injunction against issuing or serving execution on a judgment of a state court, the adjudication of the state court that such debt was created by the bankrupt's fraud was not conclusive on the bankrupt court.²²

After a discharge in bankruptcy has been granted, a state court may, nevertheless, render judgment for the purpose of fixing the claim as a provable debt, or for the purpose of fixing the liability of sureties and the like; and rights of the bankrupt are sufficiently protected if the judgment provides, by its terms, that it shall not be enforced against the bankrupt but that it shall be operative only as evidence of a claim against his estate and the like.²³

§ 3157. Domestic and foreign discharges. A discharge given under the act of 1898 is valid throughout the United States.¹ A discharge in bankruptcy which is granted by a court of the United States, is a bar in an action brought in a court of the United States or in any of the state courts.² A discharge in bankruptcy which is given by the courts of one nation is not a defense to an action brought in another nation,³ at least if the creditor was domiciled,

²¹ *Dean v. Justice, etc.*, 173 Mass. 453, 53 N. E. 803.

²² *Knott v. Putnam*, 107 Fed. 907.

²³ *Barry v. New York Holding & Construction Co.*, 229 Mass. 308, 118 N. E. 639.

See also, *Bosworth v. Pomeroy*, 112 Mass. 293.

¹ *Hanover National Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113

² *Ruiz v. Eickerman*, 5 Fed. 790; *Morency v. Landry*, — N. H. —, 103 Atl. 855; *Moore v. Horton*, 32 Hun

(N. Y.) 393; *Pattison v. Wilbur*, 10 R. I. 448.

Contra, *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602.

See, *A Discharge in Insolvency, and Its Effect on Non-residents*, by Hollis R. Bailey, 6 Harvard Law Review, 349.

³ *Gibbs v. Societe Industrielle et Commerciale des Metaux*, 25 Q. B. D. 390; *New Zealand Loan & Mercantile Agency Co. v. Morrison* [1898], A. C. 349.

See also, *Morency v. Landry*, — N. H. —, 108 Atl. 855.

at the time of the bankruptcy proceedings, in the nation in the courts of which it is sought to enforce the claim and in which such discharge is pleaded.⁴

§ 3158. Discharge as affecting liens. Discharge in bankruptcy is generally said to be merely a bar to an action upon the debts of the bankrupt affected thereby, in which it is sought to enforce a personal liability. It does not amount to a discharge on the debt itself. Accordingly, if a creditor has obtained a valid lien,¹ as by attachment,² or by garnishment,³ or by judgment,⁴ or by levy,⁵ or by mechanic's lien,⁶ such lien is in no way affected by a subsequent

⁴Morency v. Landry, — N. H. —, 108 Atl. 855.

¹Arkansas. Gray v. Bank, 137 Ark. 232, 208 S. W. 302.

California. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N.S.) 404, 126 Pac. 149.

Georgia. Dozier v. McWhorter, 113 Ga. 584, 39 S. E. 106; Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100; McCall v. Herring, 116 Ga. 235, 42 S. E. 468; Philmon v. Marshall, 116 Ga. 811, 43 S. E. 48; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004.

Maryland. Frey v. McGaw, 127 Md. 23, L. R. A. 1916D, 113, 95 Atl. 960.

Minnesota. Gregory Co. v. Cale, 115 Minn. 508, 37 L. R. A. (N.S.) 156, 133 N. W. 75.

Nebraska. Paxton v. Scott, 66 Neb. 385, 92 N. W. 611.

North Dakota. John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 42 L. R. A. (N.S.) 292, 137 N. W. 412.

New Jersey. Taylor v. Taylor, 59 N. J. Eq. 86, 45 Atl. 440.

New York. Storm v. Waddell, 2 Sandf. (N. Y. Ch.) 494; Macy v. Jordan, 2 Denio (N. Y.) 570; Lowry v. Morrison, 11 Paige (N. Y. Ch.) 327.

Pennsylvania. Woods v. Klein, 223 Pa. St. 256, 72 Atl. 523.

Wisconsin. Bank v. Elliott, 109 Wis. 648, 85 N. W. 417.

²United States. In re Blumberg, 94 Fed. 476.

Arkansas. Gray v. Bank, 137 Ark. 232, 208 S. W. 302.

Connecticut. Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554.

Maine. Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 85 Am. St. Rep. 408, 49 Atl. 1039.

New Hampshire. Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705.

North Dakota. Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L. R. A. 770, 88 N. W. 703.

Apparently contra, Wood v. Carr, 115 Ky. 303, 73 S. W. 762.

³Gray v. Bank, 137 Ark. 232, 208 S. W. 302; Marx v. Hart, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 200.

⁴Arkansas. Gray v. Bank, 137 Ark. 232, 208 S. W. 302.

Georgia. Dozier v. McWhorter, 113 Ga. 584, 39 S. E. 106; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004.

Minnesota. Gregory Co. v. Cale, 115 Minn. 508, 37 L. R. A. (N.S.) 156, 133 N. W. 75.

North Dakota. John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 42 L. R. A. (N.S.) 292, 137 N. W. 412.

⁵Frazee v. Nelson, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; Pinkhard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

⁶Seibel v. Simeon, 62 Mo. 255; Bassett v. Baird, 85 Pa. St. 384.

discharge of the debtor in bankruptcy. Even if the statute provides that a judgment shall be marked as satisfied of record when the judgment debtor files a certified copy of his discharge in bankruptcy, such statute is regarded as intended to prevent such judgment from becoming a lien upon after-acquired realty; but it is not intended to affect the lien of such judgment as it existed when the bankruptcy proceedings were instituted.⁷

However, a proceeding in the nature of an attachment of a salary of a state employe, which is obtained by filing a judgment with the Secretary of State in accordance with the local statute, has been held not to give a lien upon compensation which falls due after the filing of the petition in bankruptcy.⁸

A discharge in bankruptcy does not affect the lien of a mortgage which is not an unlawful preference under the bankrupt act;⁹ and the fact that the interest of the mortgagor was contingent does not prevent his title, when subsequently acquired, from inuring to the benefit of the mortgagee if the mortgage contained a covenant of warranty.¹⁰ An equitable assignment of an expectancy for the purpose of securing a debt is not affected by the fact that such debt is subsequently barred by a discharge in bankruptcy.¹¹ If a testator has charged a devisee's debts upon land which is devised to such debtor, such lien is not affected by a subsequent discharge of the debtor in bankruptcy.¹² A discharge in bankruptcy does not prevent either a creditor¹³ or the trustee in bankruptcy¹⁴ from setting aside conveyances of property by the debtor in fraud of his creditors. The bankrupt can not object to a proceeding against property which the bankrupt had conveyed fraudulently before

⁷ *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 42 L. R. A. (N.S.) 292, 137 N. W. 412.

⁸ *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, 166 N. W. 1.

⁹ *McBride v. Gibbs*, 148 Ga. 380, 96 S. E. 1004; *Bisby v. Walker*, — Ia. —, 169 N. W. 467 [opinion modified on rehearing, 171 N. W. 152]; *Cook v. Farrington*, 104 Mass. 212.

¹⁰ *Bisby v. Walker*, — Ia. —, 169 N. W. 467 [opinion modified on rehearing, 171 N. W. 152].

¹¹ *Bridge v. Kedon*, 163 Cal. 493, 43 L. R. A. (N.S.) 404, 126 Pac. 149.

¹² *In re Fussell*, 129 Ia. 498, 105 N. W. 503.

¹³ *United States. Moyer v. Dewey*, 103 U. S. 301, 26 L. ed. 394.

Georgia. Johnson v. Grocery Co., 112 Ga. 449, 37 S. E. 766.

Minnesota. Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

Nebraska. Flint v. Chaloupka, 78 Neb. 594, 13 L. R. A. (N.S.) 309, 111 N. W. 465.

Pennsylvania. Deposit National Bank v. Hay, 262 Pa. St. 388, 105 Atl. 463.

¹⁴ *In re Pierce*, 103 Fed. 64.

bankruptcy.¹⁵ If a debtor has, in fraud of his creditors, conveyed land which was not within the jurisdiction of the bankruptcy court, the grantee can not set up the discharge of the debtor as a defense against a suit by the creditors to set such conveyance aside.¹⁶ If the conveyance is made after bankruptcy, however, the grantee can set up the bankrupt's discharge as against a judgment rendered after such discharge, upon a liability which existed prior to such discharge.¹⁷ A discharge in bankruptcy is said to be a personal discharge, while a creditor's bill to set aside a fraudulent conveyance is a suit in rem; and accordingly a discharge in bankruptcy is said not to be a bar to such suit.¹⁸ On the other hand, it is held that a creditor can not sue after a discharge in bankruptcy has been granted, to set aside a prior fraudulent conveyance, on the theory that the right to bring such suit is in the trustee, and also on the theory that the bankrupt is released from all provable debts.¹⁹

Any preference obtained within the four months, as by levy,²⁰ may be set aside on direct proceedings by the trustee.

Even though a lien exists, a discharge in bankruptcy protects the debtor from further personal liability.²¹ If no lien exists a debt is barred, even though no exemptions could have been had against a judgment rendered thereon. A debt for the purchase price of a chattel is barred by bankruptcy even though such property could not have been held as exempt against such debt.²²

If a lien can be enforced only by a proceeding in which a personal judgment is obtained, a discharge in bankruptcy to the debtor against whom such judgment must be obtained, as a prerequisite to enforcing the lien, prevents the enforcement of such lien.²³ If a subcontractor or materialman can enforce a lien against the property of the person for whom such work has been done or material furnished, only on paying a personal judgment against the contractor, the discharge of the contractor in bankruptcy will pre-

¹⁵ *Deposit National Bank v. Hay*, 262 Pa. St. 388, 105 Atl. 463.

¹⁶ *Flint v. Chaloupka*, 78 Neb. 594, 13 L. R. A. (N.S.) 309, 111 N. W. 465.

See also, *Moyer v. Dewey*, 103 U. S. 301, 26 L. ed. 394.

¹⁷ *Upahur v. Briscoe*, 138 U. S. 365, 34 L. ed. 935.

¹⁸ *Flint v. Chaloupka*, 78 Neb. 594, 13 L. R. A. (N.S.) 309, 111 N. W. 465.

¹⁹ *Ruhl-Koblegard Co. v. Gillespie*,

61 W. Va. 584, 10 L. R. A. (N.S.) 305, 56 S. E. 898.

²⁰ *In re Francis-Valentine Co.*, 93 Fed. 953.

²¹ *First National Bank v. Hoffman*, 102 Kan. 465, 171 Pac. 13.

See § —.

²² *Graham v. Richerson*, 115 Ga. 1062, 42 S. E. 374.

²³ *Pike Bros. Lumber Co. v. Mitchell*, 132 Ga. 675, 26 L. R. A. (N.S.) 409, 64 S. E. 998.

vent him from enforcing such lien.²⁴ An assignment of future wages is generally held to create a lien upon such future wages as earned;²⁵ and where this view of such assignment is taken, the subsequent discharge of the assignor in bankruptcy does not affect such lien,²⁶ at least if the assignee has not proved his claim.²⁷ In other jurisdictions, however, it is held that such assignment does not create a lien until the wages are earned;²⁸ and where this theory prevails, the discharge of the assignor in bankruptcy extinguishes the lien created by such assignment, as to wages which are earned thereafter.²⁹

If an action is brought against husband and wife, who own community property, the discharge of the husband in bankruptcy is a defense, both to himself personally and to the community property.³⁰ However, it is held that if property is held by the entirety, the discharge of the husband in bankruptcy prevents the creditor from enforcing sale of such property during the lifetime of the husband, under a judgment which was rendered within four months before proceedings in bankruptcy were begun.³¹ A judgment which is rendered against the husband may be enforced against property held by the entirety if the death of the wife has vested the whole

²⁴ *Pike Bros. Lumber Co. v. Mitchell*, 132 Ga. 675, 26 L. R. A. (N.S.) 409, 64 S. E. 998.

²⁵ *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 65 L. R. A. 602, 70 N. E. 564; *Monarch Discount Co. v. Chesapeake & O. Ry. Co.*, 235 Ill. 233, 120 N. E. 743; *Citizens' Loan Association v. Boston & Maine R. Co.*, 196 Mass. 528, 14 L. R. A. (N.S.) 1025, 82 N. E. 696; *Raulins v. Levi*, 232 Mass. 42, 121 N. E. 500.

²⁶ *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 65 L. R. A. 602, 70 N. E. 564; *Monarch Discount Co. v. Chesapeake & Ohio Ry.*, 235 Ill. 233, 120 N. E. 743; *Citizens' Loan Association v. Boston & Maine Ry.*, 196 Mass. 528, 14 L. R. A. (N.S.) 1025, 82 N. E. 696; *Raulins v. Levi*, 232 Mass. 42, 121 N. E. 500; *Rate v. American Smelting & Refining Co.*, 56 Mont. 277, 184 Pac. 478.

²⁷ *Citizens' Loan Association v. Bos-*

ton & Maine Ry., 196 Mass. 528, 14 L. R. A. (N.S.) 1025, 82 N. E. 696.

²⁸ *Levi v. Loevenhart*, 138 Ky. 133, 30 L. R. A. (N.S.) 375, 127 S. W. 748; *Rate v. American Smelting & Refining Co.*, 56 Mont. 277, 184 Pac. 478; *Hupp v. Union Pacific Railroad Co.*, 99 Neb. 654, L. R. A. 1916E, 247, 157 N. W. 343.

²⁹ *Levi v. Loevenhart*, 138 Ky. 133, 30 L. R. A. (N.S.) 375, 127 S. W. 748; *Rate v. American Smelting & Refining Co.*, 56 Mont. 277, 184 Pac. 478; *Hupp v. Union Pacific Railroad Co.*, 99 Neb. 654, L. R. A. 1916E, 247, 157 N. W. 343.

See as to the effect of a statutory proceeding in the nature of an attachment, *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, 166 N. W. 1.

³⁰ *Sound Credits Co. v. Powers*, 100 Wash. 668, 171 Pac. 1031.

³¹ *Ades v. Caplin*, 132 Md. 66, L. R. A. 1918D, 276, 103 Atl. 94.

estate in the husband, although he has been discharged in bankruptcy in the meantime.³²

In many of the cases in which this question has been raised, the lien was created more than four months before the institution of bankruptcy proceedings.³³ However, the provision of the bankrupt act which declares levies made within four months of the institution of bankruptcy proceedings to be void, means merely that the trustee may, by taking proper steps, have such levy declared void. If the trustee does not attack such levy, a sale thereunder is valid as against the debtor.³⁴ The same principle applies to attachments which the trustee does not attack.³⁵

§ 3159. Effect on liability of co-debtor. The bankrupt act of 1898 provides: "The liability of a person who is co-debtor with, or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."¹ This section is not affected by the amendment of 1903. Accordingly, a discharge does not affect the liability of other parties.² The bankruptcy of the principal does not operate as a discharge of the surety.³ Even in the absence of a specific statute the discharge of one debtor in bankruptcy is not a bar to an action against those who were jointly liable with him on contract.⁴ Hence, the discharge of a maker

³² *Frey v. McGaw*, 127 Md. 23, L. R. A. 1916D, 113, 95 Atl. 960.

³³ *United States*, In re Blumberg, 94 Fed. 476.

Georgia. *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100; *Philmon v. Marshall*, 116 Ga. 811, 43 S. E. 48.

Maine. *Stickney & Babcock Coal Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408, 49 Atl. 1039.

Maryland. *Frey v. McGaw*, 127 Md. 23, L. R. A. 1916D, 113, 95 Atl. 960.

North Dakota. *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 42 L. R. A. (N.S.) 292, 137 N. W. 412.

³⁴ *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40.

³⁵ *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 Atl. 705.

¹ See § 16 of Act of 1898.

² *Polk v. Stephens*, 118 Ark. 438, 176 S. W. 689; *First National Bank v. Hoffman*, 102 Kan. 405, 171 Pac. 13; *Wilcox v. Hersch*, — R. I. —, 110 Atl. 409.

Judgment may be rendered against all the obligors, with a perpetual stay of execution against the bankrupt. *Wilcox v. Hersch*, — R. I. —, 110 Atl. 409.

³ *Mace v. Wells*, 48 U. S. (7 How.) 272, 12 L. ed. 698; *Leader v. Mattingly*, 140 Ala. 444, 37 So. 270; *Empire State Surety Co. v. Des Moines*, 152 Ia. 531, 131 N. W. 870; *First National Bank v. Hoffman*, 102 Kan. 465, 171 Pac. 13; *Wolfboro Loan & Banking Co. v. Rollins*, 195 Mass. 323, 81 N. E. 204.

⁴ *Illinois*. *Sandusky v. Bank*, 81 Ill. 353.

Indiana. *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121.

Kentucky. *Edwards v. Coleman*, 9 Ky. (2 A. K. Mar.) 249.

Massachusetts. *National Bank v. Sawyer*, 177 Mass. 400, 83 Am. St. Rep. 292, 59 N. E. 76.

New Jersey. *Linn v. Hamilton*, 34 N. J. L. 305.

does not discharge the indorser,⁵ even if the note in question is not proved as a claim against the bankrupt's estate.⁶ The discharge of a partner does not release his copartner.⁷

§ 3160. Surety on bond conditioned on judgment against principal. If, however, the surety is held on a bond whereby he is liable only in case judgment is rendered against his principal, strong reasons exist for holding that the surety is not liable if the principal is discharged in bankruptcy, and invokes such discharge in the action in which such bond has been given and thereby prevents judgment from being rendered against him. "The cases are numerous in which it has been held, and we believe correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend."¹ For these reasons the discharge of the principal in bankruptcy has been held to discharge the surety from liability on a *capias* bond,² a bond in attachment,³ or a bond given to discharge a garnishment,⁴ or an appeal bond.⁵

The language of the bankrupt act, however, provides expressly that the liability of a surety is not affected by the discharge of the bankrupt;⁶ and this is applied in many jurisdictions to liabilities of this sort.⁷ The reasons for holding that discharge is personal to

Ohio. Childs v. Childs, 10 O. S. 339, 75 Am. Dec. 512.

Wisconsin. Hill v. Trainer, 49 Wis. 537, 5 N. W. 926.

¹ **National Bank v. Sawyer**, 177 Mass. 490, 83 Am. St. Rep. 292, 59 N. E. 76.

² **National Bank v. Sawyer**, 177 Mass. 490, 83 Am. St. Rep. 292, 59 N. E. 76.

³ **Abendroth v. Van Dolsen**, 131 U. S. 66, 33 L. ed. 57; **Hill v. Trainer**, 49 Wis. 537.

⁴ **Wolf v. Stix**, 99 U. S. 1, 8, 25 L. ed. 309 [quoted in **Goyer Co. v. Jones**, 79 Miss. 253, 256, 30 So. 651].

⁵ **Keyes v. Bennett**, 218 Ill. 625, 75 N. E. 1075; **Bryant v. Kinyon**, 127 Mich. 152, 53 L. R. A. 801, 86 N. W. 531; **Barber v. Rodgers**, 71 Pa. St. 362.

⁶ **Braley v. Boomer**, 116 Mass. 527; **Johnson v. Collins**, 117 Mass. 343.

⁷ **Klipstein v. Allen-Miles Co.**, 136 Fed. 385.

⁸ **Alabama.** **Young v. Howe**, 150 Ala. 157, 43 So. 488.

Georgia. **Odell v. Wootten**, 38 Ga. 224.

Illinois. **House v. Schnadig**, 235 Ill. 301, 85 N. E. 395.

Mississippi. **Goyer Co. v. Jones**, 79 Miss. 253, 30 So. 651.

New York. **Knapp v. Anderson**, 71 N. Y. 466.

North Carolina. **Lafoon v. Kerner**, 138 N. Car. 281, 50 S. E. 654.

⁹ See § 16, Act of 1898.

¹⁰ **Stull v. Beddeo**, 78 Neb. 114, 14 L. R. A. (N.S.) 507, 110 N. W. 861.

the bankrupt are as strong in a case of this sort as in any other. Accordingly, it is held that sureties on such bonds,⁸ such as an attachment bond,⁹ or an injunction bond,¹⁰ or a bond for redelivery of goods taken on execution,¹¹ or on a poor debtor's recognizance,¹² are not released by the discharge of their principal in bankruptcy. Some cases reach this result in harmony with the general principles on the subject by holding that a special judgment, *pro forma* only,¹³ or a judgment, execution on which is perpetually enjoined,¹⁴ should be rendered against the bankrupt to fix the liability of the sureties.

If an attachment becomes void, as being an invalid preference, by the institution of proceedings in bankruptcy within four months thereafter, such proceedings in bankruptcy which result in a discharge to the bankrupt, operate as a discharge of the surety on his bond.¹⁵ The discharge of the surety is, however, due to the invalidity of the attachment, and not primarily to the discharge of the bankrupt.¹⁶

⁸ *Stull v. Beddeo*, 78 Neb. 114, 14 L. R. A. (N.S.) 507, 110 N. W. 861.

⁹ *Flagg v. Tyler*, 6 Mass. 33; *McCombs v. Allen*, 82 N. Y. 114.

¹⁰ *Stull v. Beddeo*, 78 Neb. 114, 14 L. R. A. (N.S.) 507, 110 N. W. 861.

¹¹ *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891.

¹² *Carpenter v. Goddard*, 191 Mass. 54, 76 N. E. 953.

¹³ *Rosenthal v. Nove*, 175 Mass. 559, 78 Am. St. Rep. 512, 56 N. E. 884. (Judgment provided for by statute.)

¹⁴ *United States, Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083.

Connecticut. Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290.

Michigan. Brown & Brown Coal Co. v. Antezak, 164 Mich. 110, 128 N. W. 774, 130 N. W. 305.

Pennsylvania. United States Wind Engine Co. & Pump Co. v. North Penn. Iron Co., 227 Pa. St. 262, 75 Atl. 1094.

Rhode Island. Butterick Publishing Co. v. E. F. Bowen Co., 33 R. I. 40, 80 Atl. 277; *Wilcox v. Hersch*, — R. I. —, 110 Atl. 409.

¹⁵ *Casady v. Hartzell*, 171 Ia. 325, 151 N. W. 97; *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 28 L. R. A. (N.S.) 233, 75 Atl. 1049.

¹⁶ " * * * the bankrupt act (1898) declares that attachments or other liens obtained at any time within four months prior to the filing of a petition in bankruptcy against an insolvent person shall be deemed null and void in case he is adjudicated a bankrupt, and the property affected by the attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt. Now, it is quite clear, we think, if no bond had been filed, the attachment having issued within four months prior to the filing of the petition, the lien, attachment, and all the proceedings, would have been null and void, by the terms and operation of the bankrupt act. In *Hill v. Harding*, 130 U. S. 703, 32 L. ed. 1084, * * * , it is said the bond or recognizance takes the place of the attachment as a security for the debt of the attaching creditor; they can not dispute the election, given to the debtor by statute, of substituting the new security for the old one.

"In *Corner v. Mallory*, 31 Md. 468, this court said the period of four

§ 3161. Partnership and individual debts. A bankrupt may be discharged from his liability to the creditors of a partnership of which he is a member by a discharge given in bankruptcy proceedings affecting himself alone if due notice is given to the creditors of the partnership.¹ Hence, partnership creditors may participate in individual insolvency and bankruptcy proceedings.² Under a state statute which requires a creditor who accepts a dividend from an estate assigned for the benefit of creditors to release the debtor from further claims, partnership proceedings will relieve the partners from their partnership and individual debts. Hence, the assignment of a partnership which does not include individual

months was fixed as a period within which no preference should be gained by one creditor by attachment over the claims of other creditors of the bankrupt. And the law effects no hardships in dissolving such attachments, as the creditor's claim is not impaired, and he is only deprived of a lien and priority that he might otherwise obtain to the prejudice of other creditors, and in violation of the policy of the law, which is to effect a fair and equal distribution of the property of the bankrupt among all his creditors.

"It is also quite certain, under both the decisions and the terms of the bankrupt act itself, that if the property had been attached within four months prior to the filing of the petition, and the defendant had been adjudged a bankrupt, it would have been released and discharged; and if this be so, there can be no reason why the bond which stands in the place of the attachment and the property should not be relieved and released. *Metcalf Bros. v. Barker*, 187 U. S. 174, 47 L. ed. 126 * * * ; *Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083, * * * ; *Wolf v. Stix*, 99 U. S. 1, 25 L. ed. 309; *Randle v. Mellen*, 67 Md. 181, 8 Atl. 573; *Hutchins v. Taylor*, * * * Fed. Cas. No. 6,953;

Swan v. Littlefield, 4 Cush. 574; *Curtis v. Barnum*, 25 Conn. 370. The recent cases of *House v. Schnadig*, 235 Ill. 304, 85 N. E. 395, and *A. Klipstein & Co. v. Allen-Miles Co.*, * * * 136 Fed. 388, are in point, and are somewhat analogous cases." *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 28 L. R. A. (N.S.) 233, 75 Atl. 1049.

¹ *United States. Tuckers v. Oxley*, 9 U. S. (5 Cranch) 34, 3 L. ed. 29; *Lesser v. Gray*, 236 U. S. 70, 59 L. ed. 471; *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. 249; *In re Diamond*, 149 Fed. 407; *Horner v. Hamner*, 249 Fed. 134, L. R. A. 1918E, 465.

California. Hawley v. Campbell, 62 Cal. 442.

Kansas. Inge v. Stillwell, 88 Kan. 33, 42 L. R. A. (N.S.) 1093, 127 Pac. 527.

Massachusetts. Clarke v. Stanwood, 166 Mass. 379, 34 L. R. A. 378, 44 N. E. 537.

Minnesota. Loomis v. Wallblom, 94 Minn. 392, 69 L. R. A. 771, 102 N. W. 1114.

New Jersey. Murphy v. Nicholson, 87 N. J. L. 278, 94 Atl. 62.

Wisconsin. Curtis v. Woodward, 58 Wis. 409, 46 Am. Rep. 647, 17 N. W. 328.

² *Clarke v. Stanwood*, 166 Mass. 379, 34 L. R. A. 378, 44 N. E. 537.

property is void.³ If in individual proceedings a discharge is sought which will affect partnership debts, such debts must be scheduled,⁴ notice must be given to partnership creditors,⁵ and the petition in bankruptcy and the petition for discharge should refer to such debts and ask relief therefrom.⁶

In other jurisdictions it has been held that a discharge of an individual member of a firm does not bar his liability on partnership debts.⁷

It has been held that a discharge can not be granted to an individual partner in a proceeding against the partnership only; since the individual parties are not parties, their individual estates are not affected, and the debts of the partnership are therefore not provable claims against the estates of the individual partners in such proceeding.⁸ On the other hand, it has been held that, whether a partnership is an entity distinct from its members or not, the debts of the partnership are the direct and primary debts of the partners, even under the bankrupt act; and that it would be inconsistent to grant a discharge from a partnership debt as a joint debt, and to leave the partners severally liable thereon.⁹ If there is no agreement between the partners and the creditors of the partnership, that the partners shall remain personally liable, a discharge of the partnership in bankruptcy under a composition agreement operates as a discharge of the individual partners,¹⁰ even if the creditors had believed that the partners would remain liable personally, and accordingly had insisted upon the omission, from the composition agreement, of a provision discharging the partners from liability.¹¹ The fact that the partnership does not ask a dis-

³ *McCord-Brady Co. v. Mills*, 8 Wyom. 258, 46 L. R. A. 737, 56 Pac. 1003.

⁴ *In re Laughlin*, 96 Fed. 589; *In re Hartman*, 96 Fed. 593.

⁵ *In re Laughlin*, 96 Fed. 589; *In re McFaun*, 96 Fed. 592; *In re Russell*, 97 Fed. 32.

⁶ *In re McFaun*, 96 Fed. 592.

⁷ *Glenn v. Arnold*, 56 Cal. 631; *Perkins v. Fisher*, 80 Ky. 11.

⁸ *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368; *In re Barden*, 101 Fed. 553; *Strause v. Hooper*, 105 Fed. 590; *In re Hale*, 107 Fed. 432 (involuntary proceedings); *In re Pincus*, 147 Fed. 621; *In re Bertenshaw*, 157 Fed. 363, 17 L. R. A. (N.S.) 886.

As to the property and effect of a bankruptcy proceeding against a partnership, to which the partners are not parties, see *Francis v. McNeal*, 228 U. S. 695, L. R. A. 1915E, 706, 57 L. ed. 1029.

⁹ *Francis v. McNeal*, 228 U. S. 695, L. R. A. 1915E, 706, 57 L. ed. 1029 [overruling, *In re Bertenshaw*, 157 Fed. 363, 17 L. R. A. (N.S.) 886, and following *Vaccaro v. Security Bank*, 103 Fed. 436].

¹⁰ *Abbott v. Anderson*, 265 Ill. 285, L. R. A. 1915F, 668, 106 N. E. 782.

¹¹ *Abbott v. Anderson*, 265 Ill. 285, L. R. A. 1915F, 668, 106 N. E. 782.

"The defendants withdrew their objections to the composition upon the

charge in bankruptcy proceedings does not prevent an individual partner from instituting voluntary bankruptcy proceedings and from seeking a discharge from liability for partnership debts.¹²

A discharge given to a partner in proceedings in bankruptcy is a defense to a liability due from him to the other partner, growing out of the partnership transactions, if such claim was a provable debt when the proceedings were begun.¹³ If, however, such obligation was not a provable debt when the proceedings in bankruptcy were begun,¹⁴ as where it arose out of a judgment rendered after the bankruptcy proceedings were begun,¹⁵ the discharge of such partner is not a defense thereto.

§ 3162. Who can take advantage of discharge in bankruptcy.

A discharge in bankruptcy merely gives to the debtor an affirmative defense which he may waive, or of which he may avail himself at his election. The bankrupt himself may, of course, use his discharge as a defense.¹ Those claiming under him by succession, such as his widow,² may set up such defense. Other persons can not compel the bankrupt to plead the discharge if he does not wish to, and can not plead it to protect their own interests.³ A garnishee can not take advantage of the fact that the debtor in the original action has been discharged in bankruptcy, if such debtor does not take advantage of such discharge.⁴ The discharge of a

proviso being stricken out, and when it had been stricken out there was nothing to which the objections could apply. The objections were not withdrawn upon the faith of any agreement that the partners should remain individually liable for any deficiency, or upon any agreement that the law was as understood by the referee and the court, and the only effect of striking out the proviso was to leave the composition to have its legal effect without any agreement on the subject. We do not find any ground of estoppel against the complainant. The examination of the partners had shown that some of them were solvent and their individual assets might have been drawn into the administration, but the creditors preferred to accept the offer of composition merely from a mistaken view of the law." Abbott

v. Anderson, 265 Ill. 285, L. R. A. 1915F, 668, 106 N. E. 782.

¹² Horner v. Hamner, 249 Fed. 134, L. R. A. 1918E, 465.

¹³ Dycus v. Brown, 135 Ky. 140, 28 L. R. A. (N.S.) 190, 121 S. W. 1010.

¹⁴ Hefner v. Hefner, 26 S. D. 74, 127 N. W. 634.

¹⁵ Hefner v. Hefner, 26 S. D. 74, 127 N. W. 634.

¹ See § 3156.

² Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931.

³ Bush v. Stanley, 122 Ill. 406, 13 N. E. 249; George Bohon Co. v. Moren, 151 Ky. 811, 152 S. W. 944; Alabama Great Southern Railway Co. v. Crawley, 118 Miss. 272, 79 So. 94; Marx v. Hart, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 260.

⁴ Discharge of debtor does not affect liability of garnishee. Marx v.

mortgagor does not release a grantee from such mortgagor who has assumed and agreed to pay the mortgage debt.⁵

§ 3163. Other forms of secondary liability. Discharge of a corporation in bankruptcy does not release the directors from liability for corporate debts,¹ nor does it relieve stockholders from such liability.²

§ 3164. Necessity and method of pleading discharge. If the bankrupt elects to avail himself of his discharge as a defense, he must plead his discharge in the action against him on the claim to which he seeks to interpose his discharge as a defense.¹ If the bankrupt does not plead his discharge properly he waives the defense.² If the debtor does not attempt to plead his discharge until after verdict, it is too late for him to interpose such defense without leave of the trial-court.³ Still more clearly is it too late if he waits till after final judgment and then attempts to avail himself of his discharge as a defense.⁴ If the bankrupt does not plead his discharge in a foreclosure suit, but permits judgment to be taken therein, he can not plead his discharge in a suit based upon the foreclosure decree to recover the balance due thereon.⁵ It has been said that a bankrupt who fails to plead and prove his discharge in bankruptcy can not have a judgment against him set

Hart, 166 Mo. 503, 89 Am. St. Rep. 715, 66 S. W. 260; Alabama Great Southern Railway Co. v. Crawley, 118 Miss. 272, 79 So. 94.

⁵ Childs v. Childs, 10 O. S. 330, 75 Am. Dec. 512.

¹ In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38.

It does not relieve them in equity. First National Bank v. Mfg. Co., 127 Mass. 563.

² Way v. Barney, 116 Minn. 285, 38 L. R. A. (N.S.) 648, 133 N. W. 801; Elsbree v. Burt, 24 R. I. 322, 53 Atl. 60.

¹ Maryland. Griffith v. Adams, 95 Md. 170, 52 Atl. 66.

Massachusetts. Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794; Rogers v. Abbot, 206 Mass. 270, 138 Am. St. Rep. 394, 92 N. E. 472.

Minnesota. Northwest Thresher Co. v. Herding, 126 Minn. 184, L. R. A. 1916F, 837, 148 N. W. 57.

Mississippi. Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 So. 94.

North Carolina. Balk v. Harris, 130 N. Car. 381, 41 S. E. 940.

North Dakota. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L. R. A. (N.S.) 858, 126 N. W. 102.

Wisconsin. Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

² Griffith v. Adams, 95 Md. 170, 52 Atl. 66; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

³ Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794.

⁴ Leisure v. Kneeland, 2 Wash. 537, 26 Am. St. Rep. 888, 27 Pac. 176.

⁵ Leisure v. Kneeland, 2 Wash. 537, 26 Am. St. Rep. 888, 27 Pac. 176.

aside so as to permit him to set up such defense.⁶ It has been held, however, that the defense of a discharge in bankruptcy is an honest and a meritorious defense;⁷ and that wherever a court may vacate a default judgment and permit an honest and meritorious defense to be set up, it may vacate a default defense for the purpose of a discharge in bankruptcy to be set up.⁸ If the discharge has been granted after the default judgment was taken, a court will allow such default to be set aside in order that such discharge may be set up as a defense.⁹ A judgment against a bankrupt after his discharge has been granted, can not be treated as a nullity.¹⁰ A and B were jointly liable, and A obtained a discharge in bankruptcy. Subsequently, the creditor obtained a judgment against A and B jointly, A not pleading his discharge in bankruptcy. Execution issued: A's property was levied on and sold and the judgment was satisfied on the record. Subsequently, in a proceeding to which B was not a party, such sale was set aside and the satisfaction was vacated. The creditor then attempted to enforce the judgment against B on the theory that the judgment against A was absolutely void and hence the satisfaction was a nullity, and the judgment against B was valid and in full force. This theory was held to be untenable, the judgment against A being valid, and the satisfaction preventing the enforcement of the judgment against B.¹¹

If a discharge in bankruptcy is granted after an action has been begun against the bankrupt and before final judgment therein, the bankrupt may use such discharge as a defense against such judgment, or as a means for preventing the enforcement thereof.¹²

If the bankrupt pleads his adjudication in bankruptcy and asks for a continuance until his discharge is granted or refused, and the trial-court overrules his motion for continuance and renders

⁶ *Mack Mfg. Co. v. Van Duerson*, 138 Fed. 953.

⁷ *Northwest Thresher Co. v. Herding*, 126 Minn. 184, L. R. A. 1916F, 837, 148 N. W. 57; *Citizens' National Bank v. Branden*, 19 N. D. 489, 27 L. R. A. (N.S.) 858, 126 N. W. 102.

⁸ *Northwest Thresher Co. v. Herding*, 126 Minn. 184, L. R. A. 1916F, 837, 148 N. W. 57; *Citizens' National Bank v. Branden*, 19 N. D. 489, 27 L. R. A. (N.S.) 858, 126 N. W. 102.

⁹ *New Hampshire Savings Bank v. Webster*, 48 N. H. 21.

¹⁰ *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. ed. 994; *Lackey v. Steere*, 121 Ill. 598, 2 Am. St. Rep. 135, 13 N. E. 518.

¹¹ *Lackey v. Steere*, 121 Ill. 598, 2 Am. St. Rep. 135, 13 N. E. 518.

¹² *Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985; *Morris v. Perkins*, 148 Ga. 554, 97 S. E. 526; *Rogers v. Western Marine & Fire Ins. Co.*, 1 La. Ann. 161; *Cornell v. Dakin*, 38 N. Y. 253.

judgment, equity will enjoin the enforcement of such judgment on the application of the bankrupt after he has received his discharge in bankruptcy.¹³

It is said that the pleading need not show the jurisdiction of the court of bankruptcy as this may be presumed.¹⁴ Some courts hold that the answer pleading a discharge must show notice to the creditor in question as provided for by statute,¹⁵ while other authorities hold that regularity in proceedings will be presumed, and it will accordingly be presumed that notice was given as required by law.¹⁶ Under the latter theory, the creditor must plead that the bankrupt did not schedule his debt if he wishes to take advantage of that fact.¹⁷ It is not necessary that the bankrupt should plead facts to show that the debt in question is not within one of the statutory exceptions to the operation of the discharge.¹⁸

§ 3165. Burden of proof. The bankrupt act provides: "A certified copy of an order * * * granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."¹ This section was intended to relieve the bankrupt from the necessity of proving the entire record of the bankruptcy proceedings, to prove his discharge. Under this section, and under the general principles of law, it is held by the weight of authority that if the discharge is admitted or proved the burden of proof is upon the creditor to show that such discharge is not a defense to the liability which he is seeking to enforce.² An

¹³ *Morris v. Perkins*, 148 Ga. 554, 97 S. E. 526.

For a case refusing an injunction, but not involving the effect of a discharge, see *Pell v. McCabe*, 250 U. S. 573, — L. ed. —.

¹⁴ *Bryant v. Kinyon*, 127 Mich. 152, 53 L. R. A. 801, 86 N. W. 531; *Bailey v. Gleason*, 76 Vt. 115, 56 Atl. 537.

¹⁵ *Balk v. Harris*, 130 N. Car. 381, 41 S. E. 940; *Bailey v. Gleason*, 76 Vt. 115, 56 Atl. 537.

¹⁶ *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. 249.

¹⁷ *B. F. Roden Grocery Co. v. Leslie*, 169 Ala. 579, 53 So. 815.

¹⁸ *Bailey v. Gleason*, 76 Vt. 115, 56 Atl. 537.

¹ Section 21(f), Act of 1898, as amended Feb. 5, 1903, c. 487, § 7.

² *United States. Kreitlein v. Ferger*, 238 U. S. 21, 59 L. ed. 1184.

Illinois. Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060.

Iowa. Hallagan v. Dowell (Ia.), 139 N. W. 883 [s. c., 179 Ia. 172, 161 N. W. 177].

Mississippi. King v. Kellogg, 114 Miss. 375, 75 So. 134.

New Jersey. Claffin v. Wolff, 88 N. J. L. 308, 96 Atl. 73.

North Carolina. Laffoon v. Kerner, 138 N. Car. 281, 50 S. E. 654.

Vermont. In re Grout, 88 Vt. 318, 92 Atl. 646.

attempt has been made to distinguish between the burden of proof and the weight of the evidence; and to hold that the burden of proof, which the bankrupt assumes if he pleads his discharge in bankruptcy and such allegation is denied by the creditor, does not shift; but that with the production of new evidence the burden may shift from one side to the other.³ While it is more accurate to use the term "burden of proof" as fixed by the pleadings and as remaining throughout the case upon the party on whom it is thus placed, the courts are very likely to use it with reference to the necessity of offering evidence to meet the uncontradicted evidence offered by the adversary party; and as thus used with reference to a discharge in bankruptcy, the introduction of evidence by one of the parties frequently drives the other to meet it by other evidence, or to lose the case. If the discharge in bankruptcy is conceded to exist, or if it is proved, the creditor can not recover unless he shows that his claim was not provable in bankruptcy,⁴ if he seeks to avoid the effect of the discharge on this ground, as where he claims that the claim was for wilful and malicious injury, or incurred by fraud and the like.⁵ If the fact that the debt in question was omitted from the schedule is conceded or is established, the debtor is bound, in most jurisdictions, to establish the fact, by affirmative evidence, that the creditor had notice of the proceedings in bankruptcy in time to take advantage thereof.⁶ It has been held, however, that the presumption in favor of the discharge renders a discharge operative as against a debt which was not scheduled, unless the creditor shows that he did not have knowledge of the proceedings.⁷ It would seem that the presumption in favor of the discharge should not protect a debtor who has failed to comply

³Smith v. Hill, 232 Mass. 188, 2 A. L. R. 1667, 122 N. E. 310 [citing, Sloan v. Grollman, 113 Md. 192, 77 Atl. 577; Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404; Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436].

⁴Hallagan v. Dowell, 179 Ia. 172, 161 N. W. 177; Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537.

⁵Hallagan v. Dowell (Ia.), 139 N. W. 883 [s. c., 179 Ia. 172, 161 N. W. 177].

⁶Maryland. Sloan v. Grollman, 113 Md. 192, 77 Atl. 577.

Massachusetts. Smith v. Hill, 232 Mass. 188, 2 A. L. R. 1667, 122 N. E. 310.

Michigan. Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404.

Minnesota. Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076.

Nebraska. Armstrong v. Sweeney. 73 Neb. 775, 103 N. W. 436.

⁷Laffoon v. Kerner, 138 N. Car. 281, 50 S. E. 654.

with the requirements of the bankrupt act by omitting the name of a creditor from the schedule. Whichever party may be bound to establish notice, or the want of it, in cases of this sort, the use of the term "burden of proof" in two different senses induces some courts to say that the burden of proof remains on the defendant who has alleged his discharge, and that this burden does not shift although the preponderance of evidence shifts from side to side; while the other use of the term "burden of proof" leads other courts to speak of the effect of introducing evidence which must be met in order to prevail, as the shifting of the burden of proof.

§ 3166. New promise as waiving discharge. While it is occasionally said that a discharge in bankruptcy discharges the debt,¹ this statement is made to explain the rule that a debt which is barred by a discharge in bankruptcy is not revived by a part payment,² or by anything short of an express promise. It is usually said that a discharge in bankruptcy does not discharge the debt itself, but merely creates a bar to enforcing it, which the debtor may take advantage of, if he wishes.³ There is so great a difference between the discharge of a debt and its bar by bankruptcy that a promise made by a third person to a creditor is supported by sufficient consideration if the creditor discharges the debtor from liability on a debt already barred by bankruptcy.⁴

The debtor may accordingly prefer not to take advantage of his discharge, and may waive the bar thereof. Such a waiver may be effected by a new promise to pay a debt which is otherwise barred by such discharge.⁵ Such a promise is enforceable if made after

¹ It is said that "the decree of the bankrupt court discharges and extinguishes the debt." *Needham v. Matthewson*, 81 Kan. 340 [sub nomine, *Matthewson v. Needham*, 26 L. R. A. (N.S.) 274, 105 Pac. 436].

In this case, however, it is said that the old debt is a moral obligation which is a sufficient consideration for a subsequent promise to pay it.

² See § 3169.

³ *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676 [affirming, *Zavelo v. J. S. Reeves & Co.*, 171 Ala. 401, 54 So. 654].

It is said that a discharge in bankruptcy "goes only to the remedy and does not cancel the debt, which remains as an unenforceable moral obligation." *Rate v. American Smelting & Refining Co.*, 56 Mont. 277, 184 Pac. 478.

It may be added that in this same case the court quotes, *In re West*, 128 Fed. 205, to the effect that a discharge in bankruptcy operates as a discharge of the obligations of the bankrupt.

On this question see §§ 3156 et seq.

⁴ *Webster v. Le Compte*, 74 Md. 249, 22 Atl. 232.

⁵ *United States, Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854;

the proceedings in bankruptcy have been instituted but before a discharge has been granted.⁶ It has, however, been held that in

Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676 [affirming, 171 Ala. 401, 54 So. 654].

Alabama. *Anthony v. Sturdivant*, 174 Ala. 521, 56 So. 571; *Dantzler v. Scheuer*, — Ala. —, 82 So. 103.

California. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13.

Indiana. *Willis v. Cushman*, 116 Ind. 100, 17 N. E. 168.

Kentucky. *Thornberry v. Dila*, 80 Ky. 241; *Brooks v. Paine* (Ky.), 77 S. W. 190.

Maryland. *Old Town National Bank v. Parker*, 121 Md. 61, 87 Atl. 1105.

Massachusetts. *Way v. Sperry*, 60 Mass. (6 Cush.) 238, 52 Am. Dec. 779.

Michigan. *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347.

Minnesota. *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917; *Pearsall v. Tabour*, 98 Minn. 248, 108 N. W. 808.

Missouri. *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837.

New York. *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543; *Herrington v. Davitt*, 220 N. Y. 162, 1 A. L. R. 1700, 115 N. E. 476.

North Carolina. *Cauley v. Dunn*, 167 N. Car. 32, 83 S. E. 16.

Ohio. *Turner v. Chrisman*, 20 Ohio 332.

Pennsylvania. *Hobough v. Murphy*, 114 Pa. St. 358, 7 Atl. 139; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. 142.

England. *Kirkpatrick v. Tattersall*, 13 Mees. & W. 766.

United States. *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854; *Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676.

Alabama. *Griel v. Solomon*, 82 Ala. 85, 2 So. 322.

Arkansas. *Lanagin v. Nowland*, 44 Ark. 84.

Georgia. *Dicks v. Andrews*, 132 Ga. 601, 64 S. E. 788.

Iowa. *Knapp v. Hoyt*, 57 Ia. 591, 42 Am. Rep. 59, 10 N. W. 925.

Maine. *Otis v. Gazlin*, 31 Me. 567.

Maryland. *Old Town National Bank v. Parker*, 121 Md. 61, 87 Atl. 1105.

Massachusetts. *Lerow v. Wilmarth*, 89 Mass. (7 All.) 463, 83 Am. Dec. 701.

New Hampshire. *Wiggin v. Hodgdon*, 63 N. H. 39.

New York. *Jersey City Ins. Co. v. Archer*, 122 N. Y. 376, 25 N. E. 338.

North Carolina. *Hornthal v. McRae*, 67 N. Car. 21; *Fraley v. Kelley*, 67 N. Car. 78.

Wisconsin. *Hill v. Trainer*, 49 Wis. 537, 5 N. W. 926.

"It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge." *Zavelo v. Reeves*, 227 U.

order to waive the bar, the new promise must be made after discharge and before suit is brought upon the debt.⁷

A debt which is barred by a composition with creditors under the bankrupt act, is a sufficient obligation to amount to a consideration for a subsequent promise to pay it,⁸ as long as no new and independent consideration, outside of the pre-existing liability, supports the promise of the creditor to refrain from enforcing the bar of the original debt. If the original debt was released by a valid release under seal, or if it was discharged by compromise which was supported by a sufficient consideration, the former obligation is generally held not to be a sufficient consideration for the subsequent promise.⁹ Such new promise may be enforced by the assignee of the claim which the debtor thus promises to pay.¹⁰

§ 3167. Elements of new promise. An unaccepted offer is not such a new promise as will render the former debt enforceable.¹ A promise by the debtor to the creditor to pay a debt barred by bankruptcy if he were given time is unenforceable if it is not shown that such offer was accepted and a definite time fixed for extension.² If the debtor offers to pay in instalments and the creditor refuses this offer, there is no new contract, and the bar of the statute is not waived.³

In order to revive a debt which has been barred by a discharge in bankruptcy an express promise is necessary.⁴ This promise must

S. 625, 57 L. ed. 676 [affirming, *Zavelo v. Reeves*, 171 Ala. 401, 54 So. 654; citing, *Kirkpatrick v. Tattersall*, 13 Mees. & W. 766; *Griel v. Solomon*, 32 Ala. 85, 2 So. 322; *Lanagin v. Nowland*, 44 Ark. 84; *Knapp v. Hoyt*, 57 Ia. 591, 42 Am. Rep. 59, 10 N. W. 925; *Otis v. Gazlin*, 31 Me. 567; *Wiggin v. Hodgdon*, 63 N. H. 39; *Jersey City Ins. Co. v. Archer*, 122 N. Y. 376, 25 N. E. 338; *Hornthal v. McRae*, 67 N. Car. 21; *Fraley v. Kelley*, 67 N. Car. 78; *Hill v. Trainer*, 49 Wis. 537, 5 N. W. 926].

Contra, *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408.

⁷ *Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785.

⁸ *Herrington v. Davitt*, 220 N. Y. 162, 1 A. L. R. 1700, 115 N. E. 476;

Cohen v. Lachenmeier, 147 Wis. 649, 133 N. W. 1099.

⁹ See § 634.

¹⁰ *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729.

¹ *Stern v. Smith*, 225 Ill. 430, 80 N. E. 307; *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692.

² *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917.

³ *International Harvester Co. v. Lyman*, 90 Minn. 275, 96 N. W. 87.

⁴ *Illinois. Katz v. Moessinger*, 110 Ill. 372.

Indiana. Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196.

New Hampshire. Stark v. Stinson, 23 N. H. 259.

be clear and unequivocal.⁵ A note given for such pre-existing debt is a sufficient express promise,⁶ as is a confession of judgment for such debt.⁷

Such promise must be clear and unequivocal.⁸ A promise by a debtor, "I will pay you some day—can't say when";⁹ or a promise, "You will be paid every dollar [of your claim] with interest as soon as I can sell the mill";¹⁰ or that the debtor "shall have her money even if but a little at a time,"¹¹ has been held to be sufficiently clear and unequivocal. On the other hand, a statement to the effect that the bankrupt expects to pay more of his former debts, that the next debt paid will be that of the creditor in question, and that the bankrupt regards his promises good;¹² or a statement that the bankrupt "will make a desperate effort to pay you something on the note";¹³ or a statement by him, "I will do all I can to pay you";¹⁴ or a statement, "Be satisfied; all will be

Ohio. *Turner v. Chrisman*, 20 Ohio 332; *Dyer v. Isham*, 4 Ohio C. C. 429, 2 Ohio C. D. 633.

Pennsylvania. *Bolton v. King*, 105 Pa. St. 78.

⁵ *Bigelow v. Norris*, 139 Mass. 12, 29 N. E. 61.

⁶ *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429.

⁷ *Dewey v. Moyer*, 72 N. Y. 70.

⁸ **United States.** *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854.

Alabama. *Dantzler v. Scheuer*, — Ala. —, 82 So. 103.

Illinois. *Stern v. Smith*, 225 Ill. 430, 80 N. E. 307.

Indiana. *Meech v. Lamon*, 103 Ind. 515, 53 Am. Rep. 540, 3 N. E. 159.

Kansas. *Needham v. Matthewson*, 81 Kan. 340, 26 L. R. A. (N.S.) 274, 105 Pac. 436.

Michigan. *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261; *Brewer v. Boynton*, 71 Mich. 254, 39 N. W. 49.

Minnesota. *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917.

Pennsylvania. *Bolton v. King*, 105 Pa. St. 78.

North Carolina. *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692.

South Carolina. *Ferguson v. Harris*,

39 S. Car. 323, 39 Am. St. Rep. 731, 17 S. E. 782.

Vermont. *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602.

Washington. *Coe v. Rosene*, 66 Wash. 73, 38 L. R. A. (N.S.) 577, 118 Pac. 881.

"Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus, partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient." *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854.

⁹ *Bolton v. King*, 105 Pa. St. 78.

¹⁰ *Herrington v. Davitt*, 220 N. Y. 162, 1 A. L. R. 1700, 115 N. E. 476.

¹¹ *Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38.

¹² *Coe v. Rosene*, 66 Wash. 73, 38 L. R. A. (N.S.) 577, 118 Pac. 881.

¹³ *Moore v. Trounstone*, 126 Ga. 116, 54 S. E. 810.

¹⁴ *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408.

right. I intend to pay all my just debts, if money can be made from hired labor. Security debt I can not pay. * * * All will be right betwixt me and my just creditors";¹⁵ or, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I now have for building and it will do you more good to get it in a lump";¹⁶ or, "I will send you the first spare 'V' or 'X' I have. * * * I will not be long either";¹⁷ or, "I shall not take any notice of your abuse of me till I have paid you the amount I owe you, which I shall surely do,"¹⁸ is not sufficiently clear and unequivocal to render the bankrupt liable upon such promise.

It is often said that such a promise must be unconditional.¹⁹ This, however, means only that the creditor who wishes to enforce a conditional promise must show that the condition has been performed, and that the new promise can not be enforced if the condition has not been performed.²⁰ On the other hand, if the condition annexed to such promise is fulfilled, the promise is enforceable.²¹ If the debtor promises to pay "when he is able." such promise is enforceable on proof that he is able.²² If a bankrupt promises to pay certain notes when they mature if he is able, and if not able then to pay them when he is able, such promise is valid, but the bankrupt is not bound to renew such notes as they fall due.²³

¹⁵ *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854.

¹⁶ *Faison v. Bowden*, 72 N. Car. 405.

¹⁷ *Bigelow v. Norris*, 141 Mass. 14, 6 N. E. 88.

¹⁸ *Dennan v. Gould*, 141 Mass. 16, 6 N. E. 222.

¹⁹ *Egbert v. McMichael*, 48 Ky. (9 B. Mon.) 44; *Bigelow v. Norris*, 139 Mass. 12, 29 N. E. 61; *Brown v. Collier*, 27 Tenn. (8 Humph.) 510.

²⁰ *Alabama*. *Kraus v. Torry*, 146 Ala. 548, 40 So. 956; *Dantzler v. Scheuer*, — Ala. —, 82 So. 103.

Indiana. *Meech v. Lamon*, 103 Ind. 515, 53 Am. Rep. 540, 3 N. E. 159.

Massachusetts. *Elwell v. Cumner*, 136 Mass. 102; *Nathan v. Leland*, 193 Mass. 576, 79 N. E. 793.

Minnesota. *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917.

New York. *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406.

²¹ *Alabama*. *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322.

Iowa. *Knapp v. Hoyt*, 57 Ia. 591, 10 N. W. 925.

Kentucky. *Eckler v. Galbraith*, 75 Ky. (12 Bush.) 71.

Massachusetts. *Way v. Sperry*, 60 Mass. (6 Cush.) 238.

Vermont. *Sherman v. Hobart*, 26 Vt. 60.

²² *Torry v. Krauss*, 149 Ala. 200, 43 So. 184; *Taylor v. Nixon*, 36 Tenn. (4 Sneed) 352.

See also, *Dantzler v. Scheuer*, — Ala. —, 82 So. 103.

²³ *Dantzler v. Scheuer*, — Ala. —, 82 So. 103.

An oral promise to pay such debt is sufficient in the absence of statute,²⁴ though if the statute specifically requires a written contract in such cases such contract can not be enforced if not in writing.²⁵

§ 3168. Nature of liability created by new promise. Whether the new promise creates a new liability supported by the original liability as a consideration, or whether the new promise merely waives the bar of the discharge and leaves the original liability in force is a question upon which there is a real conflict of authority and a greater apparent conflict. Some authorities hold that the liability is on the new promise.¹ While, in some cases, this means nothing more than that the creditor may sue on the new promise if he so elects, in other cases it means that he can not sue on the original promise;² and that, if he does so, his replication, setting up the new promise, to the defendant's plea, setting up his discharge in bankruptcy, will be subject to demurrer.³ Other authorities treat the liability as being on the original claim.⁴ No good reason appears for refusing to hold that either theory of the nature

²⁴ Georgia. *Ross v. Jordan*, 62 Ga. 298.

Illinois. *Marshall v. Tracy*, 74 Ill. 379.

Michigan. *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347.

Minnesota. *Smith v. Stanchfield*, 84 Minn. 343, 87 N. W. 917.

New Jersey. *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408.

North Carolina. *Henley v. Lanier*, 75 N. Car. 172.

Vermont. *Farmers' & Mechanics' Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351.

²⁵ *Jacobs v. Carpenter*, 161 Mass. 16, 36 N. E. 676; *Nathan v. Leland*, 193 Mass. 576, 79 N. E. 793; *Farmers' & Mechanics' Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351.

¹ England. *Trueman v. Fenton*, 2 Cowp. 544.

California. *Chabot v. Tucker*, 39 Cal. 434.

Indiana. *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121.

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Kentucky. *Egbert v. McMichael*, 48 Ky. (9 B. Bon.) 44; *Carson v. Osborne*, 49 Ky. (10 B. Mon.) 155.

North Carolina. *Fraleley v. Kelly*, 88 N. Car. 227, 43 Am. Rep. 743.

Pennsylvania. *In re Field*, 2 Rawle (Pa.) 351, 21 Am. Dec. 454; *Hobough v. Murphy*, 114 Pa. St. 358.

² *Graham v. Hunt*, 47 Ky. (8 B. Mon.) 7.

³ *Graham v. Hunt*, 47 Ky. (8 B. Mon.) 7.

⁴ Arkansas. *Nowland v. Lanagan*, 45 Ark. 108.

Illinois. *Classen v. Schoenemann*, 80 Ill. 304.

New Hampshire. *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729.

New York. *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543; *Herrington v. Davitt*, 220 N. Y. 162, 1 A. L. R. 1700, 115 N. E. 476.

Ohio. *Turner v. Chrisman*, 20 Ohio 332.

of the debtor's liability may be entertained. Many of the courts have assumed, however, that one or the other of these theories must be entertained to the exclusion of the alternative. A number of courts have, however, held that if all the facts appear on the record, the rights of the parties are the same on whichever theory of the case the plaintiff is proceeding and that the creditor may, accordingly, recover on either theory.⁵

§ 3169. Part payment. Since a new promise to pay a debt barred by bankruptcy must, to be enforceable against the debtor, be clear and unequivocal, a part payment of a debt is not of itself sufficient to waive the bar of bankruptcy.¹ This is so whether the part payment is made after the discharge in bankruptcy has been granted,² or after proceedings in bankruptcy have been begun and before the discharge in bankruptcy has been granted.³ While the rule that part payment does not revive the original debt is well settled, it is unfortunate that it has been justified on the theory

¹ **United States.** *Allen v. Ferguson*, 85 U. S. (18 Wall.) 1, 21 L. ed. 854.

Alabama. *Torry v. Krauss*, 149 Ala. 200, 43 So. 184.

Illinois. *Classen v. Schoenemann*, 80 Ill. 304.

Maine. *Spooner v. Russell*, 30 Me. 454.

New York. *Herrington v. Davitt*, 220 N. Y. 162, 1 A. L. R. 1700, 115 N. E. 476.

See also, *Turner v. Chrisman*, 20 Ohio 332.

² **Illinois.** *Stern v. Smith*, 225 Ill. 430, 80 N. E. 307.

Kansas. *Needham v. Matthewson*, 81 Kan. 340 [sub nomine, *Matthewson v. Needham*, 26 L. R. A. (N.S.) 274, 105 Pac. 436].

Kentucky. *Tolle v. Smith's Executor*, 98 Ky. 464, 33 S. W. 410.

Massachusetts. *Merriam v. Bayley*, 55 Mass. (1 Cush.) 77, 48 Am. Dec. 591; *Cambridge Savings Institution v. Littlefield*, 60 Mass. (6 Cush.) 210; *Jacobs v. Carpenter*, 161 Mass. 16, 36 N. E. 676; *Heim v. Chapman*, 171 Mass. 347, 50 N. E. 529.

New Hampshire. *Stark v. Stinson*, 23 N. H. 259.

New York. *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406.

"Although the moral obligation to pay the discharged debt is a sufficient consideration for a promise to pay, the cause of action rests on the new promise, and not upon the old debt. This furnishes the distinction between a cause of this kind and one where the defense is the Statute of Limitations. The new promise to pay a debt which has been discharged in bankruptcy must be a clear, distinct and unequivocal promise to pay the specific debt without qualification or condition, and can not be implied from the fact of part payment or from other circumstances." *Needham v. Matthewson*, 81 Kan. 340 [sub nomine, *Matthewson v. Needham*, 26 L. R. A. (N.S.) 274, 105 Pac. 436].

³ *Merriam v. Bayley*, 55 Mass. (1 Cush.) 77, 48 Am. Dec. 591; *Dyer v. Isham*, 4 Ohio C. C. 429, 2 Ohio C. D. 633.

⁵ *Heim v. Chapman*, 171 Mass. 347, 50 N. E. 529.

that bankruptcy discharges the original debt as distinguished from the remedy thereon. "The Statute of Limitations, being a statute of repose, does not discharge the debt, but only bars the remedy. An implied promise to pay revives the debt so far as the statute is concerned as effectually as an express promise. But the decree of the bankrupt court discharges and extinguishes the debt, and in order to support a legal obligation to pay the old indebtedness there must be an express promise."⁴

⁴ Needham v. Matthewson, 81 Kan. 340 [sub nomine, Matthewson v. Need- ham, 26 L. R. A. (N.S.) 274, 105 Pac. 436].

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